

The Advantages of Using a "Rent-a-Judge" System in Ohio

I. INTRODUCTION

Those familiar with the processes of civil litigation in this country would probably be able to identify one of its biggest pitfalls, namely, the exorbitant amount of time spent from the start of a cause of action until its final disposition. Along with this time investment, there are many attendant disadvantages — higher legal fees, increased chances of unavailability of witnesses, and, perhaps most importantly, loss of peace of mind.

Legislators and practitioners in the legal profession have proposed various systems of arbitration which have been utilized increasingly in recent years to help alleviate some of the problems associated with civil litigation. One of the more recent developments in the alternative dispute resolution arena is that of the "rent-a-judge" system. Instituted first in California,¹ this system allows parties to hire a private judge, usually a retired judge or magistrate, to hear and resolve their dispute. The judge is given the full authority of a court to enter a judgment in the case and parties have the option of appealing that judgment, as with any other court's disposition.²

Although this system has helped to clear court dockets and thus made some headway in alleviating the normal problems of civil litigation,³ it is not without certain costs and ramifications to the litigants involved, the legal system, and society as a whole. Perhaps because of the identified costs or ramifications of this rent-a-judge system,⁴ states were not quick to adopt such systems in their own jurisdictions.⁵ Although most states do have some type of statutorily-enacted system of private judging, a majority of the states rarely utilize the system.⁶

Ohio has a private judging system in place by statute, but very rarely

¹ The California private judging system began in 1976 under the authority of CAL. CIV. PROC. CODE §§ 638-645.1 (West 1976 & Supp. 1995).

² *Id.* § 645. Californians using the private judging system have the same right of appeal as if a trial court had decided their case.

³ See Eric D. Green, *Private Judging: A New Variation of Alternative Dispute Resolution*, TRIAL, Oct. 1985, at 40.

⁴ See Sanford M. Jaffe, 'Private Judging — Proceed with Caution' is View of Rutgers ADR Center Director Sanford M. Jaffe, PRAC. & PERSP., June 8, 1989, at 204.

⁵ Jeanne E. Longworth, Note, *Private Judging: An Effective and Efficient Alternative to the Traditional Court System*, 21 VAL. U. L. REV. 681, 692 n.79 (1987).

⁶ *Id.* at 682. For example, Indiana adopted a private judging statute in 1982, after taking notice of California's similar statute, but has rarely used the private judging system.

uses the system.⁷ This Note will give some background about civil litigation in Ohio and also explore possible reasons for the lack of use of the private judging system in Ohio. This will be followed by a discussion of the rent-a-judge system that will familiarize the reader with the concepts and processes involved. Finally, this Note will present a cost-benefit analysis of invoking the rent-a-judge system and will conclude with some suggestions for practitioners in Ohio and in other states where private judging statutes are not used as anticipated by their legislatures.

II. CIVIL LITIGATION IN OHIO

As previously stated, the statutorily enacted private judging statutes have rarely been used in some states. Ohio is typical of many states in that it enacted a private judging statute at the urging of proponents,⁸ but its system has not been utilized as envisioned. The statute providing for private judging in Ohio became effective on September 26, 1984,⁹ but even as late as 1988, the system had never been used.¹⁰ Indeed, it is over a decade later and the number of cases that are referred out for disposition by private judges is minimal.¹¹

At least at first glance, the private judging system seems to present an efficient and helpful alternative for civil litigants.¹² One would expect that at least initially there would have been an influx of cases into the private judging system, but the only initial enthusiasm for the system seems to have been centered in the halls of the state legislature, rather than in law firms or legal professional organizations.¹³ The lack of use of the system in Ohio can possibly be explained by reference to two primary factors.

First, one may hypothesize that Ohio does not have the enormously burdensome case load of other states and, therefore, there is not a pressing

⁷ OHIO REV. CODE ANN. § 2701.10 (Baldwin 1993).

⁸ Longworth, *supra* note 5, at 682 n.8.

⁹ OHIO REV. CODE ANN. § 2701.10 (Baldwin 1993).

¹⁰ Harry Franken, *Rent-a-Judge System About to Get Ruling*, COLUMBUS DISPATCH, Jan. 3, 1988, at 4C.

¹¹ SUPREME COURT OF OHIO, OHIO COURTS SUMMARY 1992 1E, 1F, 1H [hereinafter 1992 OHIO SUMMARY] (in the general division of the courts of common pleas in the state, only 20 cases were referred for private judging; in the domestic relations division, 42 cases were referred for private judging; and in the juvenile division, only one case was referred for private judging).

¹² There are negative aspects to the system and civil litigants must make some sacrifices, such as waiver of a jury trial. These negative aspects will be discussed later in the Note.

¹³ See Franken, *supra* note 10.

need for referral out of the public justice system.¹⁴ For instance, in 1992 the average time guideline for a case in the state of Ohio in the general division of the courts of common pleas was 17.3 months.¹⁵ The longest time guideline given in a Summary of the Courts distributed by the Ohio Supreme Court was thirty-six months for cases involving complex litigation.¹⁶ Similar or even lesser time guidelines recur throughout the divisions of the courts of common pleas in Ohio. In the domestic relations division, the average time for disposition of a case was 5.4 months,¹⁷ and in the juvenile division, the average time was 6.2 months.¹⁸ A comparison of these statistics and the continual complaints heard from other states about the inefficiency of their court systems might cause one to surmise that Ohio does not use the private judging system simply because it does not need to use it.¹⁹ As one professor at The Ohio State University recently stated, "The good news is that Ohio probably does not need the system."²⁰

Therefore, Ohio seems to be applying the principle of "if it's not broken, don't fix it." However, this attitude could be quite detrimental to the system of justice in Ohio. For example, many potential litigants may not realize that Ohio's courts have a fairly rapid turnover rate for cases. Therefore, individuals may feel that their access to the system is limited and accordingly, will not file a valid claim because of the expected delays, legal fees, and frustration. If the private judging system were put into practice, and this fact were more publicized, the Ohio court system would become even more efficient and people with valid claims would not be deterred from seeking justice. Increased access to the justice system is both desirable and feasible, especially if the private judging system is used.

A second reason for Ohio's non-use of the private judging system may be fear of the unknown. Although other types of alternative dispute

¹⁴ Interview with Nancy Rogers, Associate Dean and Professor at The Ohio State University College of Law, in Columbus, Ohio (Jan. 31, 1994) [hereinafter *Rogers Interview*].

¹⁵ 1992 OHIO SUMMARY, *supra* note 11, at 1E. The analogous statistic from 1993 was 17.3 months, pursuant to 1993 Ohio Courts Summary. SUPREME COURT OF OHIO, OHIO COURTS SUMMARY 1993 1J [hereinafter 1993 OHIO SUMMARY].

¹⁶ 1992 OHIO SUMMARY, *supra* note 15, at 1E. The longest time guideline was again thirty-six months for complex litigation in 1993. 1993 OHIO SUMMARY, *supra* note 15, at 1E.

¹⁷ *Id.* at 1F. The analogous statistic from the 1993 Ohio Summary was again 5.4 months. 1993 OHIO SUMMARY, *supra* note 15, at 1F.

¹⁸ 1992 OHIO SUMMARY, *supra* note 11, at 1H. The analogous statistic from the 1993 Ohio Summary was 6.3 months. 1993 OHIO SUMMARY, *supra* note 15, at 1G.

¹⁹ See Longworth, *supra* note 5, at 687 n.42 (citing Hill, *Rent-A-Judge: California is Allowing its Wealthy Litigants to Hire Private Jurists*, WALL ST. J., Aug. 6, 1980 at 1, col. 1, 15, col. 2).

²⁰ *Rogers Interview*, *supra* note 14.

resolution, such as negotiation, arbitration, and mediation are used quite frequently in Ohio, private judging may be seen as an untravelled and uncertain path by many legal professionals nationwide.²¹ Issues such as private payment by the parties and confidentiality of the proceedings, both of which will be discussed later in this Note, are quite often cited as troublesome by legal professionals.²²

Notwithstanding the ideas and theories set forth above as to whether Ohio needs a private judging system or why Ohioans are less responsive to such a system, there are some important aspects of the system which deserve to be voiced. In the future, Ohio may join the ranks of other states whose court systems are deluged with cases.²³ Therefore, it is important for legislators, lawyers, and law students to analyze thoughtfully the possibilities and alternatives, such as private judging, that will be helpful tools in dealing with such situations in the future.

III. THE RENT-A-JUDGE SYSTEM

The nickname "rent-a-judge" has been given to this form of alternative dispute resolution, mainly because most of the individuals who are hired for the private judging of disputes are retired judges.²⁴ Generally, the rent-a-judge system of dispute resolution is defined as:

[A] court-annexed process available when statutes or local court rules permit court referral of cases to neutral third parties typically meaning: (i) a fairly formal case presentation as in a court trial commonly following traditional formalities and procedural and evidentiary rules; (ii) presented by counsel, witnesses, and documentary evidence essentially as in regular trial; (iii) to a privately selected and privately paid neutral, usually a retired judge, who presides over the proceedings as a judge, and *who has the same powers as a trial judge*; (iv) wherein a record of the proceedings is usually made by a privately retained court reporter; and (v) wherein the private judge reports his decision to the referring court and *judgment is entered on the decision as if the action had been decided by a court.* (vi)

²¹ See Jaffe, *supra* note 4.

²² See *id.*; Franken, *supra* note 10.

²³ Stephen K. Haynes, Comment, *Private Means to Public Ends: Implications of the Private Judging Phenomenon in California*, 17 U.C. DAVIS L. REV. 611, 611-12 ("Over the past fifteen years, a torrent of civil litigation has deluged the courts of California. The courts have coped with this flood only at the price of a severe increase in the time a lawsuit awaits final resolution.").

²⁴ Richard Chernick, *California Attorney Reviews Legal Framework for State's Controversial Private Judge Use*, PRAC. & PERSP., Oct. 26, 1989, at 381.

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The parties' rights to appellate review and enforcement of the decision are the same as if the judgment had been entered by a district court.²⁵

Rent-a-judge resembles binding arbitration where the parties have agreed to allow appellate review of the arbitrator's award, but it is unclear whether parties can agree in advance to submit a case to a private judge as they can by contracting for arbitration.²⁶ Private judging resembles traditional litigation in form, but there are some important differences in the rent-a-judge system, such as the expertise of the judge, the speed of the decision, and the flexibility of the rules and procedures.

By breaking down this definition into its constituent elements and explaining those elements in a bit more detail, the processes and concepts involved in private judging will become more clear. First, a private judge proceeding²⁷ generally follows the format of a trial in the traditional litigation format.²⁸ The rules of trial procedure apply²⁹ and the judge exercises the authority of a "normal" judge, but the parties can also agree to "relax" the rules of procedure and eliminate some of the normal formality of the process.³⁰ One limitation and difference from the normal context of civil litigation is that both parties must waive any right they have to a jury trial in order to have a private judge hear their dispute.³¹ This provision helps to make the rent-a-judge system more expeditious, because in traditional litigation, an enormous amount of time can be spent in selecting a jury. This lack of a jury in private judging can actually be seen as one of the system's benefits, because much of the litigation that is normally referred out of the court system for private judging involves very complex or technical issues of substantive law.³² In these situations, a private judge will be chosen who has expertise in a particular field, thus eliminating much trial time that is normally spent simply explaining to the jury (or even the judge) the background of the specific area of law.³³

²⁵ Tom Arnold & Willem G. Schuurman, *Alternative Dispute Resolution in Intellectual Property Cases*, in PATENT LITIGATION 1991, at 437, 506-07 (PLI Pat., Copyrights, Trademarks, and Litig. P. Handbook Series No. 321, 1991) (emphasis added).

²⁶ *Id.* at 507.

²⁷ Private judging is not allowed in criminal proceedings due to constitutional concerns. See U.S. CONST. amend. VII.

²⁸ Arnold & Schuurman, *supra* note 25, at 507.

²⁹ Haynes, *supra* note 23, at 620.

³⁰ Green, *supra* note 3, at 39.

³¹ Longworth, *supra* note 5, at 686.

³² Green, *supra* note 3, at 39.

³³ Haynes, *supra* note 23, at 620 ("Each procedure . . . under the best of circumstances, allows the litigants to select a person with knowledge of the area of law or factual context of

The second element of the definition requires no lengthy elaboration. Even though the procedure can be less formal if the parties agree,³⁴ the need for the representation of counsel is as important in a private proceeding as in a public one. Indeed, for the initial processes in a private judging, such as choosing the judge and agreeing upon the procedures to be used, representation by counsel is essential to ensure that one party is not being taken advantage of by another party. Also, as provided for in the definition and discussed above, the rules of evidence apply and witnesses and documentary evidence must be presented in conformity therewith.

The third element of the definition of the private system has two distinct parts. The first, and perhaps more troublesome or controversial part, is the provision for payment of the private judge by the parties themselves.³⁵ Private compensation would aid the currently overloaded court system by allowing present funding to be spread over fewer cases, but it also presents the danger of discrimination on the basis of wealth.³⁶ This point will be discussed later in this Note as one of the potential "costs" of private judging, but the basic premise of most critics is that the private system creates two tiers of justice, one for the wealthy who can afford to hire a private judge and a "second class of justice"³⁷ for the poor, who must utilize the judge to whom they are assigned.³⁸ The second part of this element is what differentiates the private judging system from the system of "reference," which could be viewed as a precursor to the private judging system.³⁹ Under the reference system, parties agree to assign certain issues to a referee, who makes a decision on the issue and then submits an advisory opinion to the trial judge. The referee's opinion is not final and can be disregarded by the trial judge if he finds that it was not well supported by the facts of the case. Conversely, a private judge is autonomous in his decisions, which are final and binding on the parties.

The fourth element of the definition is also self-explanatory. Because the parties will want a full record for review if an appeal is filed on the decision, a private court reporter is usually hired to make the record of the

the dispute.").

³⁴ Green, *supra* note 3.

³⁵ See Franken, *supra* note 10 (stating that some Ohio estimates are \$500 per day for payment of private judges).

³⁶ See Longworth, *supra* note 5, at 696-702. The author discusses the possible equal protection problems that arise when the judge is privately paid.

³⁷ Jaffe, *supra* note 4, at 205.

³⁸ Haynes, *supra* note 23, at 613 ("Critics argue that private judging violates due process and equal protection because it is available only to the affluent . . .").

³⁹ The Ohio Rules of Civil Procedure provide for the reference of some issues of law or fact to a private referee. OHIO R. CIV. P. 53.

private trial.⁴⁰ The fifth element is basically a formality for the private judge, who must enter his order of judgment in the court which had original jurisdiction. The sixth element reinforces the power of the private judge by providing that his decisions will have the same enforcement value as if the judgment had been entered in court. Perhaps more than any other provision or element of the private judging system, this finality and enforcement value of the private judge's decision is the major differentiating factor between private judging and most forms of arbitration.⁴¹

IV. COST-BENEFIT ANALYSIS OF THE "RENT-A-JUDGE" SYSTEM

The benefits which result from the use of any alternative dispute resolution mechanism, and the rent-a-judge system in particular, are numerous.⁴² Critics regularly refer to the overload of court dockets in the American justice system as adding many delays to the process of civil litigation.⁴³ Judges generally are called upon not only to decide the cases before them and maintain "acceptable standards of due process," but also to manage their dockets more effectively so that more cases will get shuffled through the system quicker.⁴⁴ As one critic stated, "Overworked judges must decide cases hastily, attorneys are compelled both to make and to respond to unjustified demands, parties pay for slower and more expensive decisions, and society suffers under more costly and less wise legitimate 'justice.'"⁴⁵ The referral of some cases to private judges would help to ameliorate this problem.⁴⁶ Judges could focus more on delivering justice rather than managing the system.

Rather than limiting public use of the judicial system, a rent-a-judge system will make litigation more efficient.⁴⁷ Accordingly, if cases are

⁴⁰ Haynes, *supra* note 23, at 640. A private court reporter makes a record of the privately-judged proceedings, but the report is not transcribed or deposited as with the traditional court system unless an appeal is taken. This fact is also cited by the author as one of the major problems with the private judging system — secrecy.

⁴¹ *Id.* at 620-21 ("The key difference between arbitration and private judging lies in the nature of the decision rendered. . . . [F]or these reasons, private judging is more akin to the traditional courts than to arbitration.").

⁴² *Id.* (noting that the various forms of arbitration have historically been recognized as the solution to delays in the court system).

⁴³ Symposium, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 441 (1986).

⁴⁴ *Id.*

⁴⁵ *Id.* at 443.

⁴⁶ Haynes, *supra* note 23, at 648.

⁴⁷ Symposium, *supra* note 43, at 443.

resolved more quickly, less legal cost will result to the participants. Also, if we assume that parties are more satisfied with a judgment when they have taken some sort of role in the decision,⁴⁸ it may be inferred that a rent-a-judge system, with less restrictive rules and with the ability to choose a judge, will result in more general satisfaction with judgments and with the legal system in general.

Although some people argue that the system is not really cost effective because of the large salaries that some retired judges command,⁴⁹ there is evidence to the contrary. When taking into consideration the amount of legal fees, including those for attorneys, courtrooms, and lost time from delays that are associated with traditional litigation, the costs of compensating private judges and paying the legal fees associated with a privately-judged dispute are much more economical.⁵⁰ One observer asserted that California participants in the private judging system realize substantial savings.⁵¹ "Allegedly, the first private judging procedure saved one party to a dispute approximately \$100,000 in attorney's fees because of the speedy resolution. . . . [O]ther reports state that the procedure saved a party 'five to ten times the amount for legal fees.'"⁵²

Unfortunately, along with the benefits to be gained in the private judging system, there are also some costs. The problems with the system that are frequently discussed can be grouped into four large categories: equal protection concerns, due process concerns, First Amendment issues, and institutional/policy concerns.

A. Equal Protection Concerns

The Equal Protection Clause of the Fourteenth Amendment⁵³ to the United States Constitution was intended to maintain equality in the treatment of all individuals where state action was involved. In the area of private judging, there is some concern that wealthy litigants⁵⁴ will be able

⁴⁸ See Sanford M. Jaffe, *Using Alternative to Open the Mainstream*, RECORDER, Sept. 21, 1993, at 8.

⁴⁹ See Longworth, *supra* note 5, at 687.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Haynes, *supra* note 23, at 613. Some of the objections to the private judging system are also found with other types of arbitration.

⁵³ U.S. CONST. amend. XIV ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").

⁵⁴ One troublesome point with the research in this area is that "wealthy" is never defined. It seems that such a definition would be very helpful in determining exactly who and how many persons are being "favored" or "discriminated against."

to hire a private judge, but that litigants who are *pro se*, using legal aid, or depending on a judgment in order to pay court and attorney's fees will not.⁵⁵ "Because private litigants incur expenses which traditional litigants do not, private judging appears more expensive. Thus, the non affluent are ostensibly excluded."⁵⁶

The Fourteenth Amendment concern cited above is the more serious and more frequently discussed criticism.⁵⁷ Some critics of the system go so far as to say that a presumption arises that unilateral ability to litigate privately will disadvantage poorer litigants.⁵⁸ However, a review of the research on this topic reveals that the issues presented by this concern for equal protection are not insurmountable. Indeed, after careful analysis of this concern, one might surmise that these problems have been somewhat exaggerated.⁵⁹

State action must be present in order to present an equal protection issue.⁶⁰ Because the private judging system of Ohio has been enacted by the legislature, there is probably sufficient state action or contact with state authority to fulfill the first element of an equal protection problem.⁶¹ However, one must be careful to remember that the possible constitutional violation results from the actions of the individuals who participate in the private judging system and not the state.⁶² For example, the private judging statute in Ohio states that the written agreement providing for private judging must "identif[y] an amount of compensation to be paid by the parties to the retired judge for his services and the manner of payment of the compensation,"⁶³ but does not specify any amount. Therefore, one could argue that the potential for discrimination against the nonaffluent lies with the participating individuals and not with the state's scheme.

Further, in the Ohio statute and others similar to it, there is nothing to suggest that the state is using a facially-neutral statute to intentionally discriminate against the nonaffluent.⁶⁴ Also, because the Supreme Court has

⁵⁵ Longworth, *supra* note 5, at 683.

⁵⁶ Haynes, *supra* note 23, at 622.

⁵⁷ See generally Robert D. Raven, *Private Judging: A Challenge to Public Justice*, 74 A.B.A. J., Sept. 1, 1988, at 8; Haynes, *supra* note 23, at 629-35; Longworth, *supra* note 5, at 696-702.

⁵⁸ Note, *The California Rent-a-Judge Experiment: Constitutional and Policy Consideration of Pay as You Go Courts*, 94 HARV. L. REV. 1592, 1601 (1981).

⁵⁹ See generally Haynes, *supra* note 23.

⁶⁰ U.S. CONST. amend. XIV.

⁶¹ Haynes, *supra* note 23, at 623-24.

⁶² *Id.* at 624.

⁶³ OHIO REV. CODE ANN. § 2701.10(B)(1)(e) (Baldwin 1993).

⁶⁴ Haynes, *supra* note 23, at 624 (author suggests that California's statute is facially

never applied strict scrutiny or even medium level scrutiny in a case where the alleged discrimination was based on a classification of wealth,⁶⁵ the private judging statutes would almost definitely pass constitutional scrutiny as there certainly is a rational basis for the rent-a-judge system.⁶⁶ There appears to be a rational relationship between the state's interest in providing a more efficient court system and the means it has employed — the private judging system.

Ideally, the state is using the statute in order to provide an "auxiliary forum," which will actually help the nonaffluent in society.⁶⁷ If the traditional court system is less burdened by litigation because some litigants have moved their cases to the private forum, the nonaffluent will receive quicker, more efficient service. As one observer noted, "[R]emoving complex business disputes from the courts can only have a positive impact on court calendars and increase everyone else's access to justice."⁶⁸

Whether or not one deems the concerns cited above to be serious, there are some possible avenues for the resolution of these problems. First of all, states could set a fee cap on the salaries of private judges which would make the forum a more reasonable economic alternative for a wider group of people. Also, the legislature could define the types of litigation which could be referred out to private judges. For example, as many scholars have noted, the most common type of case to reach the private system is complex litigation.⁶⁹ By using a legislative-enacted classification system, the efficiency of the court system would be increased because a group of cases would be handled elsewhere. Rather than discriminating against the types of people who could feasibly use the private judging system, the state legislature could place a restriction, or "discriminate" if you will, on the types of cases to be heard. This type of discrimination would present even less possibility that invidious discrimination would occur.

B. Due Process Concerns

The United States Supreme Court has held that in certain situations, state courts must provide a forum in which the nonaffluent can assert fundamental rights.⁷⁰ The states do provide such a forum in the public court

netural).

⁶⁵ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (dealing with alleged discrimination and school financing).

⁶⁶ *See id.*

⁶⁷ Haynes, *supra* note 23, at 630.

⁶⁸ Green, *supra* note 3, at 40.

⁶⁹ *See id.*

⁷⁰ Haynes, *supra* note 23, at 629 n.91.

system. "Private judging does not violate due process, because a recognized and effective alternative forum exists for the resolution of the fundamental rights of the nonaffluent."⁷¹ The more pressing issue regarding due process deals with the litigants who do use the private judging system. Specifically, it is feared that if wealthy litigants can hire the private judges they choose, there is a possibility that those judges will not be impartial but will decide cases in favor of the wealthy person who will possibly be a repeat customer in the future.⁷² This analogy would extend easily to situations where the litigant was a large corporation. "Steady customers represent an important asset to any seller and a referee would find it in his self-interest to favor these parties where possible. Of course, any favoritism could not be overt, for then the opponents of the steady customers would refuse to consent."⁷³ The same author notes, however, that the problem with impartiality occurs when there is a mix of repeat players and one-time customers.⁷⁴

[The repeat players'] opponents, the one-time customers, would not be aware of the subtle systemic bias working against them. They could not therefore make a fully informed choice when they consented to the reference. The risk of a due process violation would be especially great if the delay in the state courts had compelled a party with less than full information to agree to reference.⁷⁵

Because the one-time customers will not know about this possible favoritism, they will be greatly disadvantaged.

The concerns raised regarding due process can possibly be resolved. One solution proposed for the possible equal protection problem could be effective in this situation as well. State legislatures could act to classify the types of cases or litigation that could reach the private judge. For instance, if private judging were limited to complex litigation, such as complex commercial litigation, there would be less possibility that an unknowing party would consent to a detrimental judging arrangement.⁷⁶ The parties would be on more equal footing, have similar levels of bargaining power, and probably have a staff with expertise in dealing with the legal system to assist them in making informed decisions.

⁷¹ Haynes, *supra* note 23, at 630.

⁷² Note, *supra* note 58, at 1608.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Of course, in some complex litigation the parties are individuals and not large corporations or experienced business people. Therefore, the author recognizes that this solution may be oversimplified in certain situations.

Second, even if the private judging system were left available for all types of disputes, a profile of each available private judge could be available for the perusal of potential private participants. Such a profile could include a background of the judge's expertise,⁷⁷ a roster of the judge's most recent decisions, and a list of the clients he has represented in the past. This profile would serve to put parties on notice before they consented to a particular judge. If a party was wary of a certain judge, he could then "judge shop" until he found a judge who seemed more neutral.

The possibility of unfairness that exists in the private judging system with regard to due process is not a unique problem. In the traditional court system, most judges are elected, so the possibility exists that they will favor parties whom they think will help them in their bid for re-election, either financially or otherwise. Likewise, in arbitration, the same possibility exists that the arbitrator will make a less than impartial decision on a similarly questionable basis.

C. First Amendment Issues

Although there is no rule or constitutional mandate that civil trials are open to the public,⁷⁸ there is a presumption that such court proceedings will be conducted accordingly. However, with the rent-a-judge system, an entire case can be conducted in private.⁷⁹ Once a case is referred out of the public system to a private judge, all of the proceedings are held in private at a place and time determined by the participants and the judge.⁸⁰ As stated previously in this Note, even though there is a court reporter who makes a record of the proceeding, such record is not transcribed or filed unless an appeal arises.⁸¹ Critics of this arrangement believe that there is a great need for public scrutiny of private proceedings, especially given the private compensation of private judges, in order to ensure that the judges remain accountable for their actions and decisions.⁸² This is especially true where a decision would have widespread impact on the public, as in a case where the defendant was a public entity like the Air Resources Board.⁸³

This concern with the First Amendment, or more basically with the secrecy of private judging, poses a large obstacle to the previous points

⁷⁷ See *supra* note 33 and accompanying text.

⁷⁸ Haynes, *supra* note 23, at 640 n.134. California has statutorily mandated open civil trials. CAL. CIV. PROC. CODE § 124 (West 1982).

⁷⁹ Note, *supra* note 58, at 1608.

⁸⁰ Longworth, *supra* note 5, at 685-87.

⁸¹ Haynes, *supra* note 23, at 640-41.

⁸² Note, *supra* note 58, at 1610.

⁸³ See *id.*

made in this Note about isolating the use of the private judging system to cases dealing with complex litigation. If large corporations were able to resolve their disputes in this manner and were not subject to the watchful eye of the media, there would be a risk that private judging would be a mere extension of deal-making.⁸⁴

Therefore, the secrecy offered in private judging can have an impact not only on the individuals involved, but also on the surrounding society which will be influenced by judicial decisions made entirely behind closed doors. "In cases involving trade secrets or closely guarded business methods that are not quite trade secrets but understandably regarded as private, or in cases where the parties may be concerned about bad publicity, confidentiality may be a sufficient reason for parties to 'go private.'"⁸⁵ The privacy that is offered can be very positive, as in celebrity divorce cases, where the parties rightfully deserve privacy about their personal lives. However, this privacy can be very negative if used simply as a way for large corporations to maintain their business reputation in controversial cases which could bring bad publicity. In such situations, it must be remembered that a party opposing the corporation could veto a private judging proposal if such bad publicity for the corporation was one of the goals in the dispute, such as often occurs in a manufacturer product liability case. Although the decisions of the private judge are recorded publicly, there is some valid concern that the decisions will be much less meaningful if the background and facts of the case are not fully known.⁸⁶

D. Institutional and Policy Concerns

To a great extent, American law is developed through cases, and the resulting decisions.⁸⁷ There is concern that this development through the common law will be greatly curtailed if private judges are used extensively, because the lack of common rules of procedure and standards⁸⁸ will not be conducive to the establishment of rules that can be used as precedent.⁸⁹ This flexibility in rules and procedure can be both beneficial and detrimental. "But as with private alternative dispute resolution, most procedural and evidentiary rules can be relaxed if the parties want. By waiving general rules, the parties can design rules of evidence and procedures that meet their

⁸⁴ Of course, binding arbitration raises the same concern.

⁸⁵ Green, *supra* note 3, at 40.

⁸⁶ See Longworth, *supra* note 5, at 687.

⁸⁷ Of course, this systematic development through judicial opinions is the common law.

⁸⁸ Although the rules of evidence and trial procedure apply, they can be relaxed or modified.

⁸⁹ Note, *supra* note 59, at 1612.

needs.”⁹⁰ The above passage indicates that the essence of arbitration or any dispute resolution mechanism is flexibility in rules. Therefore, private judging should not be subjected to condemnation for this flexibility when other forms of alternative dispute resolution perform in the same manner.

Another policy consideration is that because private judges have a short-term goal, that is, resolving the single dispute before them, the judges will not attempt to make broad rules that will help shape future behavior.⁹¹ As stated by one critic, “At best, referee-made law would be unfocused and lacking in unity. Worse, it might prove less cost efficient . . . because narrow . . . rules become obsolete under changing fact patterns more rapidly than broad, judge-made rules.”⁹²

However, one must question if this consideration is truly a problem. Most judges tend to tailor their decision to the facts that are presented in the particular case,⁹³ so private judging is similar to the traditional court system in this regard. Any rule-making that should come from particular decisions can still be made at the appellate level, especially if we consider that the “big” cases from which most rules come are usually highly disputed and thus appeals will probably occur.⁹⁴

One last policy consideration in the private judging system pertains to the private judges themselves. As previously stated, most of the private judges who register with the state⁹⁵ are retired judges. In Ohio, retired judges who register with the Ohio Supreme Court for private judging can no longer accept appointments by the Chief Justice for a visiting judgeship.⁹⁶ One might surmise from that rule that the profession has tried to make the system more equitable by narrowing the activities and, therefore, the diverging interests of the private judges.

However, two problems still arise with regard to the behavior of judges. First, although private judges are directed by the supreme court of the state in some manner,⁹⁷ it is unclear whether they are subject to any formal code of conduct.⁹⁸ Secondly, there is a fear that the best judges

⁹⁰ Green, *supra* note 3, at 39.

⁹¹ See generally Note, *supra* note 58, at 1612.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Under Ohio law, a decision of a private judge is appealable to higher courts, just as any normal trial court decision is. OHIO REV. CODE ANN. § 2701.10(D) (Baldwin 1993).

⁹⁵ OHIO REV. CODE ANN. § 2701.10(A) (Baldwin 1993).

⁹⁶ Board of Commissioners on Grievance & Discipline Opinion 88-006 (1988), *reprinted in* OHIO REV. CODE ANN. § 2701.10, Notes on Decisions and Opinions (Baldwin 1993).

⁹⁷ See, e.g., OHIO REV. CODE ANN. § 2701.10 (Baldwin 1993).

⁹⁸ See *id.*

currently practicing will retire early in order to earn a possibly higher salary and to enjoy hearing only the cases which they decide to take.⁹⁹

Neither of these problems is as serious as it may first appear. The first concern can be easily ameliorated by the establishment of a written code of conduct to be used exclusively by private judges, or the formal code of conduct currently in effect for members of the judiciary can be carried over to private judging activities.¹⁰⁰ The second concern is less amenable to a solution, but also is less problematic. One must recognize that the same risk of retirement exists at every level of the justice system. Many judges could easily leave the bench in favor of a more lucrative private practice.¹⁰¹ This fear should not become an obstacle to the private judging system.

V. CONCLUSION

Perhaps the true problem is inherent in our public court system, rather than the private judging system. The fact that we do not want to leave nonaffluent litigants to the "lesser" public forum or "second class justice," is evidence that we are displeased with that system. As a profession, we must realize that only through attempts at innovation, like private judging, can the public system ever have hope of improving.

The private judging system is not without flaws. However, one must be careful to distinguish these flaws and attribute them to their proper source. No matter what type of dispute resolution mechanism we discuss, whether traditional court litigation, arbitration, negotiation, mediation, or private judging, each of them will be plagued with a variety of dangers and possible problems, many of which come from the participants and not from the system itself.

Perhaps the most difficult problems with the private judging system can be alleviated so that it will be more equitable to all people. If a model private judging statute were to be enacted,¹⁰² it could include a provision for the types of cases that would be referred for private judging. As stated previously, complex litigation could be one of the major classes of cases that are referred for private judging¹⁰³ and parties would have the advantage of choosing a judge who had expertise in the subject matter of the case. The legislature could also include other types of cases whose distinct aspects would make them amenable to private judging.

⁹⁹ Haynes, *supra* note 23, at 624.

¹⁰⁰ See, e.g., 1995 Ohio Rules of Court (West 1994).

¹⁰¹ See Franken, *supra* note 10. This point is logical when considering that salaries for private judges are determined in reference to the salary of a practitioner at a large firm.

¹⁰² See Haynes, *supra* note 23, at 652 (setting forth a Model Court Rule).

¹⁰³ See Green, *supra* note 3, at 37, 40.

Further, the model statute could include a provision which would provide for more public access to the actual proceedings.¹⁰⁴ Such a provision could effect a balance between the privacy of proceedings that parties expect from a private judging and the public access that will ensure responsible and just decision making.

In conclusion, Ohio legal professionals should begin to explore the option of private judging. As stated previously, very few cases have been referred for private judging in Ohio in the past. However, the novelty of the system should not discourage litigants from taking advantage of its unique benefits. Although the court system in Ohio works rather efficiently already,¹⁰⁵ that alone is not reason to exclude a viable alternative of dispute resolution which could improve the court system even more. Litigants in Ohio should be given the option of private judging as intended by our state legislature. Ohio legal professionals should encourage the use of this option by first taking a careful look at the system, and secondly, by fully informing their clients of it.

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¹⁰⁴ See Haynes, *supra* note 23, at 652.

¹⁰⁵ See 1992 OHIO SUMMARY, *supra* note 11, at 1E, 1F, 1H.