

PUBLICATION

Private Judges: An Alternative Version of Alternative Dispute Resolution

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Some states have enacted legislation to allow parties to present their civil cases to a private judge to resolve disputes that would normally be heard in a traditional court. In some instances, the parties are able to select the private judge by agreement and in others, the private judge is assigned by the court. In either instance, the parties can benefit from this system but must be mindful of the problems that may arise with private judges. The article will outline some of the existing private judge statutes and some of the benefits and concerns associated with private judges.

Alabama

Alabama's private judge act is less than a year old. Ala. Code § 12-11A-1 *et seq.*

Alabama's private judge act allows parties, by agreement, to submit to the court where an action is already pending, a written petition for the appointment of a private judge. The types of cases allowed to be heard by a private judge are founded exclusively on domestic relations, contract, tort, or a combination of contract and tort.

The parties are required to submit a consent to appointment of the judge selected and agreed to by the parties. The private judge selected by the parties must, among other things, have been a judge in a court that would have subject matter and monetary jurisdiction of the matter for which the private judge is requested. The private judge must have served as a judge in the qualifying court for at least six consecutive years.

The Alabama private judge has all the powers as a judge of a circuit court. Further, the final judgment of a private judge is appealable in the same manner as an appeal from the circuit court of the county where the case was filed.

California

California's private judges are called temporary judges. California's private judge authority appears to be the shortest and states in its entirety as follows:

On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause. Cal. Const. art. VI, § 21.

Two of the most prominent cases to be heard by temporary judges were [Michael Jackson's](#) custody trial and [Jennifer Aniston and Brad Pitt's](#) divorce.

California's appellate courts have filled in the details applicable to temporary judges. The temporary judge hears the issues within the scope of the stipulations defined by the parties. A judgment issued by a temporary judge is appealable.

Colorado

In Colorado, parties to a pending civil action may agree to the assignment of the case to a retired or resigned judge of the Supreme Court or any other court to hear a case. Colo. Rev. Stat. § 13-3-111.

The orders, decrees, verdicts, and judgments issued in a hearing or trial held by a judge appointed pursuant to Colorado's private judge act have the same effect as those that are issued by a regularly serving judge and are enforced and appealed in the same manner.

Florida

In Florida, a private judge is called voluntary trial resolution judge. Fla. Stat. § 44.104.

So long as there are no issues involving the constitution, child custody, visitation, or child support the parties to a dispute, whether filed with the court or not, may agree to the appointment of a member of The Florida Bar to act as trial resolution judge. Thankfully, the member must be in good standing; however, they only need be a member for at least five years. Although it is unlikely that parties would want, or that the court would appoint an unqualified person to act as a trial resolution judge, the qualifications seem light.

As part of the trial resolution process the trial resolution judge may administer oaths, issue enforceable subpoenas, and apply the rules of evidence. A judgment of a trial resolution judge is appealable (findings of fact are not appealable) to the appropriate appellate court. The final judgment of a trial resolution judge must be referred to a presiding judge in the case, if one is assigned, for entry of orders and judgments as are required to carry out the terms of the decision.

Indiana

It appears that Alabama may have looked to Indiana as the example to follow when drafting its private judge act. Ind. Code § 33-35-10-1 *et seq.*

A private judge in Indiana must have been a judge in a particular court for at least four (4) consecutive years. The private judge must have been a judge in a court that would have had subject matter and monetary jurisdiction over the matter in which the private judge will serve.

Parties must agree to a case being heard by a private judge and must agree on the judge they wish to serve as the private judge.

A private judge may only hear a case founded exclusively in contract, tort, or a combination of contract and tort.

A trial with a private judge is without a jury and the private judge has all the powers as a judge of a circuit court. All actions heard by a private judge are of record and must be filed with the clerk of the court and the records must be made available to the public. Notice of certain hearings and the final trial must be posted in a place accessible to the public at least three (3) days in advance.

A judgment entered by a private judge is appealable in the same manner as an appeal from the circuit court.

Ohio

Ohio had a unique problem of private judges conducting jury trials and using courtrooms despite the statute not calling for such actions. Ohio Rev. Code Ann. § 2701.10. The Ohio Supreme Court had to step in and stop this from occurring.

Parties to a pending action may unanimously agree to the assignment of the entire case to a retired judge of their choosing.

The retired judge has all the powers, duties and authority of the active judge who approves the assignment of the case. Any decision made by the retired judge has the same force and effect as if it had been made by an active judge of the court and is appealable in the same manner.

Texas

Parties may agree to have a private judge, special judge, hear civil or family law matters. Tex. Code ann. § 151.001. Each part must file a motion with the court requesting referral of the matter to a special judge. The motion must include an acknowledgement of a waiver of a right to trial by jury, state the issues to be decided by the special judge, and state the time and place for the trial.

The judge in whose court the matter is pending may order the case referred to a special judge and stay the pending matter until resolved. The order referring the matter to the special judge must specify the issue referred to the special judge.

Texas, like Ohio and California, allows the temporary judge to hear all or just a portion of the matter to be decided.

The judge is likely referred to as a special judge because the special judge must be a retired or former judge who served for at least four years and developed substantial experience in an area of specialty.

The rules of evidence and procedure apply to a trial by a special judge. The special judge has the same powers as the referring judge.

A court reporter is required to maintain the record of the hearings with the special judge.

A verdict entered by a special judge stands as a verdict of the referring judge and is appealable.

Benefits and Concerns with Private Judges

Allowing a private judge to resolve a dispute allows the parties to possibly save time and expense especially when it comes to scheduling the trial. In some instances, the parties are able to select a judge with specialized knowledge to decide the case. Further, the parties can have their case decided privately.

Some have criticized the process because it allegedly allows the wealthy to select a jurist in a two-tiered system. This criticism seems odd since in all instances the parties must be unanimous in their agreement to allow a private judge to hear the case.

Others have argued that decisions made by private judges are outside the public eye and beyond scrutiny. However, this criticism again appears to be lacking. First, in all cases the decision of the private judge is appealable. Second, some states require that the record remain public. Finally, the public is generally not concerned with civil disputes and if the process is used more often the public will generally not care at all.

The greatest concern may be in states where the parties select the private judge to resolve the dispute. The private judge likely desires to be selected as a private judge by other parties in the future, which could result in split judgments that fail to leave either party satisfied.

Parting Thoughts

States that allow for private judges may leave open the possibility of including private judge agreements in contracts. This is complicated in the states where the actual judge must be agreed to as well. However, creative contract provisions could overcome this difficulty.

