ACFLS 30th Anniversary

ASSOCIATION OF CERTIFIED FAMILY LAW SPECIALISTS

NEWSLETTER EDITOR
DEBRA S. FRANK, CFLS

NEWSLETTER

SPRING 2010, NO. 1

FAMILY COURT REFORM BIDS TAKE CENTER STAGE WHILE BUDGET CUTS ERODE FAMILY LAW DEPARTMENT RESOURCES

LESLIE ELLEN SHEAR, CFLS, CALS

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As family law specialists, we have lost confidence in the ability of our state's courts to offer fair procedures, follow the law, and produce wise outcomes to the majority of the members of the public who come to our family courts. We have come to view the family law courtroom with trepidation on behalf of our clients.

ACFLS Comments to the Draft Recommendations of the Elkins Family Law Task Force (Fall 2009, see acfls.org/Elk)

Momentum for family law reform, both comprehensive and piecemeal, is growing in California. In April the California Judicial Council adopted the recommendations of the Elkins Family Law Task Force (www.courtinfo.ca.gov/jc/tflists/elkins-work.htm) as the blueprint for an overhaul of California's family law courts. Meanwhile, the Legislature has been considering a variety of targeted changes without reference to the more comprehensive scheme, and a legislatively-mandated audit of the use of appointees by the Sacramento and Marin County family courts is underway. All of this is taking place against the backdrop of the Governor's proposed budget cuts and dramatic reductions in trial court funding.

The final report of the Elkins Family Law Task Force adopts many of the proposals and much of the analysis offered by ACFLS in our Comments to the Task Force's draft recommendations. ACFLS has urged the Legislature to avoid piecemeal changes and use the Elkins report as the blueprint for broader and more effective family law reform. Without adequate family court funding, bench officers with greater family law experience and expertise, and utilization of more robust professional court-connected consensual dispute resolution options, ACFLS has concluded that the family courts cannot meet the needs of the families they serve.

ACFLS Legislative Coordinator Lynette Berg Robe, ACFLS

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PRIVATE JUDGES PRACTICING LAW: IS IT ETHICAL?

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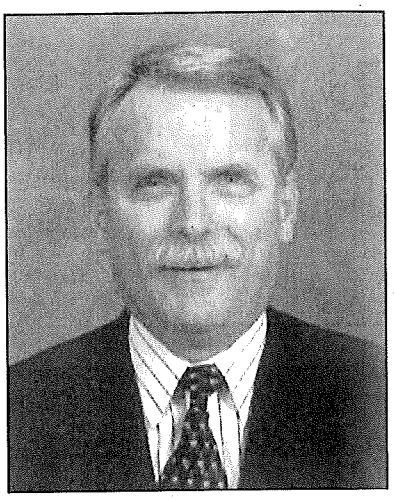

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1. Introduction

Imagine a scenario where in Case #1 you are litigating against Attorney A, and are then retained in Case #2 where Attorney A is sitting as the private judge. Should you seek to disqualify the judge in Case #2? Or, should you proceed with the two cases, likely finding yourself arguing zealously against Attorney A one day, only to appear before her as your judge the next?

Or imagine yourself handling a highly-contested Case #1 against Attorney B. His partner, Attorney A, is sitting as a private judge in another case of yours, Case #2. One day when a crisis in Case #1 arises, Attorney B is not available and so calls in his partner, your judge in Case #2. Suddenly, your judge is your opposing counsel.

How about if in either of the above situations things escalate to the point where in Case #1 sanctions are warranted against Attorney A. Do you seek those sanctions? What repercussions would that have for you and your client in Case #2, where the person who'd be sanctioned is your judge?

The question presented in this article is whether, despite containing no explicit prohibition on the practice of law by private judges, California's Code of Judicial Ethics does bar that practice, and if it does not, whether it should be amended to do so.

2. Background of Private Judging

California has led the nation in private judging since the 1980s, when such appointments increased due to delays of up to five years in getting to trial, and States such as Texas, Florida, New York and Massachusetts quickly

followed.[1] The Supreme Court has explained: "California has created a full-fledged system of private judges, colloquially 'rent-a-judge,' which permits the parties to agree to a temporary judge. . . . Such an agreement allows the parties to bypass urban courts' crowded calendars, obtain a trial on a certain, prearranged date convenient to parties and witnesses, and avoid the cost of trailing on a master calendar while waiting for a courtroom."[2]

As family law departments become more impacted by budget cuts, we are facing more and more delay in getting matters to hearing or trial. In addition, despite efforts such as California Standards of Judicial Administration, section 5.30 (e), designed to improve the training of Family Law Judicial Officers, the fact remains that many sitting in those assignments have no previous family law legal experience.

Further, it continues to be the practice that trial court judges are rotated from one assignment to another every two to three years, leaving no continuity in the judicial officer handling a family law case that may endure for years.

These and other circumstances are leading family law attorneys to recommend to their clients that they consider the option of a privately-compensated judge. Privately-compensated judges, or private judges, generally fall into two categories: retired judicial officers, and practicing attorneys who have decided to expand their practices into private judging. Retired judges seldom resume practicing law (which for purposes of this article is defined as representing a party in a litigated case, as opposed to working as a mediator or in a collaborative case). However, especially in Northern California where there is a shortage of experienced, retired family law judicial officers working as private judges, it is very common for practicing attorneys to begin taking assignments as judge pro tem.

In those cases, these attorneys either opt to make a jump and cease the practice of law entirely, or for a period of time or permanently they continue to practice law while also sitting as a judge. It is those latter situations that are the focus of this article.

3. Overview of the Law

A. The Appointment of a Private Judge.

In California, private judges are appointed pursuant to article VI, section 21 of the California Constitution which provides that "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."

Rule 2.831(b) of the Rules of Court[3] requires that private judges subscribe to an Oath of Office to confirm that they are aware of and will comply with applicable provisions of Canon 6 of the Code of Judicial Ethics and the California Rules of Court. To permit the State Bar to discipline members who violate applicable portions of the Code of Judicial Ethics, Rule 1-710 of the Rules of Professional Conduct provides that members serving as a private judges "shall comply" with all applicable portions of the canons.

When appointing a private judge, litigants generally agree that most or all laws and procedural rules shall still apply to the case, and appellate rights are preserved.[4] Some appointment orders alter the regular procedural rules, for instance by permitting ex parte communications with the private judge or providing that no motions may be filed without the private judge's authorization. However, in most cases litigants are not altering due process rights but instead are simply inserting a private judge in the place of the public judge.

The Rules of Court were recently amended to require that in all proceedings before a private judge all original papers must be filed with the court clerk, and all hearings that would be open if held in court must be open. (Rules 2.400(b) and 2.833(a).) Further, motions to seal records in cases before private judges must be heard by the trial court judge rather than the appointed private judge. (Rule 2.834(a).) These rules reinforce the idea that cases being heard by private judges are not subject to special privacy rights and are to be treated as other cases pending in the Superior Courts.

B. Ethical Rules Governing Private Judges.

The first formal standards of judicial conduct were published by the American Bar Association in 1924 as the Model Canons of Judicial Ethics. Each state has adopted its own version of the Canons. Over time, there have been several substantive revisions of the ABA Canons with most states then following suit as to those revisions. The California standards, originally adopted in 1949, are currently as set forth in the Code of Judicial Ethics adopted by our Supreme Court in 1996. This Code can be found at the California Courts website at www.courtinfo.ca.gov.

With respect to when and if a judge may practice law, the original ABA Canons provided as follows (emphasis added):

> 31. Private Law Practice. In many cases the practice of law by one holding judicial position is forbidden. In superior courts of general jurisdiction, it should never be permitted. In inferior courts in some states, it is permitted because the county or municipality is not able to pay adequate living compensation for a competent judge. In such cases *one who practices law is in a position of great delicacy and must be scrupulously careful* to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success. *He should not practice in the court in which he is a judge*, even when presided over by another judge, *or appear therein for himself in any controversy.* . . .

This demonstrates that since at least 1924, exactly when a judge may practice law has been a sensitive issue, governed by the general concept that steps should be taken to avoid any conflict of interest in this area.

Today's ABA Canons (which may be found at www.abanet.org) and most states' versions are organized such that there are a set of Canons that apply to all sitting, public judges, and then a separate area where it is clarified how those rules apply to others who perform judicial functions. In the ABA Canons

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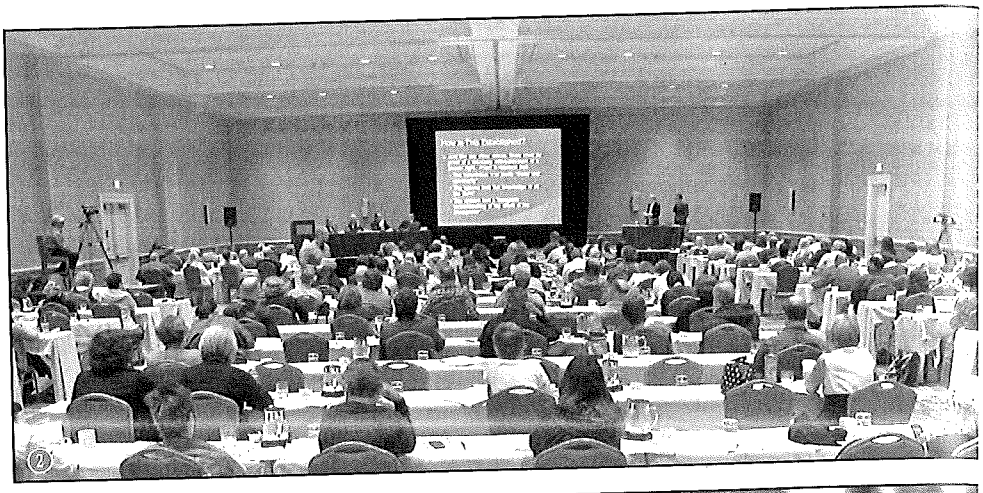
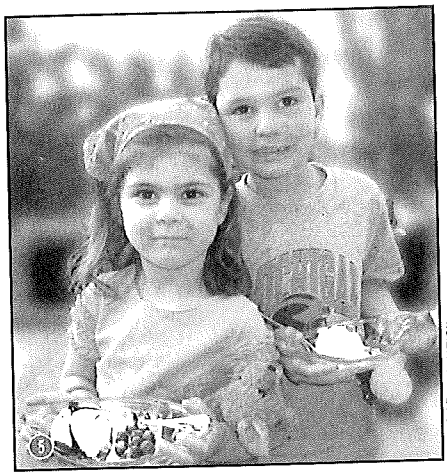
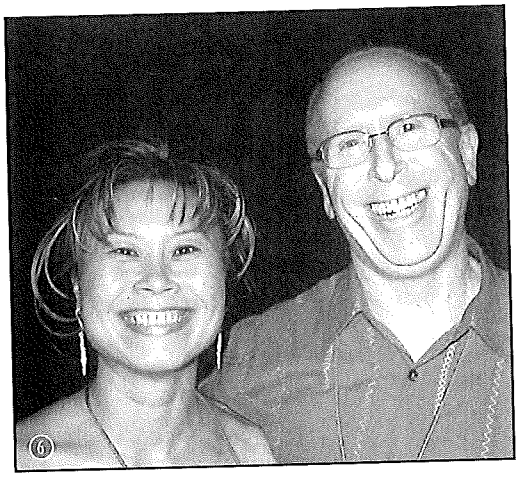
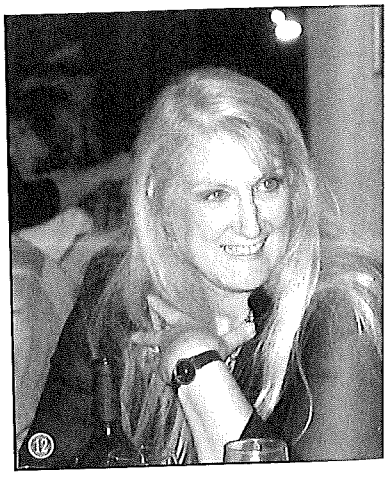
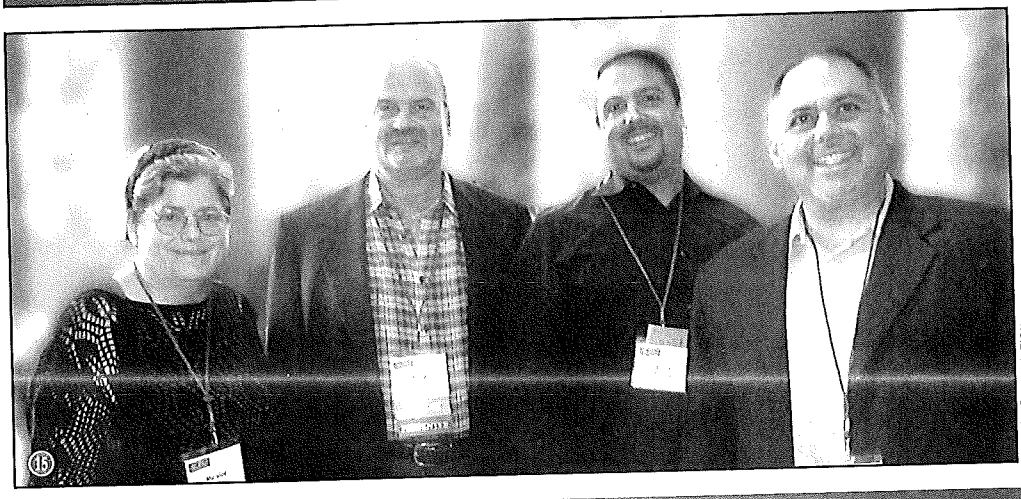
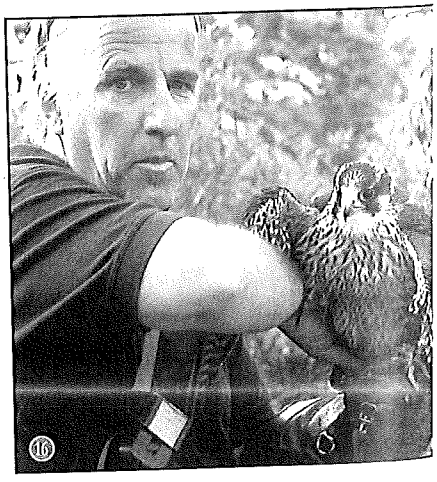




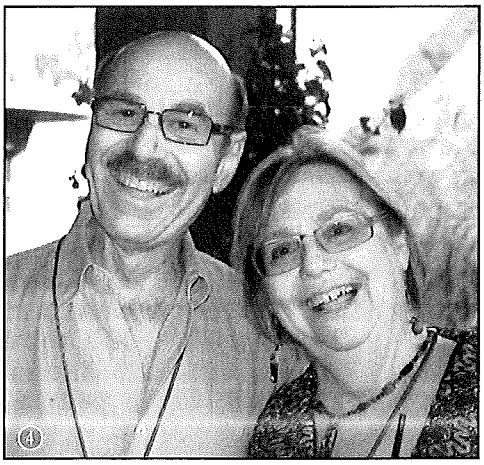


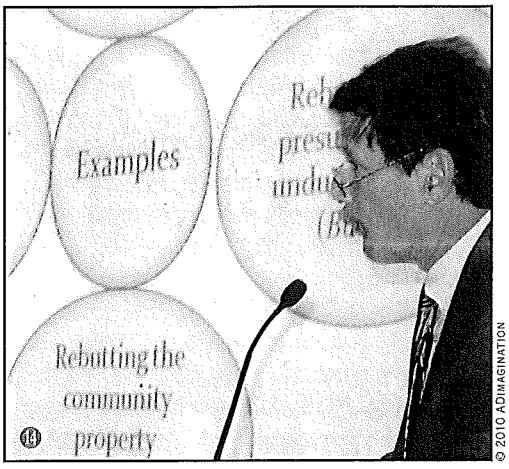


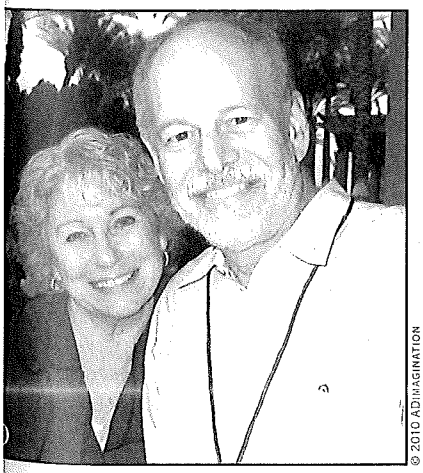


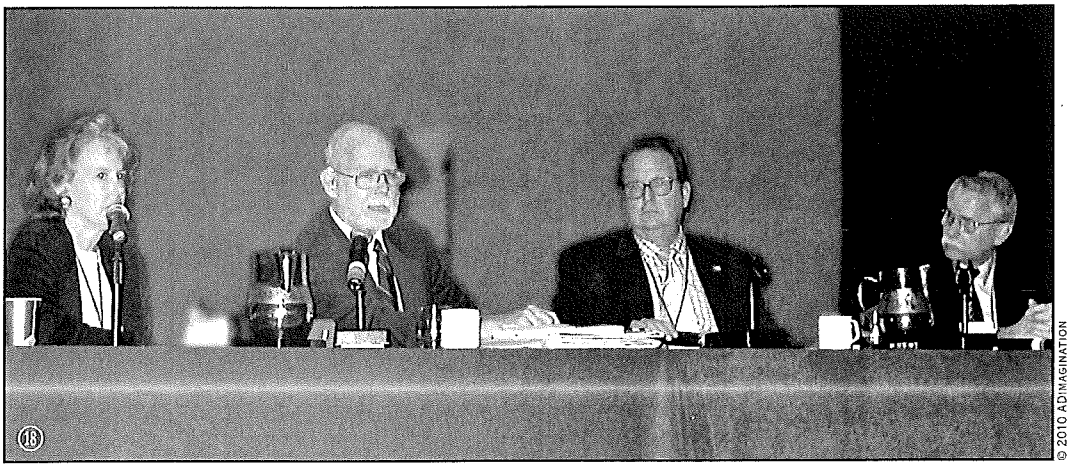


ACFLS 2010 Spring Seminar









① Eileen Preville, CFLS.
② Record attendance.
③ Camille Perona, CPA, Shane Ford, CFLS, & Sharon Bryan, CFLS.
④ Don Eisenberg, CFLS, & Leslie Shear, CFLS.
⑤ The children of Michelene Insalaco, CFLS, enjoy ice cream at Friday's buffet.
⑥ Lulu Wong, CFLS, & Peter Walzer, CFLS.
⑦ Debra Frank, CFLS, Commissioner John Chemeleski & Lynette Berg Robe, CFLS.
⑧ Frances & Ed Quirk, CFLS.
⑨ Lynn Pfeifer, ACFLS Executive Director.
⑩ Spring Seminar Co-chairs Patricia Rigdon, CFLS, & Karen Freitas, CFLS.
⑪ Diana Richmond, CFLS, & Bonnie Riley, J.D., ACFLS Webmaster.
⑫ Barbara Hammers, CFLS.
⑬ Shannon Fernandez, CFLS, Judge Aviva Bobb (Ret.), Olga Fabrick, CFLS, & Judge Isabel Cohen (Ret.).
⑭ Steven Temko, CFLS, & powerpoint!
⑮ Maralee Nelder, CFLS, Avery Cooper, CFLS, David Shebby, J.D., & Jeffery Jacobson, CFLS.
⑯ Falcon & falconer.
⑰ Perryne Anker & Judge Robert Schnider (Ret.).
⑱ Judges Maren Nelson, Michael Naughton & Thomas Trent Lewis with moderator Garrett Dailey, CFLS.

UNCREDITED PHOTOS BY LULU WONG & FRIEDA GORDON

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and in the majority of states, those who perform judicial functions are placed into four distinct categories:

1) Retired Judge Subject to Recall – a formerly-sitting judge who may be called back to the bench at any time;

2) Continuing Part-Time Judge – a judge who "serves repeatedly on a part-time basis by election or under a continuing appointment";

3) Periodic Part-Time Judge – a judge "who serves or expects to serve *repeatedly* on a part-time basis, but under a separate appointment for each limited period of service or for each matter"; and,

4) Pro Tempore Part-Time Judge – a judge who "serves or expects to serve *once or only sporadically* on a part-time basis under a separate appointment for each period of service."

Under the ABA Canons, Retired Judges Subject to Recall may not practice law; Continuing and Periodic Part-Time Judges "shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves"; and Pro Tempore Part-Time Judges may practice law except in cases where he or she has been the judge.

These distinctions and differing treatments for different types of judges impliedly assume that the more often one sits as a judge, the more likelihood of conflicts, and hence the more restrictions that should be placed on that person's ability to practice in the geographical area where he or she sits as a judge. Typically a court of appeal will have jurisdiction over a set of counties which provides for a buffer zone larger than simply prohibiting practice in the county where one might sit as a judge.

In this area of judicial governance, California's Code of Judicial Ethics has parted ways with the ABA and the majority of states. California's Code defines a "Temporary Judge" as "an active or inactive member of the bar who, pursuant to article VI, section 21 of the California Constitution, serves or expects to serve as a judge *once, sporadically, or regularly* on a part-time basis under a separate court appointment for each period of service or for each case heard." Thus, all types of private judges are lumped together. Canon 4(G), which prohibits public judges from practicing law, does not apply to such temporary judges. One might assume from this that the Code permits all private judges to practice law without exception. However, as discussed below, the Canons are to be read as a whole. Private judges must be aware that although permitted to practice law, they must comply with other provisions of the Code as illustrated by many Ethics Committee Opinions.

4. May Private Judges in California Ethically Also Practice Law?

A. Recusal Required When *Actual* Conflict Exists.

Although the California Code of Judicial Ethics does not expressly prohibit a private judge from entering into a case or remaining in a case where counsel for a party appearing before the judge is or becomes his or her opposing counsel in a litigated matter, private judges in California are required to comply with several provisions of the Code of Judicial Ethics which arguably, when taken as a whole, would appear to preclude such practice.

First, Canon 6 (which as noted above sets out which other Canons apply to private judges) requires private judges to comply with Canon 1. Canon 1 requires judges to uphold the integrity and independence of the judiciary by establishing and maintaining high standards of conduct.

Next, Canon 2(A) applies to private judges. This Canon requires judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The Advisory Committee Commentary to Canon 2(A) states further: "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid *all impropriety and appearance of impropriety.* A judge *must expect to be the subject of constant public scrutiny.* A judge must therefore *accept restrictions on the judge's conduct that might be viewed as burdensome* by other members of the community and should do so freely and willingly. . . . The test for the appearance of impropriety is whether a person aware of the facts *might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence.*"

Finally, Canon 3(A)(5) applies to private judges and requires them to perform judicial duties without bias or prejudice and not engage in conduct that would *reasonably be perceived* as biased or prejudiced.

Hence, private judges, like those sitting in the Superior Courts, are required not only to avoid actual conflicts but to avoid even the *appearance of impropriety.* When a private judge presiding over Case #1 involving Attorney B is also Attorney B's opposing counsel in Case #2, many would agree that at the very least an *appearance* of a conflict exists. Attorney B, invested with the duty of vigorously advocating for his client's interests, will typically be asserting facts that conflict with the facts as stated by the private judge's client; will be arguing for a result in the case that is against the interests of the private judge's client; will possibly be seeking sanctions against the private judge's client; and may in some cases seek sanctions against the private judge herself. Such is the nature of litigation. The private judge, unless he has only a mediation or collaborative practice, cannot avoid becoming entangled in these types of situations.[5]

Canon 6(D)(3) requires a private judge to disqualify him or herself in any case where 1) the judge believes his or her recusal would further the interests of justice, 2) there is a substantial doubt as to his or her capacity to be impartial; and 3) when "a person" aware of the facts "*might*" reasonably "entertain a doubt" that the private judge would be able to be impartial. This section adds: "Bias or prejudice toward an attorney in the proceeding may be grounds for disqualification." This reiterates and confirms that a conflict with an attorney is cause for recusal.[6]

In keeping with this general rule, Canon 6(D)(5)(a) requires that a private judge must in all cases disclose information that is reasonably relevant to the question of disqualification under Canon 6D(3), including personal or

professional relationships known to the [private judge] that he or she or his or her law firm has had with a party, lawyer or law firm in the current proceeding, even though the temporary judge, referee or court-appointed arbitrator concludes that there is no actual basis for disqualification.[7]

Finally, the Preamble provides that "The Canons should be read together as a whole, and each provision should be construed in context and consistent with every other provision."

These rules, taken together, would appear to preclude a private judge from remaining in a case where he or she as a practicing attorney has a matter against counsel for one of the litigants. Certainly a case where the judge is actively litigating against an attorney appearing before him or her might cause a person to entertain such a doubt.

B. Actual Conflicts Extend to Cases Involving Members of the Judge's Firm.

If one concludes that a private judge may not serve in a case where counsel for one of the litigants is opposing counsel in another case, this rule must necessarily extend to situations where one of the judge's *partners or associates* has a case against counsel for one of the parties. This is because a conflict that applies to a lawyer necessarily extends to members of the lawyer's firm: "[W]hen one member of a firm is so engaged, each member thereof is an attorney or counsel so retained or employed." (*Mayo v. Beber* (1960) 177 Cal.App.2d 544, 549.)

See *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems* (1999) 20 Cal.4th 1135, where the California Supreme Court held:

> When a conflict of interest requires an attorney's disqualification from a matter, the disqualification normally extends vicariously to the attorney's entire law firm. . . . This rule safeguards clients' legitimate expectations that their attorneys will protect client confidences. (*Id.* at p. 1138, citations omitted.)

This type of provision is more explicitly stated in the rules governing judges in other states. For instance in New York it is required that a part-time judge shall not practice law in the county where his or her court is located and "shall not permit his or her partners or associates to practice law in the court in which he or she is a judge." (See 22 NYCRR 100.6(B)(2)(3).)

In keeping with this general rule, as noted above, Canon 6(D)(5)(a) requires that a private judge must disclose not only information about his or her professional relationships with those involved in a case, she must also disclose those of his or her *law firm.*

This casts the net of inherent-conflict situations even wider.

C. An Actual Conflict for a Judge Appears to Be Non-Waivable.

The Canons apply an *objectively reasonable standard*, such that the question is not whether there is actual impropriety or bias in any given situation, but whether a person aware of the facts might reasonably entertain a doubt or perceive bias. This language would appear to completely preclude a valid waiver of any known or possible conflict by the parties and counsel impacted, because the standards are created to ensure the public trust in the judiciary, and the public could never make such a waiver.[8]

The idea of the non-waivability of the Canons and perceived conflicts is supported by the Preamble to the Code, which provides:

> Our legal system is based on the principle that an *independent, fair, and competent judiciary* will interpret and apply the laws that govern us. *The role of the judiciary is central to American concepts of justice and the rule of law.* Intrinsic to this code are the precepts that *judges*, individually and collectively, *must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.* . . . Compliance [with the Code] is required to preserve the *integrity of the bench and to ensure the confidence of the public.*

Another bar to the idea of the parties waiving any conflict that may exist in this arena is the idea that such a waiver must be informed and knowing. The concepts at play here are complex and so a knowing waiver would be difficult if not impossible to obtain.

According to the Rules of Professional Conduct, Rule 3-1, "disclosure" means informing the client of the relevant circumstances and the actual and reasonably foreseeable adverse consequences. See *Gilbert v. National Corp. for Housing Partnerships* (1999) 71 Cal.App.4th 1240, where an attorney was found to be disqualified in a simultaneous representation matter even when both clients did not believe that any conflict existed. The court stated, "Clearly, as a threshold matter one must know of, understand and acknowledge the presence of a conflict of interest before one can give *informed* consent to its existence." (*Gilbert* at p. 1255.)

In the arena of private judges practicing law, it would be especially hard to fully disclose not only the actual adverse consequences but also those that are reasonably foreseeable. For instance, if the judge and counsel for the parties are opposing counsel but in a case that appears headed for settlement and which has not involved litigation, would the disclosure need to explain that anything could happen and litigation could ensue, such as sanction requests and bad-faith tactics that could sour the judge's good-will toward the attorney? In that event, why would a party ever knowingly consent to the situation? Such consent would be inherently unreasonable. Further, if new events arose in the middle of the case, arguably a new disclosure would be required, and a new consent given, complicating matters further.

The reality is that few clients are sophisticated enough to understand the significance of such a waiver and the potential for conflict of interest if the contested case between the lawyers goes sideways. While it is easy to assume that the parties' lawyers have fully advised them of these potential problems, such an assumption is unsupportable. What attorney can or would be willing to predict the twists and turns that a case may take?

D. The Code Would Appear to Preclude the Practice of Law by Lawyers Who Regularly Sit as a Private Judge.

The authority cited above arguably prohibits attorneys who work *regularly* as private judges from practicing law in the general area where they sit.

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There are at least two reasons for this conclusion.

First, Canon 3(B)(1), which applies to private judges under Canon 6 and is not waivable, requires a judge "to hear and decide all matters assigned to the judge." This means that a judge, including a private judge, once appointed, must take all steps to enable him or her to remain in the case. Certainly it would be unfair to litigants who have invested time and money in familiarizing a private judge with their case, and who are in part paying for the ability to have one judge hear the entire case, for the judge to compromise his or her ability to remain as the judge.

Were a judge to practice law in the county where the case was pending, or to have partners who did so, either party could easily and immediately force the judge to recuse herself by simply associating in as co-counsel an attorney who has a litigated case pending against the private judge or a member of the judge's firm. While, hopefully such manipulation of the system is not commonplace, it is certainly foreseeable. Litigants are entitled to counsel of their choice and hence could not be admonished or precluded from taking such action. Private judges are therefore the ones who have to act to ensure the integrity of the system. To do this, they arguably should not expose themselves to this situation and should cease practicing law or associating with partners who practice law.

Another reason why attorneys who elect to work full-time or a substantial portion of their time should cease practicing law is to make it more likely that the option of working as a private judge remains available. It has been the trend in California to expand ethical duties for both attorneys and judges. For instance, in 2003 Chief Justice George issued a decree providing that retired judges who work as private judges may not longer sit in court as judge pro tems. In so ordering, the Justice explained that he was disturbed by cases in which retired judges' private work affected their work in courts. Some part-time judges were marketing themselves from the bench. One judge recessed a Los Angeles jury trial for several days while he tended to a private case, forcing out-of-town attorneys to languish in hotels.

While Chief Justice George reported that "[t]he vast majority [of retired judges] were conducting themselves in a perfectly ethical manner, [] even a small percentage impugns the public's perception of the system."[9]

The same idea applies to the system of private judges. While most have integrity that would preclude an actual conflict and would act appropriately were the appearance of impropriety arise, if even in a small percentage of the cases a litigant suffered due to the judge's dual role, arguably the practice should be barred.

On the other hand, one can certainly argue that by requiring attorneys who wish to offer their services as private judges on a regular basis to completely give up the practice of law would dramatically reduce the number of attorneys available for private judgeships. Family lawyers are uniquely qualified to serve as judges in family law cases. This is especially true for family lawyers who have extensive trial experience. Hence, such attorneys should be encouraged to act as private judges and sit as pro tem judges in the courts.

Some argue that the marketplace will weed out unethical judges, those who allow themselves to remain in inherently conflicting situations, or who directly or indirectly retaliate against an attorney she is litigating against. Unfortunately, this same argument could be made for disreputable attorneys. While this is happening, too many litigants might be hurt. This is not a realistic solution.

Interviews with several preeminent private judges around the State turned up mixed opinions. All of the private judges interviewed agreed that were they to find themselves in a situation where an attorney was both appearing before them and their opposing counsel in another case, there would be an actual conflict and the judge would need to step out of the case. These judges also agreed that they would not become a judge in a case where a party's counsel was his or her opposing counsel in another litigated matter.

However, when asked if there should be a bright-line rule, opinions varied. Three Northern California private judges were adamant that the only ethical way to become a private judge is all-at-once. These individuals very successfully made this transition without a negative impact on their income. One attorney pointed out that one can save a great deal on errors and omissions insurance when so doing, as the complete cessation of practicing law typically enables an attorney to obtain free lifetime tail insurance coverage (and because of judicial immunity ongoing insurance is not needed).[10]

The judges who take the most conservative approach were especially careful to read and understand all of the ethical rules before taking on private judging cases. One attorney discussed how becoming a judge can be isolating, because she was required to end her association with family law groups, stop having dinners with attorney friends who would appear before her, and otherwise act in a way to minimize future conflicts, as is required by the Canons. These attorneys voiced concerns about attorneys who may casually begin taking private judging cases without full knowledge of the related obligations. It was suggested that in the future a licensing process with special education may evolve.

Another attorney explained that he moved over time into a full-time private judging practice by taking only mediation and collaborative cases during the transition period.

Other practicing private judges, both retired public judges and lawyers, believed a bright-line rule that precluded the practice of law would not be workable as it would unduly discourage attorneys from becoming private judges. Most feel that an attorney needs time to build a private judging practice and would have insufficient income if practicing law in the meantime was precluded.

5. Conclusion

The authors cannot avoid the conclusion that to protect the system of private judging, and to best protect the integrity of the judiciary, attorneys who regularly

sit as private judges should cease practicing law, at least in the county where they sit. Although there is no logical reason why this preclusion should not apply to all attorneys, the authors recognize the burden that this would put on the private judging system by excluding otherwise well qualified individuals from accepting the occasional private judging assignment. As the ABA recognizes a distinction between those who regularly accept these assignments and those who do so "sporadically," then the same distinction should exist here. However, under no circumstances should a private judge be permitted to act as a judge in one case and opposing counsel to one of the attorneys before him or her in another.

Although Canon 6 does not, standing along, expressly provide these restrictions, read in totality, the Canons arguably do. As written in an ABA opinion which analyzed whether a pro tem judge hearing criminal cases should be permitted to appear as counsel in criminal cases in the same court: "One who assumes to act as a judge on one day and advocate the next in the same judicial system is confronted with inherent difficulties that ought to be avoided and deprecates the employment of such a system."

California is a bellwether for the laws that will develop in other states, and so how Californians decide to handle this issue may have a wider impact around the country. We should act in the most conservative way to avoid actual conflicts and the appearance of conflicts. Judges, like attorneys, cannot be expected to be self-policing and should have clear rules to guide them.

The authors would submit that the approach should be the one that errs on the side of requiring higher ethical standards and best safeguards the independence of the judiciary and the public trust in judges and courts. Hence we would advocate for modification of the Code of Judicial Ethics to preclude the practice of law by attorneys who regularly sit as private judges in the geographical area where they sit, and would preclude private judges from maintaining partnerships with litigating attorneys.

Endnotes:

1 See "Rent-a-Judges Forced Out of California Courts" (4/24/2003) Martin Kasindorf, USA Today.

2 *In re Marriage of Assemi* (1994) 7 Cal.4th 896, 907-908, quoting Christian, *Private Judging, The Alternative Dispute Resolution Practice Guide* (1993) §40.3, p. 3.)

3 Unless otherwise specified, all subsequent references to Rules are to the California Rules of Court.

4 See detailed discussion in Moore, Calif. Civil Practice Proc. 26:59.

5 One might argue that it is Attorney B who faces a larger conflict. He may be unable to be an effective advocate for his client in Case #2 for fear of repercussions against his other client in Case #1, or for fear that in Case #1 the private judge will decline to award requested attorney fees as punishment for Attorney B's behavior as the judge's opposing counsel. While this may be true, it is the public trust in the *judiciary* that is the focus of this article and the attorney's ethical obligations will need to be addressed at another time and in another place.

6 Interestingly, Canon 6(D)(3)(d) provides that a private judge is disqualified from serving *at all* in family law proceedings if the lawyer holds himself or herself out to the public as representing exclusively one side or in fact represents one side 90 percent of the time (e.g. an attorney at a firm marketing itself as "divorce for husband's only" would not be permitted to sit as a private judge in any family law case). This provision further stresses the fact that the Code's purpose is not only to ensure impartiality in any given case, but to preserve the overall integrity of the bench and ensure the confidence of the public in the judicial branch of our government.

7 See discussion in Knight, Cal. Prac. Guide: Alternative Dispute Resolution (TRG 2009) 7:302.

8 It should be noted that Canon 6(D)(4) permits written waivers of the conflicts set out in 6(D)(3)(a)-(d) which would otherwise require a private judge to disqualify him or herself. This could be construed to mean that all conflicts related to private judges may be waived, although there is arguably a distinction between conflicts where the judge is required to initiate a recusal as opposed to those where the parties are permitted to seek to set aside the agreement to appoint the private judge under Rule 2.831 (f).

9 Rent-a-Judges Forced Out of California Courts," *supra.*

10 See *Knight, supra,* at 6:86. ■

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**** Practice Tip:*** In crafting an appropriate security interest, there is no reason that a spouse's interest in property *A* cannot be secured by a security interest in property *B,* if the nature of property *B* makes it easier and/or less costly to do so.

In summary, the additional security interest provisions have not significantly altered the broad powers that the court has always had to ensure a status only judgment does not impair a party's ability to ultimately obtain his or her share of an undivided asset. Rather, the amendments serve to reinforce that practitioners must evaluate the particular risks of a status only judgment in individual cases and seek such protective orders as are warranted by the risks and costs in that case.

Endnotes:

1 See *Marriage of Padgett* (2009) 172 Cal. App.4th 830.

2 See current Family Code section 2337, subdivision (g).

3 See Family Code section 2337, subdivision (c)(9).

4 Family Code section 2337, subdivision (c)(9)(A).

5 Family Code section 2337, subdivision (c)(9)(B).

6 Family Code section 2337, subdivision (c)(9)(C).

7 Code of Civil Procedure section 995.010, et seq.

8 Probate Code section 15000, et seq.

9 Family Code section 2337, subdivision (c)(9)(D).

10 Compare with Family Code section 4360.

11 Compare with Family Code section 4360.

12 See Treasury Regulation section 1.101-1(b)(4).

13 Civil Code section 2787, et seq.

14 California Uniform Commercial Code section 5102, subd. (a)(10).

15 See Civil Code section 2920, et seq.

16 See California Uniform Commercial Code sections 9310 & 9501, et seq. ■