FULL DISCLOSURE

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Is private judging soon to be a thing of the past in a post-*Jolie v. Superior Court* world? This article will discuss how one private judge's ethical breach could remake private judging as we know it; why the system needs a functioning, above-board private judging alternative; and how the lessons learned in *Jolie* could lead to a better, more transparent, alternate means to resolve family law matters.

The California Constitution, article VI, section 21 allows, on stipulation of the parties, the superior court to "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." Such temporary judges are members of the California judiciary with the full powers of any sitting California judge.

Given they are often paid by the parties, temporary judges are subject to strict regulation regarding disclosing potential conflicts of interest, including whether they are being paid by the parties or counsel in any other matter. California Rules of Court, rule 2.831(b) requires temporary judges to take an oath that they "will comply with applicable provisions of Canon 6 of the Code of Judicial Ethics and the California Rules of Court." Canon 6 requires a paid private temporary judge "from time of notice and acceptance of appointment until termination of appointment" to "disclose in writing or on the record information as required by law, or information that is reasonably relevant to the question of disqualification under Canon 6D(3), including personal or *professional relationships* known to the temporary judge, referee, or court-appointed arbitrator, 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."[1] These disclosures must be made "no later than five days after designation as a temporary judge or, if the temporary judge is not aware of his or her designation or of a matter subject to disclosure at that time, as soon as practicable thereafter."[2]

Jolie v. Superior Court[3], a writ proceeding arising in the dissolution of marriage case between Brad Pitt and Angelina Jolie, addressed the singular issue of the extent to which a privately compensated judicial officer must timely disclose new business arrangements with opposing counsel arising during the pendency of a case. It did so in a context where both sides had knowledge that the private judge and opposing counsel had worked together in the past.[4]

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In *Jolie*, Angelina Jolie filed a statement of disqualification, challenging the privately compensated temporary judge selected by the parties to hear their family law case, based on the temporary judge's failure to disclose several matters involving Pitt's counsel over which the temporary judge presided, for which he was retained following the initial appointment in the Jolie/Pitt case.[5] The opposing party/real party in interest, Brad Pitt, argued disclosures regarding new matters undertaken during the pendency of a long-lasting proceeding were not required by the temporary judge because Jolie was aware of *past* prior paid professional relationships between his counsel and the private judge, and had nonetheless agreed to the judge,

thereby *waiving* disclosures of new matters that might be undertaken.[6]

The Second District Court of Appeal in *Jolie* unanimously rejected Pitt's contention and held private judges, like arbitrators, are required under the Canons of Judicial Ethics to promptly disclosure new engagements with opposing counsel, and the failure to do so, regardless of known past business dealings between the judge and opposing counsel, violates the ethical rules. The reviewing court explained as a matter of law, the past business dealings would lead a reasonable person to question the private judge's ability to remain impartial, requiring disqualification.[7]

In his concurring opinion in *Jolie*, Justice Segal challenged the private judging regime as a whole, going so far as to argue that paying a private judge for his or her time is improper, challenging the Judicial Council to adopt the rule recommended by its *ad hoc* committee in 1993 that a private judge can only be paid by the superior court, not litigants.[8]

Since the publication of the *Jolie* decision, the reaction of fellow family law practitioners and private judges has been, to say the least, interesting and mixed. For those unhappy with the decision, the critique has centered around Justice Segal's concurring opinion. Those involved with private judging, including their handlers (referred to in the opinion as "alternative dispute providers"), are clearly now worried this niche business may be in peril and the implication in their negative reaction is that attorneys are the ones responsible for this potential overhaul of a system on which so many of us (including these authors) have come to rely.

To the extent some take such a dim view, it is not difficult to figure out why. The obvious answer is that private judging is a big business. Like many businesses, private judges (and in particular their organizational handlers) are not interested in losing "customers," which strict disclosure requirements is likely to cause. Lost in their self-serving criticism is the fact that the solution is, for now, within their control. There is no question the public court system is overtaxed and needs an outlet for complex cases that stretch their thin resources. For those practitioners who have had private judging matters, they have become comfortable with the flexibility and looser formality such appointments offer. It is that very flexibility and looser formality that needs to be overhauled if the private judging system is going to remain a viable alternative.

The *Jolie* judicial officer (or the agency under which auspices he provided services) could have disclosed the new business engagements he had with opposing counsel as they arose (and without having had to be asked) but he chose not to. The existence of his already-pending involvement in the *Jolie* matter would have been revealed upon a conflict check for each new matter. His attempts to foist responsibility on his handlers for his non-delegable duty fell on deaf ears. Every lawyer knows one cannot foist responsibility for ethical lapses or errors on subordinates; so should judges. As the decision posits, how hard is it for a private judge to undertake a timely conflict check just as we as practitioners are required to do? The reality is, private judges and likely, their handlers, have been lackadaisical about their ongoing disclosure obligations, because disclosing may mean they have to turn down business.

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The court of appeal in *Jolie* did not adopt the bright line test applicable to arbitrators, that every innocent nondisclosure *automatically* requires disqualification. But if a private judge fails to disclose new engagements with counsel in ongoing matters, he or she does so at his or her own peril, meaning timely disclosure is required to *all* relevant parties, including the parties in both the new *and* the ongoing matter.

The obvious solution to avoid the peril the judge faced in *Jolie* is to "disclose, disclose, disclose." But why didn't the court adopt a bright line rule? Wouldn't that have been a better solution, as it would have eliminated the gray and reduced the potential for continued lack of disclosure, and arguably further litigation as to whether the failure to disclose was egregious enough? If the standard is that a court *must* disclose, is the consequence still fact-dependent?

Presumably, the difference in the arbitration rules and those set forth for a privately compensated judicial officer is something best handled by the Legislature. The *Jolie* opinion all but begs for such a loophole to be closed. A bright line rule would aid litigants and ensure private judges and

the agencies through which they work to know exactly what they need to do.

The responsibility, while sitting squarely with the privately compensated judicial officer, must also fall on the attorneys using the private judging services. This means if for some reason, the privately compensated judge fails to make a disclosure involving an attorney's dealings with him or her, the attorney, knowing he or she has another pending matter before that same private judge, needs to make the disclosure. This may result in parties dropping a particular private judge. But that is the price of required transparency. The legal system works when all involved play by the rules. While we have fallen into the trap of believing if we select our judicial officer, our knowledge of their past rulings or dealings with us will influence that judicial officer's decision in the matter at hand, such thinking is what has gotten us into the pickle described by Justice Segal, and causes the system to be less than transparent.

Unless or until new rules are issued or the parameters of private judging change, stipulations appointing a private judge should have explicit direction that *all* new retentions or engagements involving the same parties or counsel for the parties will be promptly disclosed so that the rules are clear. Close(r) attention should be paid by attorneys when hiring a private judge to the disclosures about their relationship with opposing counsel. Better yet, the parties may well consider agreeing that during the pendency of their matter, no other matter will proceed before the same private judicial officer involving either of the attorneys in the matter at issue. In addition, practitioners who already are involved in a private judging matter need to keep close watch on when they become engaged in another matter before the same private judge. If the appropriate disclosure is not promptly made, the attorney should provide notice and disclosure to ensure matters that should be disclosed are not missed, and to eliminate the potential for a lingering time bomb.

To address Justice Seagal's concerns, the family law bar and judicial council should consider whether family courts should have a centralized list of approved private judges whose time will be billed and paid by the court (as opposed to the parties) so as to avoid the "repeat player/business" concern that was so overt in the *Jolie* matter and to ensure the same level of transparency exists both in the public court and the private domain. Alternatively, we might adopt a system like that used in England, where cases are evaluated for complexity or net worth at the outset so as to have courtrooms dedicated to handling larger cases that require more time and judicial experience.

The *Jolie* case shone a light on the parallel private judging system, and its potential for its own undoing. Whenever a public function is privatized, there is always a risk that the greater public policy concerns will be minimized in favor of profitability. The answer is to hold private judges and their handlers accountable in the same way public courts and judicial officers are held accountable.

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1 Canon 6(D)(5) (italics added).
2 Cal. Rules of Court, rule 2.831(d).
3 (2021) 66 Cal.App.5th 1025
4 See *Jolie, supra,* 66 Cal.App.4th at p. 629.
5 *Jolie, supra,* 66 Cal.App.4th at p. 613.
6 *Id.* at 628.
7 *Jolie, supra,* 66 Cal.App.4th at pp. 626-628.
8 *Jolie, supra,* 66 Cal.App.4th at pp. 631-633.