

Private judges offer quick justice at a price

Few have ventured into private trials since Florida legalized them in 1999. But private judges may be a more popular option with frustration over public sector inefficiencies and an onslaught of mortgage foreclosures slowing circuit courts.

By Jose Pagliery

When some of South Florida's most influential legal professionals gathered around a conference refreshment table to discuss doomsday scenarios for the state judicial branch, one jurist stood apart from the rest, cheery and energetic.

Retired Miami-Dade Circuit Judge Paul Siegel was busily promoting his new enterprise, Voluntary Trial Resolution — private trials before a hired judge, a state-sanctioned practice little-known and rarely used. Although the option has been in state law since 1999, few lawyers have ventured into those uncharted waters.

But the environment has changed. Nationwide frustration with public sector inefficiencies has induced a turn toward privatization. And an onslaught of mortgage foreclosures has slowed circuit courts.

Siegel adamantly argues the time has come for lawyers to embrace his option, which offers a speedy trial that likely costs upwards of \$20,000. It's a hefty price, but for cases destined for trial, it offers potential savings by avoiding delays.

Some lawyers are brushing off the idea, taking the approach displayed by business advocate Barney T. Bishop III, the Associated Industries of Florida president, who trashed Siegel's promotional nail file promptly after the conference last spring.

Others fear a dual-track system where justice becomes another luxury, like private schools and extravagant cars.

Siegel admits private trials are a comfort available to few, saying: "Our society fortunately or unfortunately is divided between rich and poor. And the rich can afford many more things than the poor can."

The private trials can be held behind closed doors — an option critics say threatens development of precedent, could prevent potential plaintiffs from discovering how they were injured and harm the public.

To some the private option amounts to a toll express lane that avoids jammed public courts. But if the legal maxim "justice delayed is justice denied" remains true, then the ability to pay for fewer delays equates to the power to acquire more justice.

SOME SEE ADVANTAGES

Private trials have been an option in Florida for 12 years. A judge-for-hire renders a decision that must be rubber-stamped by a circuit judge but can be appealed. Only a few attorneys have offered the service, and most are retired judges. They report its use remains rare.

Kenneth D. Stern, a retired Palm Beach circuit judge who offers private judge services, said it's simply not considered by most of his peers.

"I have found to my amazement that a lot of lawyers don't even know that statute exists," he said.

The state keeps no records on the number of private judges or their cases.

Mediation and arbitration remain the most popular vehicles for alternative dispute resolution, but Jeffrey Feldman, a commercial litigator with Feldman Gale in Miami, champions the private judging option.

"It's a free-for-all in arbitration. Here, the rules of evidence apply. There are advantages to having those rules. That means the scope of discovery is the same as it would be in an ordinary civil case," he said.

Siegel maintains arbitration is more expensive because the cost of hiring a single judge is lower than hiring three arbitrators and paying administrative fees to entities like the American Arbitration Association.

Greenberg Traurig shareholder Alan Dimond, who hired Senior Circuit Judge Herbert Stettin to conduct a private trial three years ago and was pleased with the result, said the lesser-known option avoids a drawback of arbitration. He said arbitrators have "a tendency to split the baby" and rule down the middle at a loss to both sides.

"It was much more convenient, much more efficient. It was less expensive to the parties than it otherwise would have been," he said. "It creates a parallel system that is advantageous to those who can afford to take advantage of it."

Dimond expects more of private judges than arbitrators.

"What you're asking for is a legal ruling for the judge to tell you who's right on the law. The factual findings tend to be more precise with a private judge than they are with an arbitrator," he said.

Florida allows private trials to be conducted in secret, which is seen as an advantage by some in family law.

"Being able to obtain a private trial because of the desire to keep wealth a secret or keep infidelity a secret or just to get the case over with more quickly is not different than many of the other things money will buy," Siegel said.

Stern argues the same money wasted paying for lawyers to deal with court system inefficiencies would be better spent before a private judge by allowing a business to move past litigation and toward expansion.

"With the economy the way it is and people trying to resolve matters way ahead of time, it doesn't make sense to let a sitting case fester and produce more attorneys fees," Stern said.

"You can get this behind you and get on with what's more important in your life. That's a very attractive option," he said. "Even if it's more expensive, bringing a situation to closure two years or more in advance saves a great deal of money. It eliminates uncertainty."

LIGHTEN THE LOAD

Providing a high-speed lane for justice could have its drawbacks.

"One of the reasons that legislatures across the country were unable to defund the judiciary in these difficult financial times is because they were forced to recognize that business interests need the judiciary," said Duane Morris partner Lida Rodriguez-Taseff, a Miami commercial litigator.

But decreasing state pay might give talented judges an incentive to leave the bench to preside over private trials.

Jesse Diner, an arbitrator and former Florida Bar president, is quick to point out options like mediation and arbitration have been around for decades and haven't crippled the traditional court system.

"There will always be a need for a public judiciary that's fair, impartial and adequately funded," assured the managing shareholder of Atkinson Diner Stone Mankuta & Ploucha in Fort Lauderdale.

David Jagolinzer, a personal injury lawyer at the Ferraro Law Firm in Coral Gables, isn't a fan of private trials.

"I want more judges. I want more senior judges. I want more trials so that I can move my cases faster. But to go outside of the system would create discord. It's basically saying, 'I have no faith in our current judiciary,?'" he said.

Florida's courts are facing an unprecedented burden brought on by the mortgage foreclosure crisis and worsened by yearly threats from a Legislature willing to slash its funding. State court data show a 240 percent increase in the number of yearly civil case filings from 2005 to 2009 while the total number of circuit judges increased only 6 percent.

Siegel maintains private trials serve to lighten the load.

"By having a private trial system, then Joe Blow's auto accident trial will get to trial quicker because we're carving out a number of cases going to the other system. It's a plus for everybody," he said. "Anything that gets rid of cases is good for the balance of the cases."

LOSS OF PRECEDENT?

Florida law allows litigants who choose private trials to keep the proceedings secret if all parties agree.

Jagolinzer criticizes the option, saying: "The DuPonts, Union Carbides, R.J. Reynolds — they'd much rather keep things out of the press for their stock prices."

Rodriguez-Taseff warned a casualty of trial secrecy is the potential loss of legal precedent. Cutting the number of cases tried in public means a reduction in the body of legal work other judges may draw upon. In private hands, she said, "We're going to stop evolving as a legal system."

However, most fears are based on the assumption that the popularity of private trials will spike.

"I frankly doubt that private trials would be so numerous and that they would involve such a broad spectrum of the areas of law that we would find a substantial diminution of opinions giving needed guidance to trial judges and attorneys," said Stern, the Palm Beach private judge.

Whether the costs are high enough to keep out all but the rich or low enough to draw many cases out of public courtrooms, Lydecker Diaz senior partner Richard Lydecker thinks little will change.

"It would have the effect of standing in front of a raging herd of elephants with a pea shooter to try to stop it," he said. "For that reason, it won't do much for congestion of the courts — or threaten the judiciary for that matter."

The private system isn't suitable for all cases. State law prohibits the venue for battles involving custody, visitation or child support. Third parties who never agreed to use a private judge can't be dragged into using that option.

Personal injury attorneys prefer the vagaries of jury trials to bench trials.

Some defense lawyers say corporate clients would rather delay potential monetary judgments by sticking with the predictably slow pace of public courts.

Most jurists interviewed for this story conclude the private option is best suited for commercial disputes and could be added as a contract clause much like arbitration is today. State law mandates that agreement would determine how the parties will split the costs.

Contracts that lead to private trials give Rodriguez-Taseff yet another reason for pause because she believes the general public could be harmed. She noted a judge operating behind closed doors has the power to enforce an agreement even if the terms harm the public good.

"You're only getting the judge to judge what you want them to judge. The judge has no broad judicial obligation to do a public good or service," she said.

Twelve years into the experiment, private trials have not caught on. Retired Miami-Dade Circuit Judge John Gale, who has offered the service since 1999 from his Coral Gables office, estimates there are fewer than a dozen private judges in South Florida. Most keep themselves busy with mediation and arbitration.

Siegel, who retired in December, has yet to book a single trial. He has reached out on social media, circulated at this year's annual Florida Bar convention in Orlando and sent lawyers and nonlawyers direct messages on LinkedIn. He is now offering his first trial free. Its estimated value of \$22,000 reflects 55 hours of his work, which includes a weeklong trial and two days to read case law and write a final judgment.

Directing private trial advertisements to non-lawyers is not something regulated by the bar, according to Lili Quintiliani, assistant ethics counsel for The Florida Bar.

"An advertisement by an attorney who's also, for example, a mediator, would only trigger our rules if they were promoting their legal services," Quintiliani said, noting those who offer alternative dispute resolution services don't have to be lawyers.

Those advertisements are also not regulated by the state court system's Alternative Dispute Resolution Center, which oversees mediation and arbitration matters. Court spokesman Craig Waters noted state law gives the center no jurisdiction.

"Without that, it cannot act or set standards," Waters said.

Siegel's free trial offer is a method he refers to as "running a special to prime the pump." In other words, he needs to gain the confidence of a legal community with clients averse to change, especially if millions of dollars are on the line. As noted by Jorge Perez, a former Miami-Dade circuit judge who now does mediation with Gordon & Rees in Miami, private trials are "on the fringe."

Stranger still are offers of private jury trials, a service not expressly addressed in state law but one Siegel notes is not prohibited.

Kenneth Reilly, a Shook Hardy & Bacon partner who is lead trial counsel for Philip Morris tobacco litigation, said paying for private juries could be as expensive as mock trials, which often cost more than \$75,000 each. But the option could be a vital one as feuding firms could use highly educated jurors to tackle complex scientific or technical questions.

"Here's an opportunity possibly for selecting expert jurors, professional jurors, much like arbitrators," Reilly said.

Siegel realizes it could be a long time before private juries, or even private trials, become commonplace. Until then, he'll offer mediation and scan public notices for business disputes suited to his service, ignoring the dozens of foreclosure filings that keep the underfunded public court swamped.