NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

HON. JOSEPH A. ZAYAS
CHIEF ADMINISTRATIVE JUDGE

HON. NORMAN ST. GEORGE
FIRST DEPUTY CHIEF ADMINISTRATIVE JUDGE

DAVID NOCENTI
COUNSEL

MEMORANDUM

To: All Interested Persons

From: David Nocenti

Re: Request for Public Comment on a Proposal for a New Commercial Division Rule to Encourage Use of Lawyers as Referees on Consent

Date: October 26, 2023

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The Administrative Board of the Courts is seeking public comment on a proposal, proffered by the Commercial Division Advisory Council (CDAC), to create a new Commercial Division Rule 9-b (22 NYCRR § 202.70(g)) to encourage use of referees in the adjudication of disputes, upon consent of the parties and with the approval of the court. (Exhibit A, CDAC Memorandum)

CDAC submits that the use of referees to adjudicate disputes in the Commercial Division is underutilized. The CPLR contemplates the use of private referees to make judicial determinations upon the consent of the parties and with the approval of the court. CDAC writes that referees can be particularly helpful when a case involves hundreds of issues, many emergency rulings, multiple trials, and/or a multitude of orders. CDAC hopes to bring attention to the availability of referees to adjudicate disputes with a new Commercial Division rule.

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Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: David Nocenti, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 10th Fl., New York, New York, 10004. Comments must be received no later than December 15, 2023.

All public comments will be treated as available for disclosure under the Freedom of

Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

M E M O R A N D U M

From: Subcommittee on the Role of the Commercial Division in the Court System

O. Peter Sherwood
Mark C. Zauderer

Date: June 26, 2023

Subject: Proposal for a New Commercial Division Rule to Encourage Use of Lawyers in Private Practice as Referees On Consent

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The Subcommittee recommends the adoption of a New Commercial Division Rule as follows:

> Rule 9-b. Counsel should be aware that in accordance with CPLR 4301 and 4317(a), on consent of the parties, and with the agreement of the Court, any person may be appointed by the Court to act in place of the assigned Supreme Court Justice, to determine any or all issues or to perform any act, with all the powers of the Supreme Court.

Over the past decades, Courts in New York have adopted many measures to enhance efficiency in the disposition of cases. This effort has had a significant, salutary effect in the Commercial Division, where complex cases often intensely utilize the time and attention of judges, with an inevitable effect of extending the timeline of cases on the judge's docket. Innovations such as mandatory mediation and Alternative Dispute Resolution -- in particular arbitration -- have helped to distribute the burden of litigation and have generally been positively received by the legal community. However, there is a different form of adjudication that is available in New York under existing statutes and rules, which has been underutilized: referees.

The use of referees in adjudication, unlike arbitration, operates completely within the existing judicial system. The CPLR expressly contemplates this procedure by authorizing, upon consent of the parties and the approval of the court, the appointment of a person to be substituted

for the Supreme Court Justice to make all judicial determinations. Appeals are taken directly to the Appellate Division in the same manner as an appeal from any other order of the trial court. See CPLR 4319 ("the decision of a Referee shall comply with the requirements for a decision by the court and shall stand as the decision of a court."). Note that this designation of a referee to hear and determine is distinctively different from a reference for a referee to hear and report. See CPLR 4311.

Two separate articles authored by former justices of the Appellate Division have strongly supported the consensual use of a private referee (see the two articles attached). As they note, the system has been employed in California.

Experience has shown that use of referees can be particularly attractive to the court and the litigants in a case that does not simply involve, as is typical, a judicial determination of rights involving a past event or transaction. Some cases, like the Napoli v. Bern case cited in one of these articles, involve hundreds of issues, many requiring emergency rulings, such as in this law firm break up case requiring the reassignment of 24,000 clients to different lawyers, and multiple trials and hundreds of orders addressing complicated issues arising over a period of years during the course of judicial supervision. Moreover, where a chosen referee has supervision of the matter, delay and obfuscation is much less likely to take hold, as the parties are particularly motivated to preserve their credibility with the referee.

As with other rules that the Administrative Board has adopted upon recommendation of the Commercial Division Advisory Council, the rule encouraging use of the referee model is purely voluntary. However, in instances in which the parties and the court choose to employ it, use of a private practitioner as a referee can serve as an important and useful tool for both the

parties and the court system. We believe that practitioners, as well as many judges, may not be aware of the availability of this alternative. The proposed rule would bring attention to its utility.

Broader Use of Special Masters: A Proposal

David B. Saxe and Danielle C. Lesser, *New York Law Journal* – August 4, 2017

Under Federal Rule of Civil Procedure 53, federal judges have the authority to appoint a special master, without the parties' consent, to be paid by the parties, to "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." See FRCP Rule 53(a)(1)(C). The rule directs that the appointing court "consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay." Rule 53(a)(3).

We believe that such a rule ought to be adopted in our state civil practice, especially in matters involving complex commercial litigation. Commercial litigators have called for New York state courts handling commercial cases to be authorized to use special masters in the manner of the federal courts. In 2012, the Chief Judge's Task Force on Commercial Litigation in the 21st Century recommended that we "[c]reate a panel of 'Special Masters' drawn from our State's seasoned commercial litigators who are no longer in active practice and are available for appointment by the court—upon the consent, *and at the expense*, of the parties" (emphasis added). The following year, at a panel discussion held by the Commercial and Federal Litigation Section of the New York State Bar Association in January 2013, the focus was on how to implement the recommendations of the Task Force, and it was agreed that "the use of special masters, which are paid by the parties, to handle pretrial matters like discovery disputes is key to streamlining [commercial] litigation." Brendan Pierson, "Panel Suggest Ways to Execute Reforms to Commercial Division," N.Y.L.J., Jan. 24, 2013 at 1, col. 3.

CPLR 3104 authorizes judges to appoint referees or judicial hearing officers to supervise disclosure; it allows private attorneys to serve as referees to supervise disclosure only where the parties so stipulate. CPLR 3104(b); see *Ploski v. Riverwood Owners*, 255 A.D.2d 24 (2d Dept. 1999). In areas other than the supervision of disclosure, the appointment of private attorneys as special masters (without the parties' consent) is only permitted in special programs where the Chief Administrator has specifically approved of their use, and that regulatory authorization only provides for uncompensated service. See Uniform Rules of the Trial Court, 22 NYCRR §202.14.

Such a special master pilot program was created by the Chief Administrative Judge for the Commercial Division in August 2014, for a limited 18-month period. It authorized the referral of complex discovery issues to uncompensated special masters on the consent of the parties. See Lisa Gerson, "Summer of Rule Changes in the Commercial Division," N.Y.L.J., Aug. 21, 2014, at 4, col. 1. The Office of Court Administration was, however, slow to solicit pro bono special masters. See Amaris Elliott-Engel, "Court Administrators Seek Special Masters for Commercial Division," N.Y.L.J., Dec. 11, 2014 at 5, col. 1.

New York state courts need statutory or regulatory authorization comparable to that of FRCP Rule 53, allowing them to appoint special masters without the consent of the parties, to be compensated by the parties, in appropriate cases. Such special masters could serve various useful pretrial and post-trial functions to streamline the litigation process, functions that otherwise would fall within the orbit of the overloaded trial judge or court staff.

There are certainly various types of litigation in New York state courts where the assigned judges get bogged down for weeks, months, and even years by tasks that could be handled expeditiously through

such appointments. The functions served by special masters in federal court span an extraordinarily wide variety of situations, making such appointments essential to streamlining our over-burdened judicial system. See, e.g., *Moore v. Leflore County Bd. of Election Commrs.*, 361 F. Supp. 603 (N.D. Miss. 1972); *Costello v. Wainwright*, 387 F. Supp. 324 (M.D. Fla. 1973); *Bynum v. Baggett Transp. Co.*, 228 F.2d 566 (5th Cir. 1956). Lawyers representing parties in complex matters are well compensated for their work and ample funds are earmarked to pay for experts hired to put the best light on their client's position. The fees of a special master, a practitioner who has the confidence of the court, should be no less critical.

The enormous benefit of having a private attorney serve as special master is illustrated by the Napoli Bern dissolution action, where the feuding equity partners were persuaded by Justice Eileen Bransten of the New York County Commercial Division to engage an experienced attorney, Mark Zauderer, to resolve the issues of their highly contentious action. The parties agreed that, as referee pursuant to CPLR 4301 and 4317, "with all the powers of the court," he would handle all disputes. This form of reference serves to limit challenges to his decisions to appeals to the Appellate Division. See Ben Bedell, "Napoli Bern Business Divorce Will Create Two Separate Firms," N.Y.L.J. Aug. 17, 2015 at 1, col. 3. In his first year, it was reported that Zauderer had "written close to 20 court decisions" (see Christine Simmons, "New York Firm's Demise Means Many Tough Calls for Referee," N.Y.L.J. July 12, 2015 at 1, col. 3).

While this is clearly an extraordinary use of a private attorney at an expense far beyond what litigants would normally spend for a special master to resolve pretrial or posttrial issues, Zauderer's assignment highlights the benefits of the use of a private attorney in this manner. If every issue he addressed had been submitted to the court for determination, each issue would have required a formal motion, addressed through the normal, lengthy, decision process. The assigned tasks that were part of his mandate allowed him to address these issues efficiently.

Moreover, drawing from a diverse group of experienced practitioners will enhance the efficacy of a special master program and will encourage broad participation in these assignments. Recognition from the judiciary in this way will improve the visibility of talented and experienced practitioners and will highlight to firms, clients, and the bar that the judiciary supports diversity through these appointments. In our view, there is a paucity of women and minorities appointed to serve as adjuncts to the judiciary, necessitating programs like the 2015 series sponsored by the Second Circuit Judicial Conference and New York Federal and State Judicial Council entitled, "Securing Appointments As a Fiduciary, Monitor, Master or Other Judicial Adjuncts."

It is difficult to understand the downside of allowing for the appointment of special masters to move along complex litigation, particularly if safeguards like those in FRCP Rule 53 were included to protect against unreasonable expense. See Rule 53(a)(3). Not only does the appointing court have a continuing responsibility to protect against unreasonable expense and to ensure that the special master is properly performing the job, but the appellate court always has the authority to reverse an appointment if it is improper or is performed improperly.

David B. Saxe is a member of Morrison Cohen and a former Associate Justice of the Appellate Division, First Department. Danielle C. Lesser is also a member of the firm, where she is the co-chair of the business litigation group.

A Proposal for Private Judging in New York

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New York Law Journal

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Body

The COVID-19 pandemic has thrust a dagger into the heart of our state court system. The Office of Court Administration is to be lauded, however, for its efforts to ensure that appropriate technology has been utilized to enable the state courts to fulfill vital functions, and the court system and the bar are working hard to implement digital technology into the regular practice of law.

But, as the pandemic continues, it is also clear that we must re-examine the way we approach adjudicating disputes. Our default mechanism of initiating a civil litigation in state court is cumbersome, time-consuming, and expensive. Recognizing these shortfalls, parties often choose some alternative form of dispute resolution. In New York, parties may take advantage of arbitration (which is authorized by statute), or they may choose one of the ways that the CPLR attempts to expedite existing disputes-namely through the involvement of a referee to hear and report or hear and determine, after a litigation has already been initiated.

But these methods suffer from the same significant shortfalls. Parties to an arbitration are provided with only very narrow grounds for seeking vacatur of an arbitration award (see CPLR §7511); indeed, when a party seeks appellate review of an arbitration award, the Appellate Division does not reach the substance of the reasoning behind the underlying award. An order appointing a referee to hear and determine is usually directed toward resolving a discrete issue only and is typically brought into a litigation after the parties have completed discovery.

We believe there is a better way. In our view, New York should take a cue from California and other states and amend the CPLR to allow for litigants to select "private judges" to decide civil disputes through final judgment at the trial court level. (While California has long embraced private judging, as discussed below, practitioners in New Jersey recently suggested private judging as "a potential solution to the backlog of court cases that require public access" and to enhance access to justice in light of the pandemic. See e.g., "With Courts Limited, History Helps Guide Use of ADR," Law Journal Editorial Board, New Jersey Law Journal, July 17, 2020). Under our proposal, parties could choose any private judge they were comfortable with to decide their dispute. Every stage following the initiation of the lawsuit-from the motion to dismiss phase through the entry of judgment-would proceed under the uninterrupted supervision of a private judge. The private judge would enter a judgment that would serve as the legal equivalent of any other judgment rendered by the Supreme Court. And, under our proposal, a decision by a private judge would be reviewable on appeal by the Appellate Division or could be submitted to private appellate review, if available.

In our view, providing parties with the ability to seamlessly transition out of and back into the traditional state court system would provide for a robust guarantee of appellate review that stands in stark contrast to the narrow grounds for appellate review of an arbitration award. We also believe that embracing private judging as an alternative method to resolve disputes at the trial court level would allow parties to make informed decisions about which

private judge would be best suited to evaluate a given dispute. Our proposal would also free up justices of the Supreme Court to dedicate more attention to their other pending civil and criminal matters and would also almost certainly take some pressure off of those justices.

In short, we believe that incorporating private judging as an alternative form of dispute resolution in New York would be a welcome advancement for litigators and parties alike. It would remove a host of civil disputes out of the traditional trial court system, lower the cost of presenting a dispute to a neutral body, and serve to increase access to justice in these trying times.

A Blueprint for New York? Private Judging in California. Proponents of private judging often point to California, which has embraced the practice. Private judging is codified in California Code of Civil Procedure section 638, which authorizes the trial court to appoint a referee to "hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision" (California describes private judges as "referees"). Cal. Civ. Code §638(a). Private parties can agree to submit any future dispute to a private judge; the parties may also agree to the appointment of a private judge after a particular dispute arises. Id. §638.

Regardless of whether the parties have decided in advance of the dispute to select a private judge, the case is filed in that state's trial court (California Superior Court) and then subsequently referred to a private judge. If the parties cannot agree on a particular private judge, each party must submit up to three nominees to the court, and the court will then appoint a private judge to preside over the litigation, absent any legal objection to the selection. Id. §§640(b), 641. Section 641 allows each party to "object" to the appointment of a private judge on seven separate bases, including that the person has a conflict of interest or has previously formed or expressed an opinion as to the merits of the dispute; the trial court evaluates and rules on any objections to a private judge. Id. §642.

Once appointed, the private judge must provide a written statement of decision within twenty days of conducting a hearing. Id. §643(a). In most cases, the decision of the private judge stands "as the decision of the court" and judgment is entered "as if the action had been tried by the court." Id. §644(a). Likewise, for purposes of a potential appeal, the decision "may be excepted to and reviewed in like manner as if made by the court" by the California Court of Appeal, that state's intermediate appellate court. Id.

Many practitioners and academics have praised the efficacy of private judging in California. See e.g., Sheila Nagaraj, "The Marriage of Family Law and Private Judging in California," 116 Yale L.J. 1615, 1619 (2007); Hon. Patrick J. Mahoney (Ret.), "Advantages of Private Judges: Understanding the Benefits of Utilizing Private Judging in California," JAMS ADR Blog, Sept. 1, 2015.

Small Modifications to New York's Existing Regime Could Result in Meaningful Change. Our proposal to effect private judging would require only small modifications to the CPLR to become effective. The existing process in New York that most closely aligns with private judging is the CPLR's adoption of referees to hear and determine actions under Article 43 of the CPLR. Section 4301 allows a justice of the Supreme Court to appoint a "referee to determine an issue or to perform an act" who "shall have all the powers of a court in performing a like function; but he shall have no power to relieve himself of his duties, to appoint a successor or to adjudge any person except a witness before him guilty of contempt." CPLR §4301. Section 4317(a) allows parties to stipulate that "any issue shall be determined by a referee" and gives the court the power to designate a referee when the parties do not name one themselves. A decision by the referee then stands "as the decision of a court." CPLR §4319. 22 NYCRR §36.2(c) provides several grounds to disqualify a referee from appointment.

Our proposal includes additions and nuances to the current law that will benefit complex litigation and increase access to justice. One clear advantage of our proposal would be that private judges do not have to abide by the existing conflicts of interest rules set forth in 22 NYCRR §36.2(c). In our experience, sophisticated parties may find it advantageous to choose a private judge with some prior relationship to the parties or substantive knowledge of the dispute, who might otherwise be disqualified under 22 NYCRR §36.2(c). See also CPLR §4312 (imposing additional qualifications for a referee).

Additionally, under our proposal, court approval of a private judge would not be required to preside over matrimonial actions, over actions against a corporation to obtain a dissolution, over actions to appoint a receiver of its property or actions to distribute its property, or over actions where a defendant is an infant; under the CPLR, court approval is currently required for the appointment of a referee in each of these actions. CPLR §4317(a).

What Are the Advantages? Private Judging Reduces the Cost of Litigation While Expanding Choice and Access to Justice. We propose that these modest revisions will attract parties to take advantage of New York's private judging procedure. First and foremost, private judges will offer what arbitrators cannot: full, unfettered access to appellate review as if appealing from any other judgment rendered by the Supreme Court. We routinely hear parties complain about the limited appellate review provided for arbitration awards, and we are confident that private judging would be an attractive and effective alternative.

Likewise, the cost savings associated with filing a basic statement of claims instead of a more comprehensive complaint would be attractive to parties hesitant to commit to the initial costs and comprehensiveness required in a traditional litigation. The process would still maintain public access to proceedings and procedural certainty; although proceedings before a private judge may be conducted in a private setting, the public would have access to the initial filing details, the final judgment, and any documents associated with an appeal from the final judgment. Allowing parties to file the statement of issues with the clerk or virtually via NYSCEF would also provide certainty for purposes of the potential application of a statute of limitations. While our proposal would treat a private judge's judgment as any ordinary judgment subject to appeal to the Appellate Division, we suggest that presenting appeals to a panel of private judges, as part of our proposal or a subsequent one, would likely result in additional cost savings and access to justice, and would certainly free up resources for our already beleaguered Appellate Division.

Notably, allowing parties to side-step the traditional trial court process would ultimately lead to the more prompt resolution of civil disputes. We anticipate that former state and federal judges would be quick to establish themselves in compliance with any new rules applicable to private judges. Private ADR providers such as NAM (National Arbitration and Mediation), JAMS, and AAA would be in a position to offer talented former judges or their staff to fulfill the expected demand for this new type of ADR service. In many cases, we anticipate that the mutually selected private judge, who will likely have some substantive background in the issues being litigated, can provide a sound resolution that leaves the defeated party reluctant to bring an appeal.

Under the CPLR's referee rules, an action must be filed with a detailed complaint in the normal course, and the reference to a judicial referee is made at a later time. As we propose, parties who seek to take advantage of private judging would only be required to submit to the Supreme Court a streamlined statement of claim, which would only include jurisdictional allegations. Promptly after filing that statement, the matter would be transferred to a private judge for resolution through final judgment. In other words, if the parties anticipate submitting the dispute to a private judge, they could save the resources that would otherwise go into preparing a more comprehensive complaint and come before a private judge in an expeditious and more cost-effective manner.

* * *

Implementing private judges into New York's civil litigation framework will not immediately solve the caseload and overcrowding issues that affected the state court system before the pandemic. Nevertheless, with some fairly straightforward changes to the existing framework to incorporate private judging, we think that New York could lead by example in creating an effective mechanism for dispute resolution. This process would also remove some of the workload pressure from trial judges, but it would still result in maintaining the public's access to proceedings and litigants' ability to seek unfettered appellate review. Finally, our proposal would seamlessly incorporate technological advances in the private sector, which we believe would complement the Office of Court Administration's dedicated work to modernize the state courts in light of the pandemic.

David B. Saxe and James M. Catterson both served as Associate Justices at the Appellate Division, First Department. Justice Catterson is now a partner at Arnold & Porter Kaye Scholer. Justice Saxe is now a partner at Morrison Cohen and a neutral at NAM (National Arbitration and Mediation). The authors acknowledge the outstanding assistance of Jesse Feitel , an associate at Davis Wright Tremaine, in preparing this article.

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