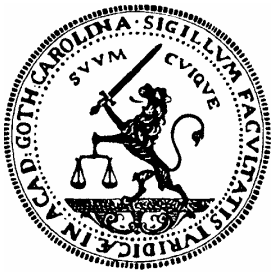

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Contents

Summary

The state of California is using a certain model of private judging called rent-a-judge. The subject matter of this thesis is the public policy problems surrounding the rent-a-judge and the constitutional problems it creates. These problems arise mainly because of the hybrid form of the system. On one side, rent-a-judge gives decisions equivalent to state courts' and on the other side, it is a system where the litigants are paying the judge.

Rent-a-judge has been widely used in California ever since the rediscovering of the reference statute in 1976. The popularity of the system is mostly due to its speed and efficiency. Another factor for its popularity is the secrecy that rent-a-judge is providing the litigants.

Rent-a-judge is the subject of several policy concerns; early retirements, creation of a two-tiered system, bias concerns because of repeat costumers, impediment of establishment of rules and disadvantages to the public interest. Public policy objections are mainly built upon just arguments and discussions. There is no concrete information showing how much harm rent-a-judge actually is causing.

The more important objections against rent-a-judge are the constitutional ones. To be more specific, they relate to the first amendment right of access to trials and equal protection in the Fourteenth Amendment that involves a discussion on wealth as suspect classification.

The First Amendment gives a right of access to criminal trials. It is however, uncertain if such a right exists when it comes to civil trials. U.S. Supreme Court rejected the opportunity of answering that question. California Supreme Court, on the other hand has acknowledged a first amendment right of access to civil trials.

The equal protection in Fourteenth Amendment gives protection to groups classified as suspect class. This means that wealth needs to be acknowledged as suspect class in order to challenge rent-a-judge with the equal protection clause. U.S. Supreme Court has not acknowledged wealth as a suspect class, while California Supreme Court has done that.

Rent-a-judge challenged with the First Amendment under California law should be unconstitutional. Rent-a-judge challenged with equal protection under federal law would remain to be constitutional. It is however, difficult to foresee the outcome if rent-a-judge is challenged with the equal protection clause under California law.

Sammanfattning

Delstaten Kalifornien använder ett system med privatdomare som heter ”rent-a-judge”. Det här arbetet tar en närmare titt på vilka socialpolitiska och konstitutionella problem som uppstår p.g.a. rent-a-judge. Dessa problem har uppkommit främst p.g.a. systemets hybrida karaktär. Dels har det en statlig karaktär då det givna beslutet likställs med beslut från de delstatliga domstolarna och dels har det en privat karaktär då det är parterna som betalar för domaren.

Rent-a-judge har använts i Kalifornien sedan 1976 då det återupptäcktes efter att ha varit ”bortglömt” sedan 1872. Rent-a-judge systemets popularitet beror främst på dess snabbhet och effektivitet.

Rent-a-judge ger upphov till ett flertal socialpolitiska problem; förtidspensionering, ett tvådelat system, partiskhet p.g.a. återkommande klienter, hämmande av nya lagregler och nackdelar för samhällsintressen. Dessa problem har oftast enbart diskuterats och det finns ingen konkret information som kan visa vilken skada rent-a-judge egentligen för med sig.

De allvarligare invändningarna rör de konstitutionella frågorna. Jag har här närmare studerat first amendment rättigheterna rörande tillgång till domstolsprövning och ”equal protection klausulen” i Fourteenth Amendment rörande skydd av ”suspect classifications”.

First Amendment ger tillträdesrätt till domstolsprövning som avser misstanke om brott. Det är däremot osäkert om samma rätt gäller för domstolsprövning som avser civilrättsliga skyldigheter och rättigheter. USA:s högsta domstol nekade möjligheten till att besvara denna fråga. Kaliforniens högsta domstol har däremot erkänt en sådan rätt till domstolsprövning.

Fourteenth Amendment ger skydd för grupper som klassas som en ”suspect class”. För att kunna hävda att ”rent-a-judge” strider mot Fourteenth Amendment måste välstånd anses vara en ”suspect class”. USA:s högsta domstol har inte erkänt välstånd som en ”suspect class”, medan Kaliforniens högsta domstol har gjort ett sådant erkännande.

Rent-a-judge systemet strider mot First Amendment, men endast på delstatlig nivå. Rent-a-judge skulle förbli konstitutionell på en federal nivå även om det bestreds med equal protection clause. Det är däremot svårare att förutse huruvida rent-a-judge strider mot equal protection clause om det bedöms på delstatlig nivå i Kalifornien.

Abbreviations

ADR	Alternative Dispute Resolution
ART	Article
CAL	California
CIV	Civil
CONST	Constitution
FAA	Federal Arbitration Act 1925
GOV	Government
JAMS	Judicial Arbitration & Mediation Services
PROC	Procedure
SEC	Section
U.S.	United States

1 Introduction

Alternative dispute resolution. These three words spell out an important part of today's procedural law. Congested court dockets and a long waiting for a day in civil court have characterized the past decades. The waiting for a day in court could in some states take several years. The lack of efficiency increased the privatization of justice, where ADR became the answer.

The state of California rediscovered an interesting model of private judging; a hybrid type of ADR that is a mixture of state sponsored and privately paid system. Rent-a-judge, as this type of private judging is called in California, is officially a part of the California state system.

The speed and efficiency of rent-a-judge is unquestioned, however, the hybrid form of the system creates both constitutional and public policy problems. After more than 30 years of its "rebirth," the rent-a-judge is still surrounded by questions waiting to be answered.

1.1 Purpose and delimitations

The purpose of this thesis is to study what kind of public policy problems rent-a-judge is creating and whether the system is violating the constitution. The access to materials related to public policy problems has been more limited than I had expected and as a result, the policy problems are a smaller part of this thesis than the part with the constitutional problems is. I will study whether rent-a-judge is violating the first amendment right of access to trials and the equal protection clause of the Fourteenth Amendment. Another constitutional question surrounding rent-a-judge is whether it is violating due process. The discussion surrounding due process will be left out of this thesis, due to limited space and the fact that I chose to look closer at the First and Fourteenth Amendment.

1.2 Materials and method

I am using a traditional legal analytical method in order to clarify the above-mentioned public policy problems and constitutional problems concerning rent-a-judge. This thesis includes use of following materials; relevant statutes, case law and doctrine. Case law is important when analyzing the subject matter of this thesis since the U.S. is a common law country. I will look into both federal cases and cases from California.

Many of the articles used in this thesis are from law journals dated back to the 1980s and 1990s. The lack of new material is due to two factors. Firstly, it is the older materials that have taken a closer look into the problems caused by the rent-a-judge. Secondly, the more recent articles do not add anything new to the discussion and most of them do not even address to the

constitutional problems. In order to find more updated information concerning the subject matter of this thesis, I have used various internet sites when the needed information has not been possible to find in law journals. Some of the facts presented in this thesis are from the beginning of the 1990s. The reason for this is that it was not possible to find information from later years.

1.3 Disposition

I begin my thesis with a short introduction to ADR in chapter 2. This will be followed by the background to rent-a-judge in chapter 3 and a presentation of the procedure in chapter 4. Chapters 2-4 are descriptive parts with the purpose of giving a basis to the following chapters. It is important to understand how rent-a-judge works in order to understand the problems surrounding it.

In chapter 5 the attention will turn towards the public policy problems surrounding the rent-a-judge system. Thereafter, in chapter 6, I will scrutinize the constitutional objections made against rent-a-judge. Finally, in chapter 7, I will discuss the various problems and present the conclusions that I have made. Statutes mentioned in this thesis are presented in Supplement A.

2 ADR

Alternative dispute resolution is the mutual term for the different mechanisms developed as an alternative to court adjudication.[1] ADR originally emerged from the U.S.[2] In the early 1970s, the search for alternatives increased as a result of constant docket congestion, high legal costs and a long waiting for a day in court.[3] More than 30 years later, the ADR market is still growing for each day. Many law firms in U.S. today offer these services through their own ADR department. Services offered vary from private judging to mediation.[4]

There is no generally accepted definition of ADR, but one of these is as followed; "It is a set of practices and techniques that aim

(1) to permit legal disputes to be resolved outside the courts for the benefit of all disputants,
(2) to reduce the cost of conventional litigation and the delays to which it is ordinarily subject, or
(3) to prevent legal disputes that would otherwise likely be brought to the courts."[5]

Proponents of ADR see the different mechanisms as important alternatives to the "one size fits all" mentality. They mean that litigation in court is not suitable for all disputes. Some examples of various ADR mechanisms are; negotiation, mediation, arbitration, mini-trial, private judging and summary jury trial.[6]

There is no clear distinction between ADR and traditional court adjudication. ADR mechanisms rely many times on legal norms and sanctions.[7] There are, however, differences between ADR and traditional litigation. Mediation and negotiation, for example, give the parties the possibility to control both the process and the solution. Adjudicators, at the other hand, impose a solution on the parties. The important distinction lies in the aim of these two processes. Mediation is forward-looking and therefore more suitable when the parties wish to preserve an ongoing relationship, such as in family disputes and long-standing business transactions. Adjudication, by contrast, is backward looking and divides the parties into right and wrong. Another difference is in the given decision. The judgment of a public judge is often published and forms a precedent, which is very important in common law countries. Mediation, on the other

[1] Nolan-Haley, Jacqueline M, Alternative Dispute Resolution, 2nd Ed., 2001, St. Paul. Minn,. at 1.
[2] Westberg, Peter, Kontrakterad Privatdomare, ur Festskrift till Lars Heuman, Stockholm, 2008, at 582.
[3] Nolan-Haley, at 5.
[4] Ibid. at 9.
[5] Freeman, Michael, Alternative Dispute Resolution, 1995 NY, at xi.
[6] Nolan-Haley, at 1.
[7] Freeman, at xi.

hand, is more private. The flexibility of the system makes the mediators able to search creative solutions instead of being constrained by rules of law.[8]

The ADR mechanism that has been most acknowledged is arbitration. Arbitration was once facing the same suspicions that other ADR mechanisms are facing today. Nevertheless, arbitration managed to develop from something "strange" into a natural part of the administration of justice.[9]

Arbitration agreements got enforceable in federal courts through Federal Arbitration Act 1925. Arbitration agreements got binding and constituted a bar to court procedures. FAA did not stop the U.S. Supreme Court from denying arbitration as equal to court procedures. In the 1960s, the Court decided that the principles in FAA would also be valid in state courts. The full acknowledgement came finally in 1983,[10] *"(A)ny doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration, whether the problem is construction of the contract language itself or an allegation of waiver, delay or a like defence to arbitrability.*"[11] The year after this statement the Court held that any state law limiting arbitration in commercial disputes was against FAA and should therefore be put aside for the federal laws.[12]

The acceptance of arbitration took place at the same time as U.S. was struggling with long waiting time for a day in court. ADR became the answer in solving the problems.[13] Today, however, also arbitration is suffering from the same symptoms as court adjudication. Complaints are being raised about it being too slow and too expensive.[14]

The non-stop search for a faster resolution creates new alternatives at the same time as the popular ones become even more popular. One part of ADR that has a growing popularity, especially in California, is rent-a-judge. Just like the rest of the ADR field, also rent-a-judge is facing objections.

[8] Freeman, at xii.
[9] Westberg, at 582.
[10] Ibid. at 583.
[11] Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).
[12] Westberg, at 583.
[13] Ibid.
[14] Ibid. at 576.

3 History and Background

It is remarkable that "modern" type of alternative dispute resolution actually date back to the 1900th century. It would have been interesting to know why such an opportunity to utilize private judges was created. Whatever the reason was, the rent-a-judge[15] system has today developed into a big business involving a lot of money. Today, you can find several companies providing different kind of ADR services, many of them also private judging. The state where it all started is also the state where rent-a-judge has been embraced the most. Rent-a-judge proceedings are now an inescapable part of the Californian judicial system.

3.1 The history of the rent-a-judge system

The possibility to reference trials was during a long time forgotten in the mind of California. The rent-a-judge statute dates back as far as to 1872. However, the constitutional provision that authorizes temporary judges was not enacted until 1966.[16] The authorization of the 1872 statute was originally limited to handling only specific issues or questions of fact.[17]

In 1976, three lawyers[18] in Los Angeles County representing opposite sides in a complex commercial case, rediscovered this rule of law which the rent-a-judge system is built upon.[19] They found that the 1872 California law authorized any civil case to be heard by hired referees. The lawyers signed up a retired judge and then got the approval by Presiding Judge Richard Schauer of Los Angeles Superior Court. Parties involved in the case got a decision within seven months, while saving their clients $100,000 in attorneys' fees.[20]

The case from 1976 was a dispute between the operator of a medical billing company and its lawyers. The motivation behind the three attorneys' innovation of private judging was the long waiting for a day in court.[21] This became the beginning of a success. These lawyers argued that the statute should not be limited to specific issues or particular type of cases. The judge

[15] The term rent-a-judge is named by the popular press for the practice under the California general reference. See Christensen, Barlow F., Private Justice: California's General Reference Procedure, 1982 AM. B. Found. RES. J., at 79. The statutory name of the proceeding is, according to Cal. Civ. Proc. Code § 638, reference as the judge himself is called referee. See Glantz, Perry L., Analysis of a First Amendment Challenge to Rent-A-Judge Proceedings, 14 Pepp. L. Rev. 990 (1986-1987), at 990.
[16] Kim, Anne S, Rent-A-Judges and the Cost of Selling Justice, 44 Duke Law Review (1994-95), at 173.
[17] Vangel, Thomas S, Private Judging in California: Ethical Concerns and Constitutional Considerations, 23 New Eng. L. Rev. at 365, 366 (1988-1989).
[18] Hillel Chodos, James H. Craig and Seth M. Hufstedler. Kim, n53 at 173.
[19] Ibid. at 173.
[20] http://www.time.com/time/magazine/article/0,9171,952989,00.html
[21] Vangel, see n26, at 366.

was persuaded to broaden the scope of the general reference statute. The statute has since that case been given a broader scope and used to resolve entire cases.[22]

3.2 Background and the rent-a-judge business

In 1979, H. Warren Knight, an Orange County Superior Court judge, retired from his job and founded JAMS;[23] Judicial Arbitration & Mediation Services. This was the first company to provide rent-a-judge services. JAMS is today the biggest firm with the largest influence in the ADR market. Besides JAMS, there are other companies providing rent-a-judge services, e.g. Philadelphia-based Judicate and the San Francisco-based Judicial Resources. Even though it is more common that retired judges offer their services through a company, there are also judges that work on a free-lance basis.[24]

The popularity of rent-a-judge system emerged from several factors. The main reason was backlog in public courts, especially in larger cities like Los Angeles. At the same time, many retired judges wanted to continue to work after the retirement. Private judging was now offering well-compensated employment that did not affect retirement allowances.[25]

Rent-a-judge's popularity grew even more in the 1980s, together with the interest for the rest of the ADR field. This was due to increasing caseloads[26] and inability of the public courts to respond to the demands as the budget was constrained. Another reason was factors external to the court system; the need within the society to save time and money in order to be competitive in the global economy.[27]

Rent-a-judge is popular mainly in complex litigation disputes and family disputes. About half of the cases where rent-a-judge had been used in Los Angeles were divorce cases. The reason for its popularity in family disputes is not only the speed, but also the privacy of the proceedings. The reason for its popularity in complex commercial disputes, by contrast, is probably the

[22] Ibid. at 366, 367. See also Cal. Civ. Proc. Code § 638.
[23] Now JAMS/Endispute, See Chernick, Richard., Bendix, Helen I, Barrett., Robert C; Roger Clegg, Editor., Private judging: privatizing civil justice, Washington, National Legal Center for the Public Interest, 1997, at 23. I got this article through email. The page numbers I refer to is according to those in my file and not the page numbers in the book where the article is available.
[24] Kim, at 173, 174 and n4 at 166.
[25] Chernick, Bendix and Barrett, at 19.
[26] A part of the increasing caseload was increased criminal matters because of the "three strikes" legislation. The new system took up time and resources, leaving civil matters suffering. See Ibid. at 19.
[27] Ibid at 20,

fact that it gives the parties possibility to choose a private judge with expertise in a specific area.[28]

Rent-a-judge is not only used by private parties, but also by state agencies. One example of this is the State Air Resources Board[29] that turned to a private judge to settle a pollution dispute with a private oil and gas company. This troubles those who think that private judges should not be deciding on matters of public policy.[30]

3.3 The rent-a-judge industry in the new millenium

In 2003, California State Chief Justice Ronald George gave an ultimatum to the retired judges. Retired judges still working on the bench was no longer going to be permitted to take part time jobs as private judges. They had to either accept to fill in assignments earning $512.76 a day or work outside the court system earning $10.000 a day. They had to choose between the prestige over presiding over public courts and the financial reward of working as a rent-a-judge. They were not allowed to do both anymore.[31]

The reason for this ultimatum was that the retired judges' private work affected their work in court. One example is that the judges were advertising themselves in the courthouse for prospective clients that may hire arbitrators. Another example is one judge in Los Angeles that had recessed a jury trial for several days while he was working on a private case, forcing out-of-town attorneys to stay in a hotel.[32]

The competition about the cases has improved state courts. Los Angeles County Superior Court has improved their mediation programs and has now judges who are specialized in complex commercial cases. The biggest reason for these improvements is that many cases were finding their way out of the court system. The reform has also led to the waiting for a day in court to go down from 5 years in 1980s to 12-18 months in 2003.[33]

3.4 Rent-a-judge by numbers

The rent-a-judge business keeps on expanding and the number of retired judges available for hiring is increasing each year. JAMS, which had started out with only one lawyer in 1979, has until 2009 expanded to 265 judges working out of twenty-one offices in eleven states.[34] The cost of a rent-a-

[28] Kim, at 174.
[29] See page 24.
[30] Kim, at 175.
[31] http://www.usatoday.com/news/nation/2003-04-24-rentajudge-usat_x.htm
[32] Ibid.
[33] Ibid.
[34] http://www.jamsadr.com/locations/locations.asp and http://www.jamsadr.com/neutrals/neutrals.asp

judge differs around $300-500[35] per hour, but popular judges can claim up to $5.000 a day.[36]

A comparison between the number of rent-a-judge proceedings and the total number of cases filed in the California state courts shows that rent-a-judge's part of the cake is not as big as one would think. According to JAMS Orange County Regional Office, their judges handle around twenty proceedings per month as private judges.[37] The bigger part of these cases however, is a matter of pre-trial and discovery motion while the public court handles the actual trial. The JAMS[38] Orange County Office states that they only handle about two full-blown private trials a month. This is a small number compared to the fact that the civil filings in Orange County in 1991-1992 were 53 929. Defenders of rent-a-judge use these numbers to show that private judges do not make any damage to the public court system.[39] Nevertheless, the concern should not be about how many cases private judges handle, but what type of issues that are brought in front of them. Depending on the subject matter of the case, a single case could have far-ranging public effects.[40]

[35] The price for hiring a judge remains at the same level today. Fees for neutrals generally range from $200-$450 per hour and perhaps more for multi-party cases. See Chernick, Bendix and Barrett, n79 at 25.
[36] Kim, at 175.
[37] Ibid. at 178. Note that the numbers are from 1990s. Later information on this matter was not available.
[38] The author of the article used JAMS as an example since the firm controls 60 % of the ADR market in California. See Kim, n94 at 179.
[39] Kim, at 179. More recent information on this matter was not available.
[40] Ibid. at 180.

4 The Rent-A-Judge System and Current Practice

There are different kinds of private judges available depending on what the parties want to achieve. The authority and the qualifications of the judges vary. The rent-a-judge system creates problems that need to be solved in order to sort out the question marks surrounding it. One effort has been to regulate a part of it, and even though it is the first step to tune down the criticism, it is far away from a complete regulation. Nevertheless, despite of the surrounding criticism, the system has its advantages.

4.1 The rent-a-judge procedure

There are two varieties of private judging permitted under California law. The California Constitution[41] authorizes the use of a temporary judge and the California Civil Procedure Code[42] authorizes the use of a referee. Both of these judges can serve in rent-a-judge proceedings.[43]

Temporary judging is similar to reference proceedings. Major distinctions between a temporary judge and a referee are their qualifications and authority, e.g. temporary judges must be members of the state bar.[44] One of the more important differences is that the temporary judge has continuing jurisdiction until the conclusion of all trial proceedings.[45]

The power of a referee, by contrast, cease with the filing of the statement of decision. All motions and arguments after the trial decision must be forwarded to the court that appointed the referee.[46] One of the more interesting differences is the flexibility within the reference trial that makes it possible to appoint three referees. Since there are no requirements made on the qualifications of the judges, the panel often includes referees with special expertise.[47]

The reference trials are divided into two types under California law; “special” references and “general” references. Rent-a-judge falls under the latter category. There are some significant differences between these two types of references. Special references can be ordered by the court and they do not require the consent of the parties. The decisions are made on specific questions of facts and the findings are reported to the trial judge, but they

[41] Cal. Const. Art VI, § 21.
[42] Cal. Civ. Proc. Code §§ 638-645.2.
[43] Kim, at 169.
[44] Vangel, at 370.
[45] Chernick, Bendix and Barrett, at 15.
[46] Ibid. See however the discussion of this matter in Clark v. Santa Fe Association 216 Cal. App. 3d 606, 623-25, 265 Cal. Rptr. 41 (1989).
[47] Chernick, Bendix and Barrett, at 15.

are only advisory and not binding as judgments. General references, on the other hand, are proceedings where all the involved parties must consent to the procedure. The referee decides on issues on both fact and law, and the given decision is equal to a judgment of the court.[48]

There are no restrictions according to the statute concerning what type of civil cases that can be heard within the reference procedure.[49] The authorization for usage of general reference is primary found in section 638 in the California Civil Procedure Code. This statute does not require any specific qualifications for the referees; they do not even have to be lawyers. However, most of the parties choose a retired judge since they have acknowledged judicial skills and the needed expertise.[50] Criticizers have pointed out that in order to ensure some level of competency in the system, it would be preferable that California law required the referees to be members of the state bar, just as the temporary judges.[51]

When the parties have chosen a judge, they have to request the trial court to issue an order of reference authorizing the rent-a-judge to hear the case.[52] There are two ways of appointing a referee. Usually the parties agree mutually on a referee, but in case they cannot, the court can appoint one for them.[53] The parties then have the right to object the appointment based on the grounds prescribed by the Code. A legal objection can be based on lack of qualifications, bias or interest in the case, and it is the court that determines the merits.[54]

The judges' fee is negotiated between the judge himself and the parties. The cost of the judge is then borne equally by the parties. The general reference statute does not require the cost to be split evenly, but parties using rent-a-judge normally do that.[55]

Several states using statutes authorizing private judges limit the amount and source of payments to referees. The purpose behind such a rule is to make the private judges employees of the state in order to make them included in rules and regulations of the state judicial system. California, however, has not made any limitations on the payment to private judges.[56]

The parties can determine the time and place for the trial, as soon as the court has issued the order of reference. There are no restrictions on this

[48] Kim, at 169.
[49] Vangel, at 368.
[50] Kim, at 170 and Christensen, at 81.
[51] Vangel, at 393.
[52] Kim, at 170.
[53] See Cal. Civ. Proc. Code § 640.
[54] See Cal. Civ. Proc. Code §§ 641-642.
[55] Vangel, at 367 and n33, at 367.
[56] Note, The California Rent-A-Judge Experiment: Constitutional and Policy considerations of Pay-As-You-Go Courts, 94 Harv.L.Rev, see n87, at 1607 (1981). Herein after Note, Rent-A-Judge.

matter in California statutes.[57] In order to hide the proceedings, many parties choose to hold the hearings in the privacy of their homes or in their attorney's office.[58]

Rent-a-judge proceedings are conducted as traditional judicial trials. This implies that the proceedings follow the traditional rules of procedure and evidence.[59] Normally, the usual court rules apply on the procedure, but the parties may modify or disregard formal rules of pleading, evidence or procedure.[60]

The fact that the parties can abandon formal rules on evidentiary and procedural rules might offer flexibility, but it also shows disregard for the judicial process. Since the decision is equivalent to those of the traditional court, the judges should be bound by the same evidentiary and procedural rules as public judges. Parties that prefer flexibility can always choose another type of dispute resolution that is completely outside of the traditional court system.[61] Examples of those are arbitration or mini-trial that is a non-statutory procedure similar to rent-a-judge, but where the decisions are non-binding.[62]

Nevertheless, once the trial is over, the referee must file a statement of decision with the court within twenty days after the trial. This statement must contain both findings of fact and conclusions of law.[63] However, the requirement of filing findings and conclusions may be waived by the parties. This means that the referee only needs to file a brief statement of decision.[64] Since the judgments are equivalent[65] to those of other state courts and therefore appealable, the judge must follow substantive law while making the decision. The right to appeal to a state court is the main difference between rent-a-judges and arbitrators or mediators.[66]

Few parties are actually using their right to appeal. Only six cases had been appealed until 1994. Most of these cases, however, were denied review by California Supreme Court. An interesting aspect is that the court ordered the decisions by appellate court to be "depublished," which then would result in them not being binding as precedent.[67]

Private judge Lester Olson has given an explanation to the few appeals. He says that the same reason, among them economical ones, that leads parties to choose rent-a-judge procedure remains after the trial; there is still need

[57] Kim, at 170.
[58] Glantz, at 991.
[59] Christensen, at 81.
[60] Kim, at 170.
[61] Vangel, at 393.
[62] Ibid. n205-206, at 393.
[63] Kim, at 170. See Cal. Civ. Proc. Code § 643.
[64] Vangel, at 368. See also Cal. Civ. Proc. Code § 643.
[65] See Cal. Civ. Proc. Code § 644.
[66] Kim, at 171.
[67] Kim, n33, at 171. More recent information on this matter was not available.

for a speedy trial and resolution. Another explanation is the judicial process in choosing the referee. All parties must consent to the chosen private judge to try the case. This consent guarantees high confidence in the selected judge.[68]

4.2 The scope of rent-a-judge's power

The extent of a rent-a-judge's powers is not clear, but the case law holds that private judges can conduct trials the same way public judges do. The powers of a rent-a-judge depend on whether he was appointed as a temporary judge or a referee. A temporary judge has more authority than the referees do. He has the same powers as an active judge.[69]

Rent-a-judges have the authority to call in juries. The doctrine refers to these as rent-a-juries. In some cases, the members of the jury did not even know that they were taking part in a private trial, which is not that strange since some of the private trials had been held in state court buildings. There has also been a case where the parties chose jury from the county court's jury pool.[70] Nevertheless, the Judicial Council of California promulgated rules that aim at limiting these arrangements. In order to be able to use public courtrooms and resources for private trials the parties need the consent of a presiding judge.[71]

There is also a question of when the power of a private judge ends. When it comes to temporary judges, the same rules apply to them as to the active judges. He has the power to hear post-trial motions, such as motion for new trial.[72] The powers of a referee is believed to be more limited, but in *Clark v. Rancho Santa Fe (1989)*[73], the California Court of Appeal has held that a referee do have the power to hear post-trial motions.[74]

4.3 Rent-a-judge regulation efforts

In 1993,[75] the Judicial Council of California adopted rules regulating the practice of private judging. This was a first step towards a true regulation of the system. The rules cover only superficial matters and they introduced mainly three changes.[76]

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[68] Ibid.
[69] Ibid.
[70] Kim, at 172. Contrary to Kim, Vangel states in his article that only the temporary judges have the authority to call in juries. See Vangel, at 370. The articles do not explain about who is paying for the jury, but they are most likely being paid by the state.
[71] Ibid. at 173. See Cal. Rules of Court, rule 3.909 (a).
[72] Ibid. at 173.
[73] Clark v. Rancho Santa Fe Ass'n, 216 Cal. App. 3d 606, 265 Cal. Rptr. 41 (Ct. App. 1989).
[74] Ibid. at 625.
[75] "The California Rules of Court were reorganized and renumbered to improve their format and usability, effective January 1, 2007." See http://www.courtinfo.ca.gov/rules/
[76] Kim, at 196.

4.3.1 The disclosure requirement

The rule requires a private judge to disclose any potential ground for disqualification and any ground that could cause a party to doubt the impartiality of the judge. This rule is a first step of demanding ethical conduct.[77] A referee must disclose to the parties if he has or has had any personal or professional relationship with a party, attorney or a law firm involved in the case. He must also disclose if he previously has been hired by any of the parties in the case and how many times.[78]

What is still missing, however, is a public or private body supervising the rent-a-judge system.[79] One way of solving the fear of bias is to require rent-a-judges to make their disclosures public. The idea is to have "a publicly accessible track record of each rent-a-judge's cases."[80] This would ensure the judges' integrity. Such a record would also prevent possible conflicts of interest.[81]

4.3.2 The access requirement

Another demand is that rent-a-judge trials must be open to the public. The lack of access to the trials is, according to some, a violation of the First Amendment rights of the media and public. According to the California Rules of Court, the proceedings may be open to the public.[82]

However, the rules do not guarantee an access, only that the court *may* open up the doors if a person requests the case to be heard at a site easily accessible to the public. Such request must state the reasons for it, be served on all parties and the referee and lastly, it must be filed with the court.[83]

4.3.3 Use of public facilities

According to the rule by Judicial Council, parties using a referee must proceed outside the courthouse. Court facilities and personnel are not allowed to be used in the proceedings unless the parties get the consent of the presiding judge and show that the use of the public facilities would further the interests of justice.[84]

Before promulgating this rule, the private judges had the power to summon jury from the country jury pool. There have been many criticisms on the fact that this private system is using public financing. The rules of Judicial

[77] Ibid. at 196.
[78] Cal. Rules of Court, rule 3.904 (b).
[79] Kim, at 196.
[80] Ibid. at 197.
[81] Ibid.
[82] Ibid. See also Cal. Rules of Court, rule 3.910.
[83] Cal. Rules of Court, rule 3.910.
[84] Cal. Rules of Court , rule 3909 (a).

Council are an answer to these criticisms and aims on limiting the use of public recourses for private trials.[85]

These rules are just another proof on the uncertainty over the nature of the rent-a-judge proceedings. The access and disclosure requirements imply that rent-a-judges are public officials who should be accountable. However, the limiting access to public facilities gives the rent-a-judges an image of private figures. There is a public confusion on the role of rent-a-judges and this should be clarified before rent-a-judge is widespread used.[86]

4.4 The advantages

4.4.1 The advantages to the parties

The biggest advantage of rent-a-judge procedures is speed. Parties using rent-a-judge resolve their case much faster than those using the formal court system do. Rent-a-judge does not suffer from backlog of cases and their flexibility in scheduling maximizes their efficiency. There is nothing to keep private judges back in holding hearings at night or on a weekend, and by doing this, it helps them to avoid long continuances between sessions. This results in saved money since the time spent to prepare and try a case is much less compared to the traditional court.[87]

Other advantages emerge from the fact that the litigants can choose their referee. This gives them the possibility of choosing a referee with particular experience or expertise in the subject matter of the litigation. This could be important in complex cases requiring knowledge of highly technical matters. It will lead to less time spent in the hearing, since the parties do not need to present that much explanatory material. Such an expertise will also lower the risk for appeal, since there is less chance that an expert referee will make an error in analyzing the evidence.[88] In summation, using a judge with specialized knowledge needed for a complex subject matter improves the quality and efficiency of trials.[89]

One other appreciated advantage is the privacy the proceeding offers. There is actually no statement saying that the proceedings can be held private, but in practice rent-a-judge trials tend to result in closed-door proceedings. As it stands now, it is difficult for both the press and the public to gain access to rent-a-judge trials. Unless the case is appealed, there will be little information available to the public.[90]

[85] Kim, at 198.
[86] Ibid.
[87] Note, Rent-A-Judge, at 1599.
[88] Ibid.
[89] Vangel, at 373.
[90] Ibid. at 374.

4.4.2 The advantages to the court system and the "five year rule"

There are also advantages to the public at large. One assertion is that private judging benefits the judicial system and litigants because it helps reducing the number of cases from the traditional court and thereby reduces the backlog of cases. Moreover, state courts are saving money because the parties themselves pay most of the private procedures. One should, however, be careful with the significance of these assertions since the cases solved by rent-a-judges only makes a small percentage of the state court's total case load.[91]

Overloaded civil courts make it important to find remedies to decrease the workload, especially when California Civil Procedure Code has a "five year rule," which states that a case needs to be brought to trial within five years of filing. The only exception is a stipulement to an extension between the parties. Otherwise, it will be dismissed because of lack of jurisdiction.[92]

[91] Ibid. at 375.
[92] Note, Rent-A-Judge, note 3, at 1592. This "five year rule" is established by sections in Cal. Civ. Proc. Sec 583.310 and 583.360.

5 Public Policy Objections

The rent-a-judge system could be regarded as an ideal hybrid of public and private justice. "It offers the speed, efficiency, and convenience of arbitration and mediation along with an enforceable, appealable state court judgment."[93] The benefits of the system for the individuals are many, but the same cannot be said about its impact on the public interest. The system simply puts too much public power into private hands.[94]

5.1 "Brain drain"

One of the earliest criticisms against the system was that it would cause earlier retirements in the state courts, so called a "brain drain." Fortunately, there have not been any massive early retirements. The main reason is believed to be the fact that judges must work for twenty years in order to qualify for maximum retirement benefits.[95] There is however, a tendency among judges to retire as early as they can. Not many judges remain active after the required twenty years of service and this is due to the luring of becoming a part of rent-a-judge. The consequence is that there are fewer judges available for emergency courthouse assignments.[96]

The early retirements are due to the judges' low payment. A seat on the bench used to be considered prestigious enough, but now it seems to be just a part of the judges' way to the more lucrative career in the private sector. This is damaging to the court system since important cases are taken away from the traditional court. Consequently, this can lead to it being more difficult to attract good lawyers to the bench at the same time as the best judges are leaving. This makes it difficult to get a hold on senior judges to hear criminal cases. Judges close to retirement move over to commercial and family law in order to make their name known among lawyers who choose private judges.[97] A judge in Los Angeles Superior Court, for example, had to leave the criminal department and participate in civil trials since many judges within the civil court were retiring. It would be alarming if the most talented judges would retire early after being trained on the job while on the public payroll.[98]

Vangel proposed in his article some regulatory measures that should be imposed in order to prevent early retirements. One example was to regulate

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[93] Kim, at 189.
[94] Ibid.
[95] Ibid. at 176. See also Cal. Gov. Code Sec 75522 (a) "A judge is eligible to retire pursuant to this section upon attaining both 65 years of age and 20 or more years of service, or upon attaining 70 years of age with a minimum of five years of service."
[96] Kim, at 177.
[97] http://www.usatoday.com/news/nation/2003-04-24-rentajudge-usat_x.htm
[98] Chernick, Bendix and Barrett, at 39.

fees paid to private judges. Another was to regulate the retirement policy in order to make the traditional court system a retired judge's first obligation.[99]

Vangel's proposals may not be that successful in reality. Regulation of the judge's fees might reduce some of the retirements, but I find it unlikely that it would make a difference. It is doubtful that state salary can compete with the private ones, even after a regulation of fees. Judges retiring because of financial matters could always turn to other forms of private practice. Vangel's second proposal does not seem any better. It would not be appropriate to tell judges what to work with and not, once they have already retired. Lack of judges could instead be compensated by educating and employing more judges.

5.2 Two-tiered system

Rent-a-judge creates a two-tiered system, one for the wealthy and one for the poor. The economical discrimination creates major ethical and constitutional concerns. Easy to solve disputes gets a speedy trial just because the litigants are wealthy while disputes involving issues important to the society have to wait a long time for trial.[100] Using wealth as the sole criterion for who gets to use the benefits of private judging means that the state is giving an unfair advantage to the litigants.[101]

The proponents, however, claim that it might be the only cost effective dispute resolution for less wealthy litigants. Judge Hogoboom said; "*I would say that my experience in the cases I've handled is that the rich are in a great minority. The average litigant is a typical middle class business man, typical middle person. . . people who want to get their matters heard.*"[102] Despite the private judges' high fees, it may result in lower costs because of the reduced attorneys' fees. This means that the system does not only benefit wealthy litigants.[103]

5.3 Repeat costumer

The fact that rent-a-judges are privately paid for by the parties might compromise the judges' impartiality. Impartiality issues within the proceedings mostly appear in situations where rent-a-judge presides in a case with a repeat costumer and a first timer. The risk for bias is much bigger in these situations. The fear is that this behaviour would be encouraged by market forces since the goal for rent-a-judges is to keep same players.[104]

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[99] Vangel, at 391.
[100] Ibid. at 379.
[101] Ibid. at 380.
[102] Chernick, Bendix and Barrett, at 32.
[103] Nagaraj, Sheila, The marriage of family law and private judging in family law, 116 Yale L. J. 2006-2007 at 1619.
[104] Kim, at 178.

Proponents of private judging point out several safeguards against bias situations. Since parties must consent on a judge, it is not likely that one of the parties would agree to a judge that might favour the opposing party. In order to be able to stay in business, it is important for the judge to remain impartial, otherwise prospective litigants would be hesitant to retain his services. Parties not trusting their opponents could always request the court to appoint a referee.[105]

Parties can avoid potential bias also by asking their attorneys to investigate prior decisions of prospective private judges.[106] To make this possible, reference proceedings have to be more accessible and less private. An idea is to allow public and press access to rent-a-judge proceedings. This would increase the judges' judicial accountability.[107]

The California Rules of Court could be a help in preventing impartiality and bias.[108] These rules require disclosure of information helping parties to identify private judges that have repeatedly worked for a certain litigant or law firm. The rule states that a private judge must disclose information if he has been employed by any party, attorney or law firm in the case. Judges not following this rule are not only facing deselecting, but their decisions might even be reversed on appeal if he does not apply the substantive law correctly in order to please all litigants. Such reversal in a published opinion is "bad advertising."[109]

5.4 Development of the law

American law is developed through cases and its decisions. Lack of common rules of procedure and standards will impede establishment of new rules that can be used as precedent.[110] Reference proceedings impede the creation of general law when it gets underdeveloped as the litigation otherwise could have contributed to the evolution of doctrine. The one presiding in the court is by the statute termed as referee, but this does not mean that they are some kind of hybrid arbitrators-judges. They are still judges, judges that are bound to apply legal rules of procedure and evidence and substantive law.[111]

The rulemaking tends to be less important than resolving the dispute in private justice. This results in decisions based on rules not formulated for the society. The rent-a-judge's decisions have less legitimacy in the eyes of the public because of the fact that the litigants choose their own judge.[112]

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[105] Vangel, at 385. See also Cal. Civ. Proc. Code § 641.
[106] Vangel, at 387.
[107] Ibid. at 388.
[108] See Cal. Rules of Court, rule 3.904 (b).
[109] Chernick, Bendix and Barrett, at 35.
[110] Likowitz, Amy L., The advantages of using a "Rent-a-judge" system in Ohio, Ohio St. J. on Disp. Resol. 494 (1994-1995), at 503.
[111] Christensen, at 100.
[112] Kim, at 190.

The fact that rent-a-judges are not publicly accountable makes their judgments lack public weight and authority, which you can find in other state court rulings.[113]

There are however doubts in whether rent-a-judge really can harm the rulemaking. As a contrast to the federal district courts, the decisions of California Superior courts are not reported and have no precedential value. Permanent and fundamental rulemaking occurs first at the appellate level making a trial before a private judge, instead of a traditional one, irrelevant.[114]

The fact that private judges' decisions are entitled to appellate review is according to the proponents a proof that it does not hinder the development of law. A judge aware of the possibility of his decision being scrutinized will make a proper interpretation of the law. Proponents also argue that because the decisions are appealable, there is no reason to give decisions by private judges any less precedential value or think it will have a negative impact on the development of law.[115]

Problems, however, arises in the case where the decision is not appealed. Since press and public usually do not have access to rent-a-judge trials, they do not have any knowledge about the case unless it is appealed. It makes the law unpredictable, since parties will not know if a similar case has been ruled before and how the decision stands, they simply cannot predict the outcome. This will decrease the number of settled cases before trial and lead to a more clogged docket.[116] This would be a bad result since the main purpose with private judging is to reduce the backlog of cases in the traditional court system. One easy way of preventing these problems would be to have open proceedings.[117]

5.5 Public interest

Rent-a-judges are not accountable to the public, but have at the same time the authority to impose their rulings upon the whole society. Since there are no restrictions on the cases that rent-a-judges can hear, it is possible that they will deliver decisions on important civil liberties such as gun control, school prayer or abortion. Judgments by rent-a-judges have the same effect as the other state court judgments, e.g. res judicata.[118]

The rent-a-judge system might be a good alternative for the individual private parties, but might not be that for the public interest. A judge does not only resolve a dispute, but aims also at creating a rule that will prevent

[113] Ibid. at 191.
[114] Haynes, Stephen K, Private means to public ends; Implications of the private judging phenomenon in California, 17 U.C. Davis L. Rev (1984), at 637.
[115] Vangel, at 394.
[116] Ibid.
[117] Ibid. at 395.
[118] Kim, at 193.

future disputes by providing the society with guidance.[119] The referee, by contrast, will mostly be interested in solving the problem in front of him. Problem-solving might lead to application of the existing rules, but it will not lead to a contribution of legal doctrine. The consequence will be decisions that lack in unity.[120]

There should be limits on the reach of a rent-a-judge ruling, as a result of its effect on the public interest.[121] Therefore, it would be best to determine what kind of cases that would be more suitable for rent-a-judge. One way could be to categorize cases and decide that dispute over "public values" should only be settled by the public courts. These cases would include constitutional questions, governmental regulation and "issues of great concern," such as development of legal standards in product liability cases. Another way of categorizing would be to look into the number of people who are likely to be affected by the judgment. The more the subject matter of the case affects the public, the bigger is the reason to have the case tried in a public court.[122]

Example of cases more suitable for rent-a-judge is family disputes; especially divorces, since the issues are not of public significance and few people are involved.[123] Another one is tort disputes, where the question is single-plaintiff cases that only require the application of existing standards. Lastly, another type of case that is suitable for rent-a-judge is complex commercial litigation. Usually these cases involve huge amount of money, but at the same time, involve only few people and the issue is rarely of significant public importance.[124]

Even though a categorizing such this might sound good, it would become difficult to spot public law cases. Enforcement of the abovementioned guidelines would be difficult and time consuming.[125] The problem lies in the fact that disputes that are private on the surface could many times hide difficult issues of public law.[126]

5.6 The Air Resources Board Case

One big distinction between traditional court trial and referee trial is accountability. Judges in traditional court can be held accountable for their actions because the public scrutinizes them. Private judges, on the other hand, are only scrutinized by the involved parties and their attorneys, which

[119] Note, Rent-A-Judge, at 1611.
[120] Ibid. at 1612.
[121] Kim, at 193.
[122] Ibid. at 194.
[123] Kim, at 195. Sheila Nagaraj agrees to this in her article, at 1616. Nagaraj believes that private judging offers a better forum for resolving family law disputes, at 1618. In California, family cases represented 7,5 % of total filings in 2004-2005, but they accounted ca 33 % of the courts' workload in terms of time, at 1620.
[124] Kim, at 195.
[125] Ibid.
[126] Ibid. n196, at 195.

as a result limits their accountability.[127] If the public and media do not get access to private judge proceedings then it cannot be subject to public scrutiny. As a result, the public's confidence is undermined to its judicial procedure.[128]

Judicial accountability is even more important when cases involve issues regarding public interest. One example of this problem is the *Air Resources Board case*, which the parties chose to resolve with rent-a-judge. The case involved several of the nation's largest oil companies that challenged California Air Resources Board's regulations on air pollutions standard.[129]

The Attorney General's office, which represented the Air Resources Board were criticizing the choice of private judging and explained that it probably was not the best for the public interest. It also found private judging too expensive and unnecessarily protracted. Allegedly, the judge had prolonged the case in order to make more money. In return, the judge denied the allegations showing the attorney's request for more time as the reason for the drawn out of the trial. An interesting fact is that State Air Resources Board lost in rent-a-judge trial, but won later in the California Supreme Court.[130]

5.7 Conclusion of the chapter

The problems mentioned earlier in this chapter are not limited to the rent-a-judge system. Most of the criticisms mentioned above can be applied to other ADR mechanisms. However, it is still evident that rent-a-judge does create public policy problems and the hybrid character of rent-a-judge is what mainly causes these. My conclusion is that most of the criticism is based on assumptions. Nevertheless, the best way of dealing with the problems is to provide access to the reference proceedings and make the judges accountable.

[127] Vangel, at 389.
[128] Ibid. at 390.
[129] Vangel, at 390.
[130] Ibid. n193, at 390. See also Western Oil & Gas v. State Air Resources Board, 37 Cal.3d 502, 691 P.2d 606, 208 Cal. Rptr. 850 (1985).

6 Constitutional Objections

Rent-a-judge might be just another ADR mechanism among others. What makes it so controversial is the public character of an otherwise a very private sector. The rent-a-judge system creates many constitutional questions. The constitutional problems discussed in this chapter are the first amendment right of access to trials and the equal protection clause in the Fourteenth Amendment.

The arguments against the system are challenged under both federal law and California law. In many aspects, California law might be a more effective weapon against rent-a-judge.[131]

In order to be able to challenge a statute with the First- and Fourteenth Amendment, state action[132] has to be present. Rent-a-judge has to constitute a state action in order to be challenged by the First and Fourteenth Amendment. There is a presumption of rent-a-judge statute being a state action and therefore satisfying this requirement. California's private judging procedure is considered a state action since it is regarded as a delegation[133] from the state of its power to make authoritative determinations of legal rights.[134]

6.1 First Amendment objections

The First Amendment states;

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[135]

Open trials bring fairness to the system and this is essential to public confidence. The First Amendment is a rule of self-government. It is a security against governmental interference with the communicative processes. It must therefore be possible for the public to scrutinize the

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[131] Kim, 180.

[132] The challenged statute must be unconstitutional by a state action. This means that a challenge can only be brought against national and state governments. Unless there is a legislation extending these rights to private, "state action" is required. See Barron, Jerome A and Dienes, Thomas C, Constitutional Law in a nutshell, 5th ed, St. Paul MN (2003), at 562.

[133] The U.S. Supreme Court has recognized state delegation of governmental functions as basis for finding a state action. But delegation as such does not have a formal acceptance as an independent third stand of state action. See Reuben, Richard C, Public Justice: Toward a state action theory of alternative dispute resolution, 85 Cal. L. Rev. 1997, at 611.

[134] Vangel, n121, at 380.

[135] U.S. Const. 1st amendment. The First Amendment does not explicitly say that the public has a right to attend trials. The first amendment right of access to trials has developed over the years through case law.

government and hold it accountable. Open trials prevents abuse of power and influence by authorities. The knowledge of the trial being scrutinized makes everybody carry his or her duty with care.[136]

The core purpose of the First Amendment is to assure the public communication on matters regarding functioning of government. This right of communication bars the state from holding closed hearings.[137] The function of rent-a-judges is the same as to the state courts. The rent-a-judge proceedings should therefore not be allowed to be closed to public scrutiny just because the parties are paying for it.[138] The important question here becomes whether there is a right to public access to civil trials.

6.1.1 U.S. case law on the First Amendment

The first question that the court had to settle was whether the First Amendment established any right of access to trials. This question has also led to a discussion on whether the media should be privileged in such access.

It has been stated several times that media plays an important role in public scrutiny. It is well recognized that the media has an important function in the structure of self-government. However, does this mean that the important function of the media gives it a special right to attend all court proceedings? The U.S. Supreme Court has in *Broadcasting Corp. v. Cohn (1975)*[139] stated the importance of media in making public scrutiny on the administration of justice possible. "*With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.*" [140]

Despite of the media's importance, it has no more constitutional right to access information from the government than does the public.[141] In *Branzburg v. Hayes (1972),*[142] the U.S. Supreme Court rejected any press privileges and immunities that are not available to ordinary citizens.[143] This changed partially in *Nebraska Press Association v. Stuart (1976).*[144] A trial court has the possibility to issue orders that prohibits the press to publish information about a particular case either before or after the trial. These orders are called restrictive orders by courts and "gag" orders by the media.[145] In the case, Chief Justice Burger held a heavy presumption against

[136] Glantz, at 995.
[137] Note, Rent-A-Judge, at 1609.
[138] Ibid. at 1610.
[139] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, (1975).
[140] Ibid. at 492.
[141] Glantz, at 997.
[142] Branzburg v. Hayes, 408 U.S. 665 (1972).
[143] Barron and Dienes (2003), at 482. See Branzburg v. Hayes, 408 U.S. 665 (1972).
[144] See Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976).
[145] Barron, Jerome A and Dienes, Thomas C., First Amendment Law in a nutshell, 2nd ed, St. Paul MN, 2000, at 389.

validity of prior restraints.[146] This case proved that the press was not without any special constitutional protection as the primary tool of the public on matters of public interest. The Court stated a constitutional protection for the press against prior restraints.[147]

The fact that private judging is created by the state makes state action present. Closed-door proceedings could be regarded as a prior restraint on the freedom of the press since neither the press nor the public can locate the proceedings. Prior restraints create a presumption against constitutional validity[148] and are the least tolerable infringement on first amendment rights.[149]

The constitutional right of access to judicial proceedings slowly found its acceptance. In *Richmond Newspapers Inc. v. Virginia (1980),*[150] the U.S. Supreme Court stated a first amendment right of access to criminal trials.[151] Chief Justice Burger stated that the right to be able to go to court and listen is important.[152] In addition, this makes it possible to the public to exercise the right of free speech and scrutinize the judicial system.[153] He also argued that historically criminal trials had been presumptively open; *"[w]hether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open."* [154] Moreover, openness is important to expose bias or partiality.[155] *"Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law."*[156]

Core purpose behind the First Amendment is freedom of communication on government functions.[157] In subsequent cases, this right of access to criminal trials, has not only been reaffirmed, but also given a sharper scrutiny standard in reviewing trial court closures.[158]

Nevertheless, the access right to criminal trials is not absolute and imposes qualifications. In *Globe Newspaper Co. v. Superior Court (1982)*[159] the

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[146] Nebraska Press Assn. v. Stuart, 427 U.S. 539, 558 (1976).
[147] Barron and Dienes (2003), at 482.
[148] Glantz, at 996. See Nebraska Press Assn. v. Stuart, 427 U.S. 539, 558 (1976).
[149] See Nebraska Press Assn. v. Stuart, 427 U.S. 539, 559 (1976).
[150] Richmond Newspapers, Inc. V. Virginia, 448 U.S. 555 (1980).
[151] See Ibid.
[152] Ibid. at 578.
[153] Glantz, at 998.
[154] Richmond Newspapers, Inc. V. Virginia, 448 U.S. 555, 580 fn17 (1980).
[155] Barron and Dienes, (2000), at 399. Richmond Newspapers, Inc. V. Virginia, 448 U.S. 555, 569 (1980).
[156] Richmond Newspapers, Inc. V. Virginia, 448 U.S. 555, 595 (1980). (Brennan J, concurring).
[157] Note, Rent-A-Judge, note 46, at 1601. See Richmond Newspapers, Inc. V. Virginia, 448 U.S. 555, 556 (1980).
[158] Barron and Dienes (2003), at 489.
[159] Globe Newspaper Co. v. Superior Court 457 U.S. 596, (1982).

Court held that access to a trial could be denied if it was compelled by governmental interest, and narrowly tailored to serve that interest.[160] Further, in *Press-Enterprise Co. v. Superior Court of California (1984)*[161] the Court set a standard regarding public access to trials; "*The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.*"[162]

6.1.2 California state law on the First Amendment

Cases reviewed previously in this chapter concerned the federal protection. There is also protection afforded in California state law; California Civil Procedure Code § 124 states that "*the sittings of every court shall be public.*"[163] The interpretation of "court" in section 124 has only been made once by the California court. In *Swars v. City Council (1949),*[164] it found section 124 inapplicable to hearings of a local civil service commission, because it was not a "court of justice."[165] "Court of justice" was defined in *Chinn v. Superior Court (1909)*[166] as a "*tribunal exercising functions of a strictly judicial character.*"[167] Accordingly, private judging should fall under section 124, since it is judicial proceedings functioning as traditional courts, and therefore be open to the public.[168]

In *NBC Subsidiary case,*[169] the respondents suggested that section 124 was intended to only apply on criminal proceedings. The court rejected this suggestion stating that there was no support in its language or history in being intended just for criminal proceedings.[170]

However, an enforcement of the open court statute might prove to be difficult. Judicial Council made an effort to solve the secrecy problem with a rule stating that the court clerk must post a notice about the case and a name and phone number of a person regarding arrangement for attendance to proceedings held in a courthouse.[171] At the same time, having proceedings in a courthouse requires consent of the presiding judge.[172]

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[160] Ibid. at 606-07.
[161] Press-Enterprise Co. v. Superior Ct., 464 U.S. 501, (1984).
[162] Ibid. at 510.
[163] See Cal. Civ. Proc. Code § 124.
[164] See Swars v. Council of City of Vallejo 33 Cal.2d 867, 206 P.2d. 355 Cal. 1949.
[165] Ibid, fn8, at 874.
[166] Chinn v. Superior Court of San Joaquin County 156 Cal. 478, 105 P. 580 Cal.1909.
[167] Ibid. at 482.
[168] Haynes, at 645.
[169] NBC Subsidiary (KNBC-TV), Inc v. Superior Court (Locke). 20 Cal. 4th 1178, fn 8, 86 Cal.Rptr.2d 778; 980 P.2d 337.
[170] Ibid. at fn 8.
[171] Cal. Rules of Court, rule 3909 (b).
[172] Ibid. at 3909 (a).

6.1.3 Is the first amendment right of access extended to include civil trials?

The public's right to attend criminal trials is relatively clear. The same assertion cannot be made about civil trials. The question is then if the first amendment right of public access to criminal trials also extends to civil trials.

In the *Richmond Newspapers case (1980),*[173] Chief Justice Burger stated that presumption of openness under common law extended to both criminal and civil proceedings.[174] Justice Brennan added in the same case that scrutiny of judiciary and fairness to the community was just as necessary in civil trials.[175] These given statements have made some courts hold that the first amendment right to access to trials should be applied both on criminal and civil trials.[176]

Yet, two years later in the *Globe Newspaper case (1982),*[177] concurring Justice O'Connor made a statement saying that she did not interpret either the *Richmond Newspaper case* or the *Globe Newspaper case* "*to carry any implications outside the context of criminal trials.*"[178]

A contrary interpretation was made in 1996 by the state Court of Appeal in Los Angeles that held that the public had a first amendment right of access to civil trials.[179] The court noted that the U.S. Supreme Court had not recognized a first amendment right of access to civil trial, but it had recognized that open and public trials are essential to the justice system. The appellate court said that, just like with criminal trials, the right of access to civil trial is not absolute, depending on the parties' right to fair trial and governmental interest in limiting disclosure of sensitive information.

In 1999, the California Supreme Court upheld the first amendment right of access to civil trials in *NBC Subsidiary (KNBC-TV) v. Superior Court.*[180] No high court prior California had affirmed similar constitutional right in civil proceedings.[181] Chief Justice Ronald George stated in the case that *"(t)he public has an interest, in all civil cases, in observing and assessing the performance of its public judicial system, and that interest strongly supports a general right of access in ordinary civil cases.*"[182]

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[173] Richmond Newspapers, Inc. V. Virginia, 448 U.S. 555, (1980).
[174] Ibid. at 580 n17.
[175] Ibid. at 596 (Brennan J, concurring).
[176] Glantz, at 1000.
[177] Globe Newspaper Co. v. Superior Court 457 U.S. 596, (1982).
[178] Ibid. at 611.
[179] http://www.rcfp.org/newsitems/index.php?i=1330
[180] NBC Subsidiary (KNBC-TV), Inc v. Superior Court (Locke). 20 Cal. 4th 1178, 86 Cal.Rptr.2d 778; 980 P.2d 337. See at. 1212.
[181] http://articles.latimes.com/1999/jul/28/news/mn-60245
[182] NBC Subsidiary (KNBC-TV), Inc v. Superior Court (Locke). 20 Cal. 4th 1178, 1210, 86 Cal.Rptr.2d 778; 980 P.2d 337.

During the years before the *NBC Subsidiary case*, an increasing number of trials were closed in order to protect jurors from outside information and influences.[183] However, in *NBC Superior (1999)*, the court rejected the notion that juries could only be fair if courtrooms were closed.[184] California Supreme Court presented a procedure to follow when civil trials were to be closed. Firstly, the judge must provide public notice that a closure is under consideration. Secondly, before proceedings are closed or transcripts sealed, the court must hold a hearing and find that; "(i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest."[185]

However, in 2000, U.S. Supreme Court denied to hear a case concerning whether the public has a presumptive constitutional right to attend civil trials. The denied petition was aiming to clarify the right of access to civil trials.[186] Right of access to civil trials exists at the moment only at a state level and not on a federal level.

6.1.4 Would an access to civil trials also include reference proceedings?

Criticism has been directed towards the fact that the public is excluded from the reference proceedings and because of this there is a violation of the Constitution.[187] One significant problem is that the U.S. Supreme Court has not really acknowledged any right of access to the civil court system, and certainly not to a specialized part of it.[188]

The first amendment protects only against abridgement by federal and state government. This means that it does not offer any protection against an attorney who refuses to disclose the location of the hearings. In such cases, there would be no state action involved in denying the public access to the proceedings.[189] However, it would be a state action if it is the judge who is refusing to provide the information. The judges are appointed by the court and should therefore carry out the duties of a state judicial in a court proceeding. A judge refusing to disclose information about the time and place of a proceeding will constitute state action and therefore violate the First Amendment.[190]

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[183] http://www.freedomforum.org/templates/document.asp?documentID=7432
[184] NBC Subsidiary (KNBC-TV), Inc v. Superior Court (Locke). 20 Cal. 4th 1178, 1221, 86 Cal.Rptr.2d 778; 980 P.2d 337.
[185] NBC Subsidiary (KNBC-TV), Inc v. Superior Court (Locke). 20 Cal. 4th 1178, 1217-1218, 86 Cal.Rptr.2d 778; 980 P.2d 337.
[186] http://www.rcfp.org/newsitems/index.php?i=2366
[187] Glantz, at 1002.
[188] Note, Rent-A-Judge, at 1603.
[189] Glantz, at 1002.
[190] Ibid.

As stated previously, section 124 defines court as a "*tribunal exercising functions of a strictly judicial character.*" Rent-a-judge proceedings operate in a judicial capacity and their function in the statute is defined as equivalent to the traditional courts. Any tribunal exercising functions of judicial character is a court.[191]

Even though section 124 expressly states that all court proceedings are open to the public, it still does not solve the problem with exclusion from reference proceedings.[192] This controversy exists because of a statement made in Harvard Law Review[193] that got wide acceptance. The author stated that the statute mandating open trials does not apply to reference proceedings. The article says that there is no obligation to give the public access to private trials. At the same time, the conclusion of the article was that rent-a-judge proceedings violated the first amendment right of access to court proceedings because of its secrecy.[194]

The rent-a-judge proceedings should be open to public. The problem in making this a reality is the lack of an effective mechanism that could notify the public and press of time and place of the proceedings. Not providing a reasonable opportunity for public attendance could be a violation of the open trial statute.[195]

6.1.5 Would access to rent-a-judge include proceedings in private homes?

Most of the rent-a-judge trials are held in the attorneys' office or in one of the parties' home. If a right of access would be acknowledged to reference proceedings, there would remain another question; whether this inclusion would also contain private homes. Could the public demand access to reference hearings held in a private home with the help of the First Amendment?[196]

The protection afforded free speech is more comprehensive in California than the Federal Constitution. In *Robins v. Pruneyard Shopping Center (1979),* the California Supreme Court held that *"the public interest in peaceful speech outweighs the desire of property owners for control over their property."*[197] In *Pruneyard Shopping case* the free speech clause of Cal. Const art 1. §§ 2, 3 preceded over the property rights of the owner to the shopping center.[198] The U.S. Supreme Court upheld California's

[191] Vangel, at 389.
[192] Glantz, at 992.
[193] See Note, The California Rent-A-Judge Experiment: Constitutional and Policy considerations of Pay-As-You-Go Courts, 94 Harv.L.Rev, (1981). Statement in Ibid. n93, at 1609.
[194] Note, n93 at 1608, 1609 and 1614-1615.
[195] Vangel, at 389. See also Cal. Civ. Proc. Code § 124.
[196] Glantz, at 1003.
[197] See Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854, (1979).
[198] Haynes, n139 at 640.

Pruneyard decision with the statement that the states could offer greater protection than the federal constitution regarding first amendment rights.[199]

A denial of access to rent-a-judge proceedings could constitute violation of the right to open trials. Any right to access would be attached to reference hearings, independent of the location. At the same time, it does not seem likely that a court would force owners of private houses to open up their homes to the public.[200] The Pruneyard Shopping case observed that; "*It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment."*[201] The statement above leads to the conclusion that there is no support to a right of access to civil proceedings held in private homes.

What can be done in those cases is to request the case to be heard at a site easily accessible to the public. Such request must state the reasons and be served on all parties and the referee. However, the court does not *have* to move the site of the hearing it only *may* do so.[202]

6.1.6 Conclusion of the chapter

My interpretation is that rent-a-judge proceedings do not violate the U.S. Constitution since the U.S. Supreme Court has not acknowledged any first amendment right of access to civil trials. The question is, however, left open since the Court has yet not decided on the matter. California Supreme Court, on the other hand, has acknowledged a right of access to civil trials and a challenge within the state could force the doors to open up. Additionally, California's open door statute, section 124, expressly states that all courts shall be open. This should apply to rent-a-judge too. However, a right of access to rent-a-judge would not include proceedings held at private homes.

6.2 Equal protection objections

Limited access to rent-a-judge proceedings might be unconstitutional. Denying the benefits of private judging to poor litigants could violate equal protection of the Fourteenth Amendment;[203]

> All persons born or naturalized in the United States,
> and subject to the jurisdiction thereof, are citizens of
> the United States and of the State wherein they reside.
> No State shall make or enforce any law which shall abridge
> the privileges or immunities of citizens of the United States;
> nor shall any State deprive any person of life, liberty, or property,
> without due process of law; nor deny to any person within its
> jurisdiction the equal protection of the laws.[204]

[199] Glantz, at 1004. See Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, (1980).
[200] Glantz, at 1004.
[201] Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 78 (1980).
[202] Cal. Rules of Court, rule 3.910.
[203] Vangel, at 380.
[204] U.S. Const. 14th amendment.

6.2.1 Suspect classification

Suspect class status is used to give special protection to a certain minority group. "A suspect class is defined as;
(1) an obviously distinguishable minority,
(2) subject to a history of discrimination,
(3) that is so politically powerless as to be in need of special assistance."[205]

Examples of groups protected by the equal protection clause are; race, national origin, alienage and religion. They are protected against unconstitutional diversity in a statute, ordinance, regulation or policy.[206]

This doctrine of suspect classification has its basis in the equal protection clause of the Fourteenth Amendment. It is applicable to actions taken by federal and state governments.[207] When the disparity of a suspect class is made intentionally or a classification burdens the exercise of a "fundamental right," the court applies strict scrutiny. Strict scrutiny means that a statute is presumed to be unconstitutional and the government must show that the classification is necessary to a compelling governmental interest, in order to pass strict scrutiny.[208] The most interesting part here is that an equal protection challenge of a statute must show that the disparity is intended.[209]

Groups constituting suspect class are those who cannot change their distinguishing characteristic. With other words, there is no way to enter or leave these groups. This is the main difference between race and wealth that in theory can be altered. Wealth is not a suspect class, with the exception of cases when wealth is used as a proxy for another suspect class.[210]

6.2.2 Wealth as suspect classification

U.S. Supreme Court acknowledges wealth as suspect class only in criminal proceedings. In *Gideon v. Wainwright (1963),*[211] the Court stated a constitutional right to a state appointed lawyer in felony prosecutions for indigent criminal defendants. This case involved fundamental rights and the Court did therefore not refer to whether indigents deprived of non-fundamental rights should be subject to strict scrutiny.[212]

Such a question was at stake at in *Dandridge v. Williams (1970)*[213] where the Court refused to apply strict scrutiny. The Court has since that case rejected any acknowledgement of poverty alone as a suspect class.[214] In

[205] http://banap.net/spip.php?article60
[206] http://legal-dictionary.thefreedictionary.com/Suspect+class
[207] Ibid.
[208] Barron and Dienes (2003), at 253.
[209] See Washington v. Davis, 426 U.S. 229, 239-41 (1976).
[210] http://classes.lls.edu/archive/manheimk/114d3/echarts/suspect.htm
[211] Gideon v. Wainwright, 372 U.S. 335 (1963).
[212] http://www.encyclopedia.com/doc/1O184-Indigency.html
[213] See Dandridge v. Williams, 397 U.S. 471 (1970).
[214] http://www.encyclopedia.com/doc/1O184-Indigency.html

Maher v. Roe (1977)[215] and *Harris v. McRae (1980),*[216] where the subject matter was funding of abortion, the Court rejected wealth as suspect classification as well as strict scrutiny of wealth.[217] In *Maher v. Roe (1977),* the U.S. Supreme Court held that "financial need alone"[218] was not a suspect classification. However, it was implied that poverty combined with other factors could invoke increased scrutiny.[219]

6.2.3 Wealth as suspect classification in California

The California constitution might be a better weapon for equal protection challenge against rent-a-judge proceedings. An equal protection clause can also be found in the California Constitution; "*A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws(…)*"[220]

In *Serrano v. Priest (Cal. 1971),*[221] California Supreme Court expanded the suspect classifications to include wealth disparities. The case was about inequality in the state's school financing among the different districts. This inequality unconstitutionally discriminated against students living in less wealthy districts.[222] No compelling governmental interest was found present and the system was therefore invalidated. Wealth as suspect classification was for the first time extended to government institutions, in this case the school districts.[223] Ever since this case, California state courts have held that wealth is a suspect classification demanding strict scrutiny.[224]

However, the courts are reluctant in applying this too broadly, since it could invalidate the statutes that have an indirect effect of imposing a greater burden on poor people. Such reasoning could in an extreme view lead to even taxes being challenged on equal protection grounds.[225]

Nevertheless, two years after this case, in *San Antonio Independent School Dist. V. Rodriguez, (1973),*[226] the U.S. Supreme Court rejected wealth as suspect classification.[227] Justice Powell stated that equal protection was satisfied and rejected strict scrutiny on the basis that the law's function was

[215] See Maher v. Roe, 432 U.S. 464 (1977).
[216] See Harris v. McRae, 448 U.S. 297 (1980).
[217] Barron and Dienes (2003), at 343.
[218] Maher v. Roe, 432 U.S. 464, 471 (1977).
[219] Note, Rent-A-Judge, at 1604.
[220] Cal. Const. art 1, § 7 (a).
[221] Serrano v. Priest 5 Cal.3d 584, 487 P.2d 1241, 96 Cal.Rptr. 601 (Cal. 1971).
[222] Kim, at 184, 185.
[223] http://library.findlaw.com/1999/Dec/1/129939.html
[224] Kim. at 185.
[225] Ibid.
[226] See San. Antonio. Indep. Sch. Dist. V. Rodriguez, 411 U.S. 1 (1973).
[227] Kim, at 184 and n128 at 184.

not to the disadvantage of a suspect class and that it had not been shown that the indigents suffered an absolute deprivation of the wanted benefit.[228]

"In general, California courts have found that an impermissible wealth classification exists when a person's lack of wealth denies him equal access to an important state-sponsored right."[229] At the same time, California courts have refused to acknowledge wealth-based discrimination when the statute only affects a merely larger numbers of poor people than wealthy ones.[230]

"California courts will find impermissible wealth-based discrimination if;
1, the lack of wealth in the denial of an important state-sponsored benefit or
2, the challenged statute or practice discriminates directly and solely against the poor."[231]

The rent-a-judge system fits both of these criteria. Rent-a-judge is not available to the poorer litigants and lack of access to a rent-a-judge deprives them an important state-sponsored benefit; the rent-a-judge himself.[232]

6.2.4 Conclusion of the chapter

U.S. Supreme Court has rejected wealth as suspect classification, while California Supreme Court has acknowledged wealth as suspect classification. Rent-a-judge challenged under federal law would not be successful. It is difficult to say if a challenge under California law would be successful. Rent-a-judge fits the criteria stated by California courts, but it is at the same time difficult to show an intentional disparity.

[228] Barron and Dienes, (2003), at 342.
[229] Kim, at 185.
[230] Ibid. at 186.
[231] Ibid.
[232] Ibid. at 187.

7 Conclusion

Many of the problems concerning rent-a-judge emerge from the fact that it is a hybrid form of ADR. Most of these problems are complicated and it can be difficult to find concrete solutions. Nevertheless, I now would like to comment on some parts of the rent-a-judge system and present my conclusion of this thesis.

7.1 Public policy

Is rent-a-judge causing public policy problems? Yes, it is. Many of the policy issues mentioned in this thesis are problems faced by other ADR mechanisms as well. There are also other public policy concerns, faced only by rent-a-judge. The main reason for these problems is the hybrid character of the system.

One important objection is the causing of "brain drain." There are some remarks I think are important to discuss on this subject. Rent-a-judge is affecting the work of the public judges, but the early retirement accusation is not quite accurate. My conclusion is that rent-a-judge is not causing early retirements, but causing retirements as early as possible. The majority of the judges retire first after 20 years, which is the amount of time required for maximum retirement benefits.

The problem seems more to be that fewer judges are available to emergency court assignments since many judges are retiring as soon as possible. A similar problem is that judges are moving from criminal courts to civil courts, as they get closer to retirement. This leaves criminal courts with fewer judges available who are at the same time less experienced. It is however, difficult to say how big the problems caused by rent-a-judge are, since it has proven to be difficult to find data on how many judges are leaving criminal courts in favour of civil courts.

Early retirements, or rather, retirements as early as possible could be prevented to some extent by raising the allowances. It is unlikely that it would have the desired outcome. The state is not likely to be able to match the salary earned by private judges. A raise in salary combined with a fee regulation of the payments to the referees, could at the other hand, make a difference. Having said that, it is important to remember that rent-a-judge is not the only part of the ADR sector that can lure judges away from the bench.

Another policy concern, where criticizers and proponents of the system have different opinions about, is the creation of a two-tiered system. An expensive system like rent-a-judge has the obvious consequence of dividing justice into one for the poor and one for the rich. Proponents claim that the rich litigants are only in minority and that litigation many times ends up

being much more expensive. Yet, no numbers have been presented by the proponents on what percentage among the litigators using rent-a-judge, actually are rich or poor.

Even if litigation may end up costing more, rent-a-judge requires fast access to large amount of money. Since not everybody can get hold of that much money, it will result in diversity between rich and poor -a diversity where the rich litigants get an unfair advantage by the state.

The third public policy problem concerns repeat costumers. Judges having repeat costumers increase the fear of partiality and bias. The problem can occur within other ADR mechanisms too and should therefore not only burden rent-a-judge. The big difference lies in that rent-a-judge's decisions are equivalent to the state courts decisions and have the possibility of affecting many people and set a precedent. Nobody wants precedent judgments based on bias.

As mentioned in chapter 5, there are safeguards against bias, such as the consent by the parties for the selected judge. Another possibility is to check previous decisions by private judges. The safeguards mentioned could be sufficient, but only if the proceedings are open to the public, with a *guarantee* of access to both the proceedings and the documents. Another answer to the problem could be creation of a public or private body supervising the system and making the judges accountable.

Judicial accountability by rent-a-judges would also impede problems affecting public interest. It is indeed alarming that judges that are able to impose their rulings to the general public, are at the same time not accountable to the public.

One way to solve the problem could be to follow Anne Kim's proposal on only leaving family cases and commercial cases to be heard by rent-a-judges. Another way could be to prohibit state agencies to use rent-a-judge when litigating. Exceptions allowed could be those cases where the state agencies *guarantees* an access to the proceedings, e.g. by posting a note in the courthouse about time and place of the proceedings and by holding these proceedings at an easily accessible site. Exceptions could also be allowed if there is any government interest in having a closed proceeding.

A further concern is that rent-a-judge is impeding the establishment of rules. All kind of ADR mechanisms that take away cases from the docket are equally responsible for any impediment of law. What raises the eyebrow is the fact that rent-a-judging is given "a higher status" by the state since its decision is accepted as equal to state courts'. Since few cases are appealed, and few are granted review, it is difficult to say how much rent-a-judge is affecting the development of law. The fact that California cases are not precedent means that rent-a-judge does not impose an immediate danger towards the development of law.

Making the rent-a-judges accountable to the public could ease up the public policy problems surrounding rent-a-judge. Judicial accountability combined with access to reference proceedings would be the best remedy against the public policy objections.

7.2 The First Amendment

Is rent-a-judge unconstitutional under the First Amendment? Yes, if challenged under California law. The benefits of open trials are many. Most importantly, it prevents abuse of power and influence by authorities. Open trials get even more important when the judges do not have judicial accountability. Even though the public may not have a direct interest in all civil cases, it is better to have presumptively open civil trials rather than presumptively closed civil trials.

As mentioned in the previous chapter, any challenge under the First Amendment requires state action present. There is a presumption of state action when it comes to rent-a-judge since it is a delegation of the state's powers. But state action is present only when it is the judge, and not the parties, that refuses to disclose time and place of the proceedings.

One solution of this problem could be that California Rules of Court expressly state that all judges working as rent-a-judge, *have* to notify the public about the whereabouts of the rent-a-judge proceedings and that the responsibility of doing so is solely the judges'.

The *Richmond Newspapers case* stated a first amendment right of access to criminal trials. More importantly, even though the question of access to civil courts was not raised, the Court stated that both criminal and civil trials had historically been presumptively open. I read this as an "invitation" to acknowledgement of a first amendment right of access to civil trials (when the question will be raised). The only high court that came to this conclusion is the California Supreme Court in the *NBC Subsidiary case*.

U.S. Supreme Court, on the other hand, denied review of a petition concerning access to civil courts. However, this denial does not mean that the Court has decided on the question of public access to civil trials. I believe that it is a matter of time before U.S. Supreme Court reaches the same conclusion as California Supreme Court.

NBC Subsidiary case is not the only support to open up rent-a-judge proceedings. California also has an open door statute, section 124. The definition of court made in *Chinn v. Superior Court*, clearly includes rent-a-judge too. Why are then rent-a-judge proceedings still closed to the public? To start with, there is no statute expressly prohibiting a closure. Such prohibition is something California should consider, since they have already acknowledged right of access to civil courts. Another reason is the Harvard article that says that there is no obligation to give the public access to private trials. I do not think that a doctrinal conclusion should be an obstacle

to this question and it should not be accepted as a sole support in having closed proceedings. California case law and open door section 124 should be enough to open up rent-a-judge proceedings to the public.

The last question is then if the right of access also would open up rent-a-judge proceedings in private homes. The answer is no. There is no case law or statute supporting a contrary conclusion. The *Pruneyard case* stated that the California Constitution outweighed the owner's property rights, but observed at the same time that the court did not have under consideration the property or privacy rights of an individual homeowner. It is therefore unlikely that a court would come to the same decision when it comes to a person's private house. Orderly, this leads to the conclusion that rent-a-judge proceedings in private homes remains to be constitutional.

A shopping center cannot be compared to a private house. Thousands of people visit a shopping center every day, while one single stranger in your own living room would feel like an intrusion. The superior courts could not force private persons to open up their homes to strangers, but the courts could most likely prohibit them to have secret proceedings at home.

California Rules of Court are not enough to solve the problem with closed proceedings. Rule 3.910 makes it possible to request a case to be moved to a site easily accessible to the public. But the court does not *have to* grant this request, it only *may* do so. A way to solve this problem could be to explicitly state that rent-a-judge proceedings are not allowed to be held at homes. Another way could be to make a general prohibition against secret proceedings, instead of only those at private homes. By doing so, the prohibition will cover *all* proceedings, wherever they are held.

Rent-a-judge will remain constitutional if challenged under federal law since the Supreme Court has not acknowledged any right of access to civil courts and certainly not to a specialized part of it. A challenge under California law, on the other hand, will leave closed-door rent-a-judge proceedings to be unconstitutional, with the exception of proceedings held in private homes.

Enforcement of open trials will not be successful until an efficient notification mechanism is established. The current rule 3.909 (b) in California rules of court is not efficient enough, since notification of time and place must be made only if the proceedings are held in a courthouse. This means that the same requirement is not made for proceedings outside the courthouse, where most of the rent-a-judge proceedings are held. Access to rent-a-judge proceedings will be difficult to implement without an efficient mechanism.

7.3 The equal protection clause

Is rent-a-judge unconstitutional under the Fourteenth Amendment? Not under the federal law and it might not be under California law either.

Wealth has to be acknowledged as suspect classification in order to challenge rent-a-judge with the equal protection clause. California Supreme Court has stated that wealth can be a suspect class, but U.S. Supreme Court (with the exception of criminal cases) did not come to the same conclusion.

I am divided on the question whether wealth should be a suspect class. Acknowledgement of wealth as suspect class in civil trials will bring with it other problems, many might even be difficult to foresee. For example, would such an acknowledgement mean that indigent litigants, just as in criminal trials, have the right to a state appointed lawyer? Expert witnesses also cost money; a less wealthy litigant may not afford the very best one, while a wealthy litigant does. Would this then mean that less wealthy litigants have the right to a "state-sponsored expert witness?"

The U.S. Supreme Court is not likely to acknowledge wealth as suspect classification any time soon. An acknowledgment would also bring many distinction issues with it. When would indigence start to constitute a need for protection? How poor would one have to be to fall under the "indigent" category? Unlike race and nationality, wealth can be altered; it is a group that you can enter to and leave. This makes it more difficult to distinguish the protected group. What would happen if a litigant invoking equal protection based on wealth gets rich, or at least "wealthier," during the trial?

Washington v. Davis (1976) stated that an equal protection challenge of a statute must show that the disparity is intended. Even if California has acknowledged wealth as a suspect class demanding strict scrutiny, it would be difficult to prove that California intentionally aimed to discriminate the indigents with the reference statute. The fact that the statute is from 1872 will make it even more difficult to figure out the original intention with the enactment.

Rent-a-judge, challenged with equal protection clause, remains to be constitutional under federal law. Challenged under California law would probably also leave it as constitutional, it is difficult to draw a definite conclusion.

7.4 Final remark

There have been many discussions about the reference proceedings, but not much has been done about the problems. Rent-a-judge is very popular and it is highly unlikely that it would be abolished (if found unconstitutional). It is more likely that it would lead to a modification of the system. A total reorganization of rent-a-judge is not necessary. What is necessary is to make the judges accountable to the public and to make efficient rules against the problem with closed reference proceedings.

Supplement A - Statutes

The United States Constitution[233]

Amendment 1 Freedom of Religion, Press, Expression

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 14 Citizenship Rights

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
(…)

California Constitution[234]

Article I, Section 7

(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. (…)

Article VI, Section 21

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.

California Code of Civil Procedure[235]

Section 124

Except as in provided in Section 214 of the Family Code or any other provision of law, the sittings of every court shall be public.

Section 583.310

An action shall be brought to trial within five years after the action is commenced against the defendant.

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[233] http://www.usconstitution.net/const.html
[234] http://www.leginfo.ca.gov/const-toc.html
[235] http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=ccp&codebody=&hits=20

Section 583.360

(a) An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article.
(b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute.

Section 638

A referee may be appointed upon the agreement of the parties filed with the clerk, or judge or entered in the minutes, or upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties:

(a) 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.

(b) To ascertain in fact a necessary to enable the court to determine an action or proceeding.

(c) In any matter in which a referee is appointed pursuant to this section, a copy of the order shall be forwarded to the office of the presiding judge. The Judicial Council shall, by rule, collect information on the use of these referees. The Judicial Council shall also collect information on fees paid by the parties for the use of referees to the extent that information regarding those fees is reported to the court. The Judicial Council shall report thereon to the Legislature by July 1, 2003. This subdivision shall become inoperative on January 1, 2004.

Section 639

(a) When the parties do not consent, the court may, upon the written motion of any party, or of its own motion, appoint a referee in the following cases pursuant to the provisions of subdivision (b) of Section 640:

(1) When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein.

(2) When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect.

(3) When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action.

(4) When it is necessary for the information of the court in a special proceeding.

(5) When the court in any pending action determines that it is necessary for the court to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon.
(…)

Section 640

(a) The court shall appoint as referee or referees the person or persons, not exciding three, agreed upon by the parties.

(b) If the parties do not agree on the selection of the referee or referees, each party shall submit to the court up to three nominees for appointment as referee and the court shall appoint one or more referees, not exciding three, from among the nominees against whom

there is no legal objection. If no nominations are received from any of the parties, the court shall appoint one or more referees, not exciding three, against whom there is no legal objection, or the court may appoint a court commissioner of the county where the cause is pending as a referee.

(c) Participation in the referee selection procedure pursuant to this selection does not constitute a waiver of grounds for objection to this appointment of a referee under Section 641 or 641.2.

Section 641

A party may object to the appointment of any person as referee, on one or more of the following grounds:

(a) A want of any of the qualifications prescribed by statute to render a person competent as a juror, except a requirement of residence within a particular county in the state.

(b) Consanguinity or affinity, within the third degree, to either party, or to an officer of a corporation which is a party, or to any judge of the court in which the appointment shall be made.

(c) Standing in the relation of guardian and ward, conservator and conservatee, master and servant, employer and clerk, or principal and agent, to either party; or being a member of the family of either party; or a partner in business with either party; or security on any bond or obligation for either party.

(d) Having served as a juror or been a witness on any trial between the same parties.

(e) Interest on the part of the person in the event of the action, or in the main question involved in the action.

(f) Having formed or expressed an unqualified opinion or belief as to the merits of the action.

(g) The existence of a state of mind in the potential referee evincing enmity against or bias toward either party.

Section 642

Objections, if any, to a reference or to the referee or referees appointed by the court shall be made in writing, and must be heard and disposed of by the court, not by the referee.

Section 643

(a) Unless otherwise directed by the court, the referees or commissioner must report their statement of decision in writing to the court within 20 days after the hearing, if any, has been concluded and the matter has been submitted.

(b) A referee appointed pursuant to Section 638 shall report as agreed by the parties and approved by the court.

(c) A referee appointed pursuant to Section 639 shall file with the court a report that includes a recommendation on the merits of any disputed issue, a statement of the total hours spent and the total fees charged by the referee, and the referee's recommended allocation of payment. The referee shall serve the report on all parties. Any party may file an objection to the referee's report or recommendations within 10 days after the referee serves and files the report, or within another time as the court may direct. The objection shall be served on the referee and all other parties. Responses to the objections shall be filed with the court and served on the referee and all other parties within 10 days after the objection is served. The court shall review any objections to the report and any responses submitted to those objections and shall thereafter enter appropriate orders. Nothing in this section is intended to deprive the court of its power to change the terms of the

referee's appointment or to modify or disregard the referee's recommendations, and this overriding power may be exercised at any time, either on the motion of any party for good cause shown or on the court's own motion.

Section 644

(a) In the case of a consensual general reference pursuant to Section 638, the decision of the referee or commissioner upon the whole issue must stand as the decision of the court, and upon filing of the statement of decision with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court.
(b) In the case of all other references, the decision of the referee or commissioner is only advisory. The court may adopt the referee's recommendations, in whole or in part, after independently considering the referee's findings and any objections and responses thereto filed with the court.

Section 645.1

(a) When a referee is appointed pursuant to Section 638, the referee's fees shall be paid as agreed by the parties. If the parties do not agree on the payment of fees and request the matter to be resolved by the court, the court may order the parties to pay the referee's fees as set forth in subdivision (b). (…)

Section 645.2

The Judicial Council shall adopt all rules of court necessary to implement this chapter.

California Government Code[236]

Section 75522

(a) A judge is eligible to retire pursuant to this section upon attaining both 65 years of age and 20 or more years of service, or upon attaining 70 years of age with a minimum of five years of service.
(…)

California Rules of Court[237]

Rule 3.904 (b) Disclosure by referee

In addition to any other disclosure required by law, no later than five days before the deadline for parties to file a motion for disqualification of the referee under Code of Civil Procedure section 170.6 or, if the referee is not aware of his or her appointment or of a matter subject to disclosure at that time, as soon as practicable thereafter, a referee must disclose to the parties:

(1) Any matter subject to disclosure under either canon 6D(5)(a) or 6D(5)(b) of the Code of Judicial Ethics; and

(2) Any significant personal or professional relationship the referee has or has had with a party, attorney, or law firm in the current case, including the number and nature of any other proceedings in the past 24 months in which the referee has been privately

[236] http://caselaw.lp.findlaw.com/cacodes/gov/75520-75528.html
[237] http://www.courtinfo.ca.gov/rules/

compensated by a party, attorney, law firm, or insurance company in the current case for any services. The disclosure must include privately compensated service as an attorney, expert witness, or consultant or as a judge, referee, arbitrator, mediator, settlement facilitator, or other alternative dispute resolution neutral.

Rule 3.909 Proceedings before privately compensated referees

(a) Use of court facilities and court personnel

A party who has elected to use the services of a privately compensated referee is deemed to have elected to proceed outside the courthouse. Court facilities and court personnel may not be used in proceedings pending before a privately compensated referee, except on a finding by the presiding judge that their use would further the interests of justice.

(b) Posting of notice in courthouse

For all matters pending before privately compensated referees, the clerk must post a notice in the courthouse identifying the case name and number and the name and telephone number of a person to contact to arrange for attendance at any proceeding that would be open to the public if held in a courthouse.

Rule 3.910 Request and order for appropriate and accessible hearing site

The court may, on the request of any person or on the court's own motion, order that a case pending before a referee must be heard at a site easily accessible to the public and appropriate for seating those who have notified the court of their intention to attend hearings. A request for hearings at an accessible and appropriate site must state the reasons for the request, be served on all parties and the referee, and be filed with the court. The order may require that notice of trial or of other proceedings be given to the requesting person directly.

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