

As alternative dispute resolution gained steam in the early 1980s through mediation and arbitration, the Texas Legislature adopted a procedure that provided for the hiring of a former or retired judge to hear a case, non-jury. Although this “rent-a-judge” approach has been part of Texas law for more than two decades, it is often misunderstood and underutilized. In some instances, the special judge provisions of the Texas Civil Practices and Remedies Code include several significant advantages over arbitration.

By Dan Downey

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The Ignored Stepchild of ADR



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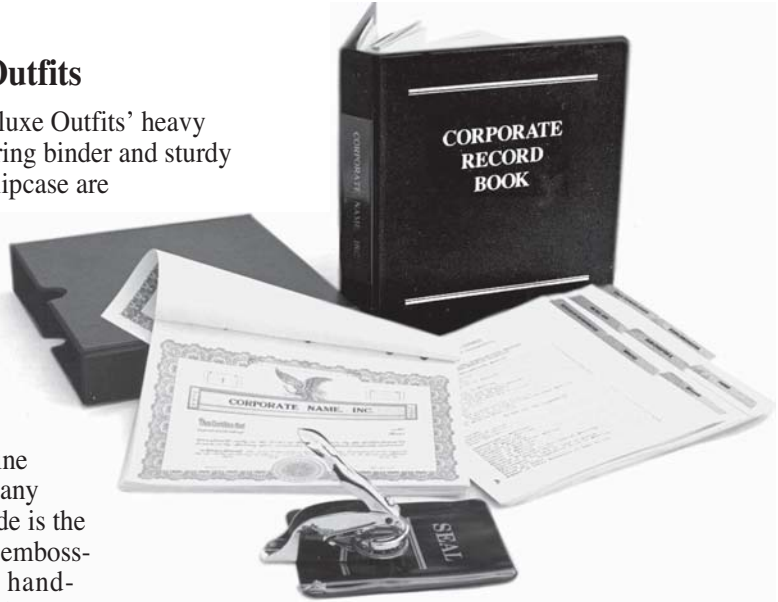
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Trial by Special Judge: The Ignored Stepchild of ADR

Chapter 151 of the Texas Civil Practice and Remedies Code¹ allows the trial court, upon agreement by all parties, to refer a civil or family case for a non-jury trial by a “special judge.” To permit such referral, all parties must file a motion in the trial court in which the case is filed: (a) requesting the referral, (b) waiving their right to trial by jury, (c) stating the issues to be referred, (d) stating the time and place agreed upon by the parties for the trial, and (e) stating the name of the special judge and the fact that he or she has agreed to hear the case and identifying the fee the judge is to receive.²

The trial court may then issue an order of referral that specifies the issues referred (which can include all issues of fact and law³) and the name of the special judge.⁴ Such an order may also designate the time and place for trial and the time for the filing of the special judge’s “report.”⁵ When such an order is signed, the proceedings in the trial court are stayed pending the outcome of the trial by the special judge.⁶

The special judge so appointed must be a retired or former district, statutory county court, or appellate judge who: (a) has served as a judge for at least four years in one of those courts, (b) has developed substantial experience in his or her area of specialty, (c) has not been removed from office or resigned while under investigation for discipline or removal, and (d) has completed at least five days of continuing legal education in the past calendar year in courses approved by the State Bar or Supreme Court.⁷

The trial may be conducted anywhere the parties choose except a public courtroom.⁸ Nor can public employees be involved during “regular working hours.”⁹ All of the rules and statutes relating to procedure and evidence in the district court apply to the trial by the special judge¹⁰ and a record of the proceedings is kept by a court reporter who meets the qualifications prescribed by law for district court reporters.¹¹ The special judge must conduct the trial in the same manner as a court trying an issue without a jury and is vested with the powers of a district judge, except that he or she may not hold a person in con-

tempt of court unless the person is a witness in the trial.¹²

The fees of the special judge, court reporter, and any other administrative costs associated with the trial are borne by the parties equally.¹³ However, the cost of a witness or any other cost related solely to a single party’s case is borne by that party.¹⁴ Further, the state or any unit of local government is prohibited from paying any costs associated with such a trial.¹⁵

Upon completion of the trial, the special judge issues a “verdict,” which must comply with the requirements for a verdict by the court.¹⁶ This verdict is considered the verdict of the district court and, unless otherwise specified in the order of referral, must be submitted no later than the 60th day after the trial adjourns.¹⁷ Should the special judge fail to timely submit the verdict, the trial court may grant a new trial if a party files a motion requesting it and a hearing is conducted after due notice to all parties.¹⁸ Perhaps the most unusual feature of this alternative dispute resolution procedure is that the right to appeal the verdict issued by the special judge is preserved and is treated as though the trial court rendered it.¹⁹

Advantages

The Right of Appeal — While contracting for binding arbitration can spare one the uncertainty of a jury trial, it is by no means certain that the process or outcome will meet expectations. There is no appeal from the arbitration decision and it cannot be set aside absent unusual circumstances.²⁰ Similarly, rulings on procedure and evidence are not subject to challenge or review. The rules applicable to arbitration typically contemplate a more informal approach to such issues and, therefore, can be unpredictable depending upon the arbitrators.²¹ A special judge, however, must have served at least four years on the bench and will be accustomed to applying the rules of evidence and procedure.²² Additionally, the judge’s history of rulings may be ascertainable through appellate decisions or informal discussion with lawyers who have appeared in his or her court.

A proceeding under Chapter 151 is virtually identical to a non-jury trial. All

rights of appeal to the courts of appeals and the Supreme Court are preserved, and the appeal is directly from the “verdict” of the special judge.²³ The trial judge’s role is the ministerial entry of judgment based upon the verdict of the special judge.²⁴ Further, the rules of procedure and evidence apply to the proceedings in the same manner they would in the trial court.²⁵ Such rulings are subject to review in the appellate courts under the same standards that apply to any case.²⁶

Cost — Litigants and lawyers are learning that the suggestion that arbitration is faster and cheaper is not always true. It can be significantly more expensive than a special judge proceeding if a panel of arbitrators is employed. Additionally, there can be significant filing fees associated with arbitration.²⁷ The fee of the special judge, on the other hand, is split equally between the parties and there are no additional filing fees or costs in addition to those associated with the filing of the case.²⁸

Whether one works on a contingency basis or bills by the hour, uncertainty over when a case will be tried leads to increased costs. For the billing lawyer, it is necessary to prepare for trial every time the case is set and to bill the client accordingly. When the case is not “reached” and then reset months later, the client may have difficulty understanding why he or she was billed for something that did not happen. The client may become especially perturbed when this process repeats itself two or three times before the case is tried. The contingent-fee lawyer knows that time is money and that delays in setting the case merely prolong the interest paid on money advanced for costs associated with the case, capital that remains burdened and cannot be used for other cases. As a result, the certainty of a trial setting may well offset the per diem expenses associated with the fees of the special judge.

Convenience — The certainty of scheduling is enhanced under the special judge procedure. With an arbitration tribunal, scheduling as well as the issuance of the final opinion can be delayed as the members of the panel struggle to find time in their respective schedules for

deliberation. A case proceeding under the special judge provisions may be the only case of its kind on the judge’s docket. The lawyers can usually pick the dates they prefer and take comfort in knowing that, absent unusual circumstances, the case will be tried on that date. Most lawyers will agree that an impending trial date is by far the most influential factor in reaching a settlement of the matter. On the other hand, if both sides agree to a continuance of the trial setting, it is rare that the judge will require any showing of good cause in addition to the agreement of the parties.

Conclusion

While personal injury cases may not lend themselves to the use of a special judge, the process can be useful in complicated commercial cases. Such cases typically require the trier of fact to review numerous documents, consider the practices and policies unique to that industry, and apply a sophisticated legal analysis to such evidence. A former or retired judge who has performed such tasks on a routine basis over the course of his or her judicial career may be a prudent alternative for lawyers to consider.

Notes

1. Tex.Civ.Prac. & Rem.Code Ann. Section 151.001 (Vernon Supp. 1992)
2. Tex. Civ. Prac. & Rem. Code Ann. Section 151.002
3. *Id.* Section 151.001
4. *Id.* Section 151.004
5. *Id.*
6. *Id.* Section 151.001
7. *Id.* Section 151.003
8. *Id.* Section 151.010
9. *Id.*
10. *Id.* Section 151.005
11. *Id.* Section 151.008
12. *Id.* Section 151.006
13. *Id.* Section 151.009
14. *Id.*
15. *Id.*
16. *Id.* Section 151.011
17. *Id.*
18. *Id.* Section 151.012
19. *Id.* Section 151.013; *See also Baroid Equip. Inc. v. Odeco Drilling, Inc.*, 64 S.W.3d 504 (Tex.App. — Houston [First Dist.] 2001, no pet.)
20. *See* Tex. Civ. Prac & Rem. Code Ann. Section 171.088; *CVN Group, Inc. v. Delgado* 95 S.W.3d 234 (Tex. 2002).
21. *See* American Arbitration Association Rules

and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes) Amended and Effective July 1, 2003, R-31

22. *See* Tex.Civ. Prac. & Rem. Code Ann. Section 151.003
23. *See id.* Section 151.013; *Baroid Equip., Inc. v. Odeco Drilling, Inc.* 64 S.W.3d 504 (Tex.App. — Houston [First Dist.] 2001, no pet.)
24. *See* Tex. Civ. Prac. & Rem. Code Ann. Section 151.011
25. Tex. Civ. Prac & Rem. Code Ann. Section 151.005.
26. *Id.* Section 151.005, 151.006; *NCF Inc. v. Harless*, 846 S.W.2d 79 (Tex. App. — Dallas 1992, orig. proceeding).
27. *See* American Arbitration Association Rules and Mediation Procedures, *supra*, R-49; R-52.
28. *See* Tex. Civ. Prac. & Rem. Code Ann. Section 151.009

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