



Private judging with a stipulated “temporary judge”

AN ADR ALTERNATIVE

This article *concentrates* on the appointment, duties, and payment of a *stipulated temporary judge*, who is a court-appointed California State Bar-licensed attorney to hear a matter as a private judge in a semi-private setting. (Cal. Rules of Court, rules 2.830-2.834.) Although discussed, this article does not concentrate on a temporary judge who *sits in a court* on the assignment of the presiding judge in traffic, small claims, and other subject-matter courts. (Cal. Rules of Court, rules 2.810 through 2.819.) [Reference to the California Rules of Court is sometimes stated within this article as “rule.”]

Note that the California Style Manual, Fourth Edition, section 5.31, states that the designation of a temporary judge sitting by *stipulation* of the parties is to be designated on the pleadings as “Temporary Judge” (not “judge pro tem” or “judge pro tempore”) *followed by* the parenthetical notation: “(Pursuant to Cal. Const., art. VI, § 21).”

ADR decision-makers

In addition to sitting public judges who render decisions, California allows three alternative dispute resolution (ADR) decision-makers outside of an official court setting. The three ADR decision makers are:

- **Arbitrators** chosen by the parties under the California Arbitration Act (CAA) or the Federal Arbitration Act (FAA).
- **General reference referees** court-appointed under Code of Civil Procedure section 638, subdivisions (a) and (b) – for a discussion, see this author’s September 2021 Advocate article entitled “Discovery referee appointments.”
- **“Temporary judges,”** stipulated to by the parties, are authorized under the California Constitution, article VI, section 21, and the California Rules of Court. A temporary judge must be a California State Bar-licensed attorney or a retired judge who has renewed his or her State Bar license. A sitting superior court judge appoints the stipulated temporary judge.

Distinguishing a temporary judge from a general reference referee and arbitrator

There are basic rules that distinguish an agreed-upon *stipulated* temporary judge from an arbitrator and a general reference referee. A stipulated temporary judge takes an oath and can enter a judgment *and* rule on post-judgment motions, whereas arbitrators and general reference referees have no such powers. More specifically:

- *The stipulated temporary judge’s oath:* A stipulated temporary judge is required to take an oath of office. (Cal. Rules of Court, rule 2.831, subd. (b) and Cal. Const., art. VI, § 21.) Whereas general reference referees and arbitrators have no statutory duty to take an oath. (See *Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, (1996) 45 Cal.App.4th 631, 636. Also see *Kajima Engineering and Construction, Inc. v. Pacific Bell* (2002) 103 Cal.App.4th 1397.) Once a stipulated temporary judge takes the oath of office, he or she has the same authority as a sitting



superior court judge. They are both bound by the same rules of evidence, procedures, and disclosures. The oath is administered by a judge or court clerk at the time of appointment.

- *Power of a stipulated temporary judge to enter judgment and post-judgment orders:* “Temporary judges, during the term of their appointment, are superior court judges, just like a regular sitting judge.” (See *In re Marriage of Assemi* (1994) 7 Cal.4th 896, 908.) Arbitrators and general reference referees have no such power.

- *Post-judgment:* A stipulated temporary judge can inform the court clerk to enter a judgment *and* has the power to *hear and rule on post-judgment motions*, such as a motion to vacate the judgment. *General reference referees and arbitrators* have no such powers. The temporary judge is empowered to render an appealable decision in the same manner as a regular judge. (See *In re Marriage of Assemi* (1994) 7 Cal.4th 896, 908.)

- *Arbitrators distinguished:* An arbitrator appointed in compliance with a pre-dispute arbitration agreement under the scheme of the California Arbitration Act (Code Civ. Proc., § 1280 et seq.) differs from a stipulated temporary judge. The arbitration proceeding is not governed by rules of evidence or judicial procedures applicable to superior court trials. The arbitrator issues an award rather than a final appealable judgment, and a party must petition the court to confirm, correct, or vacate the arbitration award. Additionally, an arbitrator has broad and conclusive powers, and an arbitrator’s decisions are generally not reviewable for errors of law or fact. (See *In re Marriage of Assemi* (1994) 7 Cal.4th 896, 908.)

- *General reference referees distinguished:* Unlike a stipulated temporary judge appointed by the trial court, a general reference referee appointed by the trial court under Code of Civil

Procedure section 368 has no post-judgment powers. (See *Yu v. Superior Court (Bank of the West)* (2020) 56 Cal.App.5th 636.)

Constitutional authorization for appointment of a stipulated temporary judge

A court-appointed temporary judge stipulated to by the parties has authority to perform the duties of a superior court judge under the California Constitution, article VI, section 21, and the California Rules of Court, rules 2.810 through 2.834. The California constitutional provision, article VI, section 21, states:

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.

There is no known statute controlling the appointment of a stipulated temporary judge, nor is there a known statute establishing the requirements for a stipulated temporary judge. The constitutional article and the court rules strictly govern the appointment and control of the stipulated temporary judge. However, *administrative* control of temporary judgeships is by a trial court judge under California Rules of Court, rules 10.740 through 10.746.

Types of cases heard by a stipulated temporary judge

Although most stipulated temporary judges are selected to hear family-law cases, the constitutional provision does not limit the type of case that a stipulated private judge can hear. For example, see the unpublished case of *Nydrle v. Willems* 2013 WL 4047134, where the claim involved vintage automobiles. Also, note that JAMS advertises its temporary judges are available to hear healthcare, insurance, personal injury, employment disputes, and other matters. Jury trials conducted by an appointed temporary judge appear to be within a temporary judge's broad powers, although this writer has found no authority.

Temporary judges requested by the parties

Court appointment of a temporary judge requested by stipulation of the parties is, with minor exceptions, controlled under rules 2.830 through 2.834. These appointments are ADR appointments permitted under article VI, section 21, of the California Constitution. The rules for appointment of a temporary judge agreed to by the parties are:

- *Appointment by written stipulation of the parties.* The stipulation must be written and state the name and office address of the "member of the State Bar" agreed upon to be the private temporary judge. (Rule 2.831(a).)
- *Approval of the stipulated appointment:* The parties request the appointment by submitting a stipulation and proposed order to the presiding judge or a judge designated by the presiding judge. The order is signed by the judge and filed with the court. (Rule 2.831(a) & (b).) (For an example of a stipulation form for the appointment of a temporary judge, see Los Angeles County Superior Court form entitled "Stipulation and Order for Appointment of Privately Compensated Temporary Judge." (LASC FAM 200, New 05/20.)) Also, some ADR providers, such as ARC, have boilerplate forms.)
- *State Bar licensed attorney:* The temporary judge appointee must be a *State Bar licensee*. (Cal. Const., art. VI, § 21.)
- *Stipulated temporary judges can be paid by the parties.* Rule 2.832 allows the parties to pay for the services of an appointed stipulated temporary judge *only* if the parties agree in writing to a compensation rate. Also, see rule 2.830(b) defining privately compensated temporary judges to mean "the temporary judge is paid by the parties." Note that an appointed stipulated temporary judge who sits *pro bono* has the same powers as one who is compensated. (Rule 2.830(a).)
- *Executed signature requirements:* To qualify as a temporary judge, the appointee is required to take an oath of office (Cal. Const., art. XX, § 3.), certify awareness of and compliance with canon

6 of the Code of Judicial Ethics, and certify awareness and compliance with applicable provisions of the California Rules of Court. (Rule 2.831(b).) (For an example of a stipulation form for the appointment of a temporary judge, see Los Angeles County Superior Court form entitled "Stipulation and Order for Appointment of Privately Compensated Temporary Judge." (LASC FAM 200, New 05/20).)

- *Five-day disclosure rule:* An appointed temporary judge has five days to disclose to the parties any prior dealings with any party or make disclosure of such dealings "as soon as practical." (Rule 2.831(d).) (See *Jolie v. Superior Court (Pitt)* (2021) 66 Cal.App.5th 1025, review denied, for interpretation and application of the disclosure rules.)
- *Disqualification:* Noncompliance with any Code of Judicial Ethics rule requires self-disqualification by the appointed temporary judge. (Rule 2.831(e).) (See *Jolie v. Superior Court (Pitt)* (2021) 66 Cal.App.5th 1052-1053, review denied, where a violation of canon 6D(5)(a) was found.)
- *Motion to withdraw stipulation of the parties to appoint a temporary judge:* Under Rule 2.831(f), if the motion to withdraw a stipulation is granted, the presiding judge must assign a further hearing or trial of the case "as promptly as possible."
- *Documents and exhibits:* An appointed temporary judge must comply with Rule 2.400 regarding the filing and handling of documents and exhibits. Specifically, subdivision (d) sets access rights to documents filed with the court.
- *Open proceedings requirement and public accessibility:* See rule 2.834 requiring an open, public access proceeding. (Also, see Super. Ct. L.A. County, Local Rules, rule 2.24(b), which limits the privacy of the hearing or trial conducted by the stipulated temporary judge.)
- *Court facility:* The use of court facilities by a stipulated temporary judge is only permitted if it "would further the interests of justice." Otherwise, the proceeding conducted by a stipulated temporary judge is to "proceed outside court

facilities.” (Rule 2.834 (c).) (Signature Resolution, for example, has a full-service courtroom constructed in its Century City office complex.)

Authority and power of a temporary judge

Upon taking the oath of office as a temporary judge, the temporary judge has the same authority and power as a superior court judge and is bound by the same rules of evidence and procedures applicable in a superior court trial. The temporary judge’s decision is an appealable judgment as if made by a sitting superior court judge. (See *Marriage of Assemi* (1994) 7 Cal.4th 896, 908.)

There are *two exceptions* to a stipulated temporary judge’s powers that require superior court action. They are (a) motion or application to *seal records* and (b) motion for leave to file a *complaint for intervention*. (Rule 2.835.)

Compensating the stipulated temporary judge

- *Compensation of the private judge* by the parties. (Rule 2.830 (c).) Also, see Rule 2.832, allowing financial compensation *only* if the parties agree in writing to a rate of payment the parties are to pay.
- Under Penal Code section 94, a sitting judge who receives compensation from a party commits a misdemeanor. However, a 1993 amendment to section 94 prescribed an exception that allows for payment of agreed-upon temporary judges: “The lawful compensation of a temporary judge shall be prescribed by Judicial Counsel rule.”
- In 2006, the Judicial Council created the following rule: “The parties may not

compensate a temporary judge selected by the parties *unless* the parties agree in writing on a rate of compensation that they will pay.” (Rule 2.832.) (Emphasis added.)

Disqualification rules of a stipulated temporary judge

Ethical standards for stipulated temporary judges are set forth in the California Code of Judicial Ethics, canon 6(D). (https://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf) and Code of Civil Procedure sections 170.1 and 170.3. These ethical standards also apply to referees appointed under Code of Civil Procedure sections 638 and 639. (Ethical rules for general referees are discussed in this author’s September 2021 Advocate article, entitled “Discovery referee appointments.”)

Code of Judicial Ethics, canon 6(D), however, has no application to privately compensated *neutral arbitrators*. These arbitrators are separately governed by Code of Civil Procedure section 1281.85, subdivision (a) and the Ethical Standards for Neutral Arbitrators in Contractual Arbitration. (<https://www.courts.ca.gov/cms/rules/index.cfm?title=ethics>) For a discussion of neutral arbitrator ethical rules, see *Roussos v. Roussos* (2021) 60 Cal.App.5th 962, 971 and *Honeycutt v. JPMorgan Chase Bank, N.A.* (2018) 25 Cal.App.5th 909.

An appointed temporary judge’s failure to make mandatory disclosures of prior professional relationships with a party’s counsel “might cause an objective person” aware of all of the facts, reasonably to entertain a doubt as to the impartiality of the chosen temporary judge. (See *Jolie v. Superior Court* (Pitt)

(2021) 66 Cal.App.5th 1025, 1032, review denied.)

Conclusion

Stipulating to an attorney to sit as a private temporary judge, with all the powers of a superior court judge, has appeal to parties waiting for a trial court assignment or parties wishing for a degree of privacy. The temporary judge retention is another ADR procedure for resolving cases.

If the rules are correctly followed, the appointed attorney can decide all issues, including post-judgment issues, in a setting not at the courthouse. At first blush, one would think such trials are in an exclusive setting; the public, however, is allowed (but unlikely to appear) to attend the proceedings under rule 2.834.

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