Is Justice Served?

> Hundreds of judges have deserted the bench to enrich themselves in a system of private arbitration. The arena is largely unregulated and tilted, many say, in favor of big business and against the little guy.

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October 22, 2006

After nine years of hearing family law cases in her Santa Monica courtroom, Jill Robbins was tired—tired of schlepping files home every night, tired of yapping litigants who didn't really understand the process, tired of not being appreciated, tired of earning the equivalent of a junior lawyer's pay.

"I wasn't enjoying myself," Robbins says, with considerable understatement.
About the same time, a number of retired judges were telling Robbins about the piles of money she could make by hiring herself out to wealthy couples looking to resolve their divorces quietly.

"They said, 'Oh my God, there's so much business out here; if you're thinking about it, this is the time,'" she recalls.

Not only did Robbins think about it, at least two attorneys remember her talking about it—openly from the bench. They say that, shortly before giving up her commissioner's robe in 1995, Robbins announced during a hearing that she had turned in her resignation and would be starting in private practice in about two months. Then, they add, Robbins asked the lawyers who were present to keep her in mind.

Apparently, many have. Robbins is now one of the city's top private family law judges, commanding $600 an hour. Her cases have included the Brad Pitt/Jennifer Aniston split and Charlie Sheen's breakup with Denise Richards.

Robbins denies soliciting business in her courtroom. "That would have been improper," she says. "I did not do that." But Robbins allows that word of her departure might have gotten out. People were calling to hire her, she acknowledges, even before she left government service.

It's no mystery why. The pay-for-justice phenomenon extends nationwide, generating hundreds of millions of dollars in business a year. (Nobody has an exact figure.) But it's most prevalent in California, where a largely unregulated private system now handles more commercial cases than do the courts, according to some in the industry.

In fact, Robbins is one of hundreds of judges who have abandoned the bench to enrich themselves by working in the private sector. Among them are four former California

Supreme Court justices who settle disputes for arbitration companies that hawk them like merchandise. Stephen Reinhardt, who sits on the federal appellate court in Los Angeles, once compared such marketing to "the rivalry between Alka-Seltzer and Pepto-Bismol."

The effect of all this is threefold. First, it has meant that a large number of cases are being decided out of public view, leaving no record or legal precedent for others to follow. Second, it has left the courts—with its overload of cases and myriad other challenges—without some of its most experienced jurists. Meanwhile, many of the best have walled themselves off behind what is, in effect, a gated community.

Now, if you're rich, you not only can afford to send your kids to the best schools and obtain the best healthcare and employ the best lawyers, but you can hire the best judges too. Says California Supreme Court Chief Justice Ronald George: It's a "two-track system of justice—one for people who can decide which trial service they want and which judge they will pick" while "others stand at the end of the line."

"We're doing the luxury spa," adds former judge and arbitrator Richard Hodge, "rather than the public swimming pool."

Not that the less-well-heeled don't find their way into the private arbitration arena. Which brings up my third point: Large companies are using arbitration to diminish many hard-won consumer rights.

Through boilerplate clauses buried in take-it-or-leave-it contracts, those who sign up for medical care, credit cards and other essential services are being forced to go into arbitration if they have a beef, thereby relinquishing the protections of the courts and the law. A 2004 study by Stanford law professor Deborah Hensler and Rand Corp. researcher Linda Demaine found that more than 55% of consumer contracts have such clauses, leaving the public at the mercy of private judges who can rule with almost no accountability.

> ***55.1%: The percentage of consumer contracts that have mandatory arbitration clauses.***

And take a guess: When private judges are deciding between a big company and you, which way do you think they tend to lean?

Until his retirement in 2004, Mitchell Shapiro was one of the city's leading franchising attorneys. I practiced law with him for six years in the 1990s. Long afterward, he worked at a large firm representing a franchise chain in an arbitration against an individual franchisee.

"You're not going to lose," Shapiro says one of his partners assured him. The firm sent the arbitrator so much business, the partner explained, "he has never decided against

us." Sure enough, Shapiro says, "on a very close case he came down in our favor."

Outsourced justice bears little resemblance to what goes on inside the system. A big reason is this: Public judges are assigned work randomly and have no stake in the cases they preside over. By contrast, private judges are chosen by the parties involved—and it's often the one with the most leverage that really makes the call. That changes the calculus considerably.

"Private judging is an oxymoron because those judges are businessmen. They are in this for money," says J. Anthony Kline, a state appellate justice in San Francisco. "In this state, there are tens of thousands, probably hundreds of thousands and, for all I know, millions of disputes that are being resolved by decision makers who are not truly independent."

If they try to be, the risk is clear: They may not get hired again.

I have had an insurance company that very noticeably did not hire me further after I ruled against them in arbitration," Hodge says. "You would have to be unconscious not to be aware that if you rule a certain way, you can compromise your future business."

In 2002, California passed a law requiring arbitration companies to make detailed disclosures about the cases they administer. The idea was to assure consumers that arbitration providers weren't favoring repeat users—namely businesses. However, a 2004 report by the California Dispute Resolution Institute, a private research group, found that because the disclosures have been incomplete, the core question of "whether a 'repeat user bias' exists in consumer arbitration cannot be addressed."

Some, though, have little doubt what the numbers would show. As one private judge put it to me: "There's an inclination on the part of 'neutrals' to know where their bread is buttered. They're going to be neutral, but they'll be more neutral for some than others."

From 1985 to 2004, when I was an attorney representing a mix of businesses and individuals, I saw a steady increase in the number of cases going into "alternative dispute resolution," a catchphrase including both private arbitrations and mediations (in which the "neutrals" try to cajole the parties to settle).

And, believe me, it wasn't all bad. ADR often provided a more streamlined process, which I welcomed. Because the proceedings were held outside the courts, I didn't have to follow a bunch of complicated—and often needless—rules. What's more, private judges could be counted on to give me and my opposing counsel something all too rare in the harried courts of California: their full attention. Rather than our case being part of a crammed docket, it was treated as if it were the only one in the world.

That's a huge selling point for someone like Jill Robbins. Sitting in the conference room

in her husband's Westside law office, the perfectly coiffed, Prada-bagged 60-year-old touts the high level of service her clients receive. "They're going to get my undivided time," she says. "There are no interruptions. You don't get that when you're in the court system."

Robbins also prides herself on keeping her mouth shut. "You're talking famous people, you're talking people who have a lot of money, you're talking people who just don't want other people knowing their business." In the confines of a law office, "you have a better chance of privacy than you have when you're walking down the halls of the courthouse."

Still, as time wore on and the private-judging industry grew, I began to focus on something else: Judges were going to unsavory lengths to land good positions. In the mid-1990s, I remember, I was defending a reluctant Brentwood property seller against a buyer. After the buyer refused to answer five deposition questions, I filed a motion to compel discovery. It was an important motion, but pretty routine.

When it came up for a hearing, Superior Court Judge Lawrence Waddington said he wouldn't decide it himself but, instead, would refer the matter to a private arbitrator. As I remember it, he said something like: "I can see that you guys aren't getting along. You need a discovery referee."

I replied that we didn't, but Waddington didn't budge. He ordered us to hire a private referee, and we wound up with one represented by a company called Judicial Arbitration and Mediation Service, or JAMS. The deposition questions finally got answered as a retired judge sat in the room, watching us and racking up billable hours. A few weeks later, as I sifted through a stack of junk mail at my office, I spotted an announcement from Waddington. He had joined JAMS and was now himself available for hire. I shook my head.

Waddington told me recently that JAMS was wooing him six months before he retired, offering him a $100,000 advance against his fees. He says he never meant to benefit JAMS when he referred out my motion, and that his clerk would have worked off a list of private judges that could have come from any company. But at the same time, he adds, "JAMS was the only game in town." Waddington is still there, pulling in $400 an hour.

Congress enacted the Federal Arbitration Act in 1925, making arbitration agreements enforceable like other contracts, and arbitration has long been a tool in labor disputes. But it wasn't until the 1970s that private judging began to take hold more generally, thanks to a prominent Los Angeles attorney named Hillel Chodos.

Chodos found himself working on a case about a business deal gone bad between some lawyers and their client—a matter so complicated that he thought it needed a level of focus the courts couldn't provide. So he and his opposing counsel found an

obscure rule allowing a retired judge to return to the bench temporarily to hear their case.

Retired judges would sometimes act as arbitrators back then, Chodos says, but most charged little or nothing. Chodos and the other lawyer "concluded, innocently enough, that it wasn't fair to ask him to serve when we were getting hundreds of dollars an hour," Chodos recounts, so they paid him "lawyer's wages."

The judge "was like a kid with a new toy," Chodos says. "He never made any money on the bench. It was a brand-new idea. He kept giggling about it."

Soon, word got out. "This is exactly what created the industry," Chodos says. "I feel like I created a Frankenstein."

A monster it has indeed become. As the courts got ever more crowded in the 1980s and '90s—when it would often take five years for a civil case to wend its way to trial—the demand for alternatives intensified. Services such as JAMS popped up to meet it.

The growth of the industry was also fueled by a series of court opinions that broadened the range of cases available for arbitration and cut off challenges to arbitration awards. In a crucial 1992 decision, Moncharsh vs. Heily & Blase, the state Supreme Court held that an arbitrator's award can stand even if it is legally wrong and causes "substantial injustice."

The result is that California now has a second legal system in which arbitrators "can rule on the basis of the tea leaves," Hodge says. "The fact is that arbitrators make mistakes . . . and there is no appeal if I make a stupid or diabolical mistake, or one that is made in bad faith. The parties are on their own."

Four years after the Supreme Court handed down its ruling in Moncharsh, the opinion's author, former state Chief Justice Malcolm Lucas, went to work for JAMS. He charges $6,500 a day, according to a company fee schedule dated January 2006. Former Justice Edward A. Panelli, who also signed the decision, is now at JAMS too. His rate: $7,500 a day.

Many in the ADR industry are reluctant to talk about the ins and outs of what they do. Not Lucie Barron.

Perhaps that's because the Australian-born owner of Los Angeles-based ADR Services isn't an attorney. A voluble single mother of seven, Barron isn't one to wrap herself in a lot of high-minded talk about justice.

"The whole business of resolving disputes is market-driven," she says. And when marketing judicial talent, it pays to have judges on your roster with name recognition. "We fight like crazy over the highly regarded judges. If people tell you we don't, it's not

true."

Barron's company represents about 85 retired judges. In 12 years, she has built her firm into an ADR "supermarket." Some of her private judges make $1 million a year, after Barron takes a 25% to 28% cut.

> ***$1,000,000: The estimated annual income of a top-tier retired judge acting as a private arbitrator.***

In recent years, the courts have applied certain restrictions to sitting judges looking for private jobs, but Barron says they still find each other. She researches prospects to determine what "market segment" they might fit into. Some judges won't ever work, she explains, because they "think they are a lot better liked and respected than they really are."

Barron meets the judges—sometimes in their courtrooms—to make her pitch. She also teaches them how to improve their prospects when they go private, advising them to collect lawyers' business cards for mailing lists, cultivate a reputation for settling cases and raise their public profile. One thing she doesn't do is tell cranky judges to be pleasant to lawyers. After all, she says, it goes without saying: "If you want to try to get business, you have to be good to the people who are going to be your clients."

Of course, it's tough to stay too grouchy as a private judge, what with all the cash you're raking in. Most California judges make $150,696 annually—hardly chump change, but not much more than starting lawyers at big firms receive. Top-tier private judges, by contrast, charge as much as $10,000 a day.

"The financial aspect of it is amazing," says David Rothman, a retired judge who now makes $600 an hour. "I never made any money as a judge or a lawyer."

For some, it's simply too much to turn their backs on. "I've had some judges tell me that there's nothing they would rather do than stay in their public position," says George, the chief justice, "but they have a responsibility to put their kids through college, and they can't do it as a judge."

Long-standing judges also have a pension plan that encourages retirement. If they reach age 60 and have served for 20 years, they are eligible for most of their salary. If they stay longer, they still pay into the plan, but with no added benefits. The diminishing returns of public service have fostered a culture in which many judges feel as if they're "passing through the system on their way to better-paying jobs," Reinhardt, the federal appellate judge, said in a speech.

It is a transition made with little shame. Arbitrator Norman Brand recalls one retirement party announcement for a judge going into private arbitration. The invitation, he says, was covered in dollar signs.

If there was ever a tool for consumers to level the playing field against the largest corporations, it's the class-action lawsuit, whereby a bunch of relatively small claims against a company are pooled into a single massive case. But in recent years, companies have figured out a way to try to immunize themselves from this threat: They've inserted prohibitions against class actions into their arbitration agreements.

The practice has not come without controversy. Declaring that contractual restrictions on class suits are "inappropriate," JAMS announced in 2004 that it would start to "ensure fairness" by ignoring such prohibitions and letting class arbitrations go forward. But then Citibank, Discover Card and American Express fought back, writing JAMS out of their arbitration accords.

Within a few months, JAMS reversed itself and announced that it would decide class actions on a case-by-case basis in each state. California now prohibits restrictions on many class arbitrations. Other states, notably New York and Delaware, let companies bar them.

John "Jay" Welsh, JAMS's general counsel, denies that the company changed its policy under pressure. He also says that consumer cases are a small percentage of JAMS's business, so the firm wasn't concerned about losing Citibank, Discover Card and American Express as clients. (Representatives for the credit card companies declined to comment.)

During the same period, another industry giant called the American Arbitration Assn. also appeared to give in to at least one company trying to bar class arbitrations. When it looked like it was going to allow a class action against AT&T, the telecommunications company's lawyers wrote to AAA President William K. Slate II. The March 2005 letter referred to the "exodus" of clients from JAMS and implied that the AAA would also lose business if it let the class action proceed.

The AAA later reversed itself and barred the class action against AT&T. Slate told me that he doesn't recall the case. The AAA's general counsel, Eric Tuchmann, declined to comment, but notes that the firm administers many class arbitrations.

As I dug deeper and deeper into the world of private judging, I came across no shortage of horror stories from people who found themselves, often unwittingly, caught up in arbitration.

There was, for instance, Connie Nagrampa, who got into a tussle with MailCoups Inc., a Massachusetts company she served as a franchisee selling direct-mail advertising. Her agreement with MailCoups included a clause requiring the arbitration of disputes, and after Nagrampa's business failed, the company tried to recover $80,000 it said it was owed.

Nagrampa lives in the Bay Area, but MailCoups initiated the arbitration against her in Los Angeles. California law generally requires that people be sued near their homes, but that standard doesn't apply in arbitrations. Nagrampa protested that she had too little money to travel, but rather than move the proceedings closer to her, the private judge at AAA transferred it farther away—to Boston. The AAA arbitrator then held the hearing without Nagrampa and ruled against her, awarding MailCoups $165,000. No explanation was given in the arbitration decision.

The five-year-old case is still circulating in the appellate courts, with no end in sight. "I got the feeling by the way I was treated that I was going to lose no matter what," Nagrampa says. "I just think the little guy has no chance in arbitration."

Then there was Eve Curtis. In 1999, the jewelry designer received a notice with her MBNA credit card bill saying that unless she objected immediately, all disputes would be arbitrated through an outfit called the National Arbitration Forum. Most people simply discard these envelope stuffers, but Curtis actually read it and sent in an objection.

When MBNA later started an arbitration against her for allegedly unpaid bills, she reminded them that she had rejected arbitration. The arbitrator entered a $28,000 award against her anyway. She was able to undo the ruling only after lengthy legal proceedings, according to documents filed in Superior Court in Massachusetts, where Curtis lives. The NAF arbitrator, Paul Rabchenuk, declined to comment.

"It's terrifying to be put through this process," Curtis says. "Every time I tried to communicate with the NAF or one of the attorneys, they just ignored me. It was decided against me before it started."

Of all the cases I learned about, however, perhaps the most unsettling involved Kaiser Permanente.

When attorney Russell Kussman agreed to represent Niaomi Franco, who was born in Kaiser's Fontana hospital with permanent brain damage, he felt he had an uphill climb. Franco's parents, he says, alleged that Kaiser had waited too long before performing a Caesarean section—a claim of negligence that the healthcare provider denied.

At the least, Kussman was determined to go before an arbitrator who didn't depend on Kaiser's business. He chose Robert Altman, a former Superior Court judge in Los Angeles, because Altman's disclosures showed no recent or ongoing work for Kaiser.

But as it turned out, the disclosures were incomplete, according to documents filed in state Superior Court in San Bernardino. Altman had done a lot of work for Kaiser, including a recent birth injury case in which he ruled for the company.

Kussman says he didn't learn of this, however, until after he lost the case. No one

accused Altman of omitting the information on purpose; he said in a court declaration that he believed his company, Lucie Barron's ADR Services, would provide it. The firm's failure to do so, he added, was unintentional. Even so, Kussman says he wouldn't have used Altman if he had known all the facts. The court reversed Altman's award, and a new arbitration is scheduled for December.

Even if there is full disclosure this time, Kussman believes he is stuck in a system that is "by its nature corrupt." Jurors don't care about pleasing Kaiser, but any arbitrator "knows that whatever he rules, Kaiser is going to look at it and decide whether they're going to use him again. It's as simple as that."

Kaiser's lawyer, Denise Taylor, challenges the idea that arbitrators are loyal to the company and says she loses more medical malpractice cases in arbitration than in court. "If an arbitrator finds for the defense too many times," Taylor says, "he or she will be blackballed by the plaintiffs' bar. It goes the other way just as much."

Still, because arbitration clauses are often buried in fine print, employee manuals or the junk that comes with credit card bills, "people are obviously entering into these agreements without any understanding of what rights they're giving up," Ronald George says.

I do know what I gave up. To write this story, The Times made me sign a contract in which I "waive and give up any right to a jury trial" if I wind up with a grievance against the newspaper. Instead, I've got to use JAMS. I'd rather have a jury than a JAMS judge decide such things. But, practically speaking, I had no choice.