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Analysis of a First Amendment Challenge to Rent-A-Judge Proceedings

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California Practicum

The California Practicum is a series of articles dealing with subjects of significance to California attorneys. The purpose of the Practicum is to inform the reader of practical problems on the cutting edge of California law in both the state and federal forums, and to act as an initial resource for finding solutions to those problems.

Analysis of a First Amendment Challenge to Rent-A-Judge Proceedings

I. INTRODUCTION

Most plaintiffs that bring civil actions in the courts today are faced with a crowded court docket that delays their case for years. Once a case has been properly filed within the statute of limitations in Los Angeles, for example, it falls into a line approximately five years long to reach the hearing stage.¹ One author noted that in 1981 there were more than 73,000 cases awaiting trial in these courts.² Many plaintiffs want something faster and are willing to pay for it. The rent-a-judge justice system is just what is needed by those who do not want to wait and are willing to spend the extra money.

The rent-a-judge procedure was authorized by California state law in 1872.³ However, very little use was made of the procedure until

1. Myers, *Rent-a-Judge in California*, 131 NEW L.J. 1042 (1981).

2. *Id.* at 1043.

3. CAL. CIV. PROC. CODE § 638 (West 1976 & Supp. 1987). Five other states—Nebraska, New York, Oregon, Rhode Island, and Washington—also have procedures in which all parties can stipulate to have a private person rule on a pending lawsuit with the same force and effect as a constitutional judge. See NEB. REV. STAT. §§ 25-1129 to 25-1137 (1979); N.Y. CIV. PRAC. L. & R. 4301-4321 (McKinney 1963 & Supp. 1987); OR. REV. STAT. §§ 3.300-3.321 (1985); R.I. GEN. LAWS §§ 9-15-1 to 9-15-21 (1985); and WASH. REV. CODE ANN. §§ 4.48.010-4.48.130 (1962 & Supp. 1987).

See also SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, THE ELEMENTS OF GOOD PRACTICE IN DISPUTE RESOLUTION 283-84 (C. Cutrona ed. 1984). The Honorable

the mid-1970's when some Los Angeles attorneys rediscovered the statute in the California Code of Civil Procedure and employed it to avoid the backlog of cases in court.⁴ From that point forward, an increasing number of cases have been resolved by private judges who are paid by the parties to these cases. These judges are known as rent-a-judges.

The rebirth of the rent-a-judge statute has not come about completely trouble-free. Many questions have been raised regarding the different constitutional issues this method of private justice raises.⁵ This comment will focus on one of these issues that has not yet been specifically decided in the courts. The primary concern is what first amendment rights the general public has to demand access to court proceedings and how the established rent-a-judge proceedings comply with any rights that may exist.

The first section of this article will examine the statutes in issue and the procedures used to implement them. The next section will examine the nature of the rent-a-judge (or reference) proceedings. The third and fourth sections will address the question of whether the public has any first amendment right to attend civil trials. Next, the secrecy of reference proceedings will be examined. In the final section of the article, the possible conflicts between any rights of access and private property rights will be analyzed.

II. FUNCTION OF A RENT-A-JUDGE PROCEEDING

The chapter in the California Code of Civil Procedure which grants authority for the rent-a-judge proceedings is entitled "Of References and Trials by Referees."⁶ As this title indicates, the statutory term for the proceedings is a reference and the rent-a-judge himself is properly called the referee.⁷

"A reference may be ordered upon the agreement of the parties"⁸ All that is required for a case to be taken up in a reference proceeding is that the parties file either a petition or a stipulation with the court. The court will then appoint a referee to hear the

H. Warren Knight, former Judge of the California Superior Court, now is the head of an organization that offers private resolution of civil disputes through mediation, arbitration, or any other format that is agreeable to the parties. The organization, Judicial Arbitration and Mediation Service, Inc., is located in Orange County, California and is well known for its use of the rent-a-judge procedure. *Id.* at 272.

4. Coulson, *Private Settlement for the Public Good*, 66 JUDICATURE June-July 1982, at 7.

5. See Note, *The California Rent-a-Judge Experiment: Constitutional and Policy Considerations of Pay-as-You-Go Courts*, 94 HARV. L. REV. 1592 (1981) (the article mentions equal protection, due process, and first amendment issues).

6. CAL. CIV. PROC. CODE §§ 638-645.1 (West 1976 & Supp. 1987).

7. *Id.*

8. *Id.* § 638.

case.⁹ If appropriate, however, the court itself may order a reference on either its own motion or on the motion of one of the parties.¹⁰

Once the referee has been appointed, the court system itself is not involved until the conclusion of the proceedings.¹¹ The parties determine a time and a place to conduct the proceedings and may even stipulate to their own rules of discovery and evidence. All of this is done without filing any notice in the public record.¹² As a practical matter, parties employing this system can hide their reference hearings from the public by conducting the hearings in the privacy of their homes.

Once the proceeding has been completed, the referee must file a written report of his findings (the "statement of decision") with the court within twenty days.¹³ The report filed must contain the refe-

9. Rosenthal & Shapiro, *Invoking Private-Judge Dispute Resolution*, 4 CAL. LAW., Sept. 9, 1984, at 25. See also CAL. CIV. PROC. CODE §§ 640-641 (West 1976 & Supp. 1987).

10. See CAL. CIV. PROC. CODE § 639 (West Supp. 1987), which states as follows:

When the parties do not consent, the court may, upon the application of any party, or of its own motion, direct a reference in the following cases:

(a) 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.

(b) 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.

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

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

(e) When the court in any pending action determines in its discretion 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.

11. Interview with Arnold Pena, Office of the Clerk of the Superior Court (July 1986). Many proceedings are now done pursuant to article 6, section 21 of the state constitution which provides for a judge pro tem. This constitutional provision states, "[o]n 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." CAL. CONST. art. VI, § 21 (emphasis added).

Parties are able to avoid the reference proceedings and their attendant requirements and proceed under this provision. Greater problems are raised with this type of proceeding because it may be totally covert and there is no requirement that any findings be reported. It is possible, therefore, that there will be no public record of the proceeding outside of the appointment of the judge and the ultimate conclusion. Another issue that may cause difficulties under this provision is that the temporary judge has complete judicial power, including the power to commit for contempt. Myers, *supra* note 1, at 1042-43.

12. Rosenthal & Shapiro, *supra* note 9, at 27.

13. CAL. CIV. PROC. CODE § 643 (West 1976).

ree's findings of fact and conclusions of law.¹⁴ This report becomes a part of the public record and is available to whoever wishes to see it. The opponents of the rent-a-judge system are not satisfied with this method of reporting because they feel the reports are too sketchy and lack the detail necessary for a proper and complete evaluation of the case.¹⁵

III. ARE THESE COURT PROCEEDINGS?

A necessary step in the analysis of the rent-a-judge system is to determine whether or not reference proceedings are in fact court proceedings. It will be this distinction which determines the context of this discussion.

The authorizing statute states: "The decision of the referee must stand as the decision of the court . . . and upon filing of the statement of decision . . . judgment may be entered thereon in the same manner as if the action had been tried by the court."¹⁶ Furthermore, decisions made in reference proceedings are appealable in the same manner as are any other court's rulings.¹⁷

Any tribunal which exercises functions that are of a strictly judicial character is a court.¹⁸ Reference proceedings operate exclusively in a judicial capacity and are defined by statute to be synonymous in their function with the traditional courts.¹⁹ Therefore, it would be illogical to contend that references are not court proceedings since the legislature has drafted the authorizing statute to make the two methods of judicial dispute resolution functionally identical.

The California Code of Civil Procedure states that all court proceedings are open to the public.²⁰ Therefore, it would seem that the plain language of the statute solves any problems of exclusion by expressly ordering that court proceedings be open to the public. How-

14. Myers, *supra* note 1, at 1042.

15. Pena interview, *supra* note 11. Section 643 of the Code of Civil Procedure requires only a "statement of decision." CAL. CIV. PROC. CODE § 643 (West 1976). Mr. Pena indicated that this requirement is taken literally and the reports usually consist only of a brief statement of the ultimate decision. Pena interview, *supra* note 11.

16. CAL. CIV. PROC. CODE § 644 (West 1976).

17. *Id.* § 645. This section is what serves to separate rent-a-judge proceedings from arbitration. The full right of appeal makes this a private court proceeding unlike arbitration. *Contra* Coulson, *supra* note 4, at 8.

18. Chinn v. Superior Court, 156 Cal. 478, 482, 105 P. 580, 582 (1909). *Accord* CAL. CIV. PROC. CODE § 644 (West 1976), which states that the decision of the referee is the same as the decision of the court. In addition, the case is treated as a trial decision for all future purposes. *Id.* § 645.

19. CAL. CIV. PROC. CODE § 638 (West 1976).

20. *See* CAL. CIV. PROC. CODE §§ 34, 124 (West 1982). Section 34 states that all of the provisions in the Code of Civil Procedure apply to all courts that are not specifically exempted. *Id.* § 34. Section 124 requires courts covered by this code to hold all sittings in public. *Id.* § 124.

ever, the controversy regarding the exclusion of the public exists largely because of unduly wide acceptance of a statement made in the Harvard Law Review that the statute mandating open trials does not apply to reference proceedings.²¹ The article states, without citing substantial authority, that there is no obligation to admit the public to these "private trials."²² The article also states that the judges may be selected on the basis of their agreement to completely exclude members of the general public that request access.²³ However, the article concludes that since these proceedings are closed to the public, they are violative of the first amendment right of public access to court proceedings.²⁴

The fundamental problem with this assertion is that it has no support in case law and contradicts the controlling statutes. Since references are classified as court proceedings,²⁵ the controlling statutes require the proceedings to be open to the public.²⁶ However, since this issue has not been decided in the courts, it is necessary to determine if there is any constitutional right to attend a civil proceeding without an express provision of any statute. If there is such a constitutional right, an attorney representing a newspaper or other party interested in attending the proceedings could use the argument to force the parties to open the doors.

21. Note, *supra* note 5, at 1609 n.93. The author limits the applicability of section 124 to "courts of record." *Id.* However, the statute plainly states that "the sittings of every court shall be public." CAL. CIV. PROC. CODE § 124 (West 1982) (emphasis added).

22. Note, *supra* note 5, at 1598.

23. *Id.* at 1599-1600.

24. *Id.* at 1614. For a discussion of the first amendment right involved, see *infra* notes 27-76 and accompanying text.

25. See *supra* notes 16-19 and accompanying text.

26. CAL. CIV. PROC. CODE § 124 (West 1982). The analysis contained in the Harvard Law Review student note assumes that reference proceedings are, in fact, court proceedings. The problem this presents is that even if a reference is a court proceeding, it is not unconstitutional as section 124 of the California Code of Civil Procedure requires courts to be open to the public. *Id.* See also *supra* note 20. This is based on the fact that there are no cases involving the exclusion of the public from reference proceedings. If, however, the rent-a-judge hearing is not a court proceeding, and section 124 does not apply, then there is no constitutional problem in this case because the recognized constitutional right to attend court proceedings would not apply.

Therefore, the conclusion that rent-a-judge proceedings pursuant to section 638 of the California Code of Civil Procedure are violative of the first amendment is not supportable by the analysis found in the student article mentioned above. If reference proceedings are court proceedings, section 124 opens them to the public. If they are not court proceedings, any argument regarding the first amendment right to attend trials does not apply.

IV. FIRST AMENDMENT RIGHT TO PUBLIC ACCESS

Throughout the history of the common law, court proceedings have been open to the public. “[I]t is one of the essential qualities of a Court of Justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on . . . have a right to be present for the purpose of hearing what is going on.”²⁷ To close the doors to the sitting of any court in a denial of public access would conflict with the long-standing common law tradition.²⁸

This tradition has not been abandoned by modern courts. The United States Supreme Court has said that “[a] trial is a public event. What transpires in the courtroom is public property.”²⁹ Thus, the requirement that the doors of trial courts be open to the public has more than just a lengthy tradition to support it. It has been recognized that the public has a need to have access to the active operation of the judiciary.³⁰

A. *The Value of the Open Trial*

In our society’s republican system of self-government, the first amendment plays a fundamental role.³¹ There is a widely held notion that by opening the doors of the courts, the community is reassured that justice is being done.³² There is a certain community therapeutic value to public trials.³³ They allow a community catharsis that would not be possible if justice were done in a covert manner.³⁴ Justice Brennan has written that “[s]ecrecy is profoundly inimical to this demonstrative purpose of the trial process. 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.”³⁵ Dis-

27. *Daubney v. Cooper*, 109 Eng. Rep. 438, 440 (1829).

28. Comment, *Private Means to Public Ends: Implications of the Private Judging Phenomenon in California*, 17 U.C. DAVIS L. REV. 611, 639 (1984).

29. *Craig v. Harney*, 331 U.S. 367, 374 (1947). See also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality ruled that there is a first amendment right for the public to attend criminal trials that cannot be defeated by mere agreement of the parties and the court); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (criminal trial may be closed to protect rights of the accused). The *Richmond Newspapers* Court did not decide the question of access to civil trials but noted an historical presumption of open trials in both civil and criminal trials. *Richmond Newspapers*, 448 U.S. at 580 n.17.

30. *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring).

31. 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.” U.S. CONST. amend. I.

32. *Richmond Newspapers*, 448 U.S. at 593 (Brennan, J., concurring).

33. *Id.* at 570.

34. *Id.* at 571.

35. *Id.* at 595 (Brennan, J., concurring).

trust of secrecy is reflected in the principle that justice carried on behind walls of silence cannot survive.³⁶

1. Fairness Through Public Involvement

The open trial enhances the appearance of fairness in the system which is essential to public confidence.³⁷ The role of the first amendment is to insure the public that the government will not interfere with the communicative processes. While on the one hand there is a need to be free to speak, on the other there is the need to hear what the government is doing. It is through this process of verbal give and take that citizens are able to exercise the right of self-government. "[T]he First Amendment protects the structure of communications necessary for the existence of our democracy."³⁸ To do this, there must be a guarantee that the political society will be able to scrutinize the government and hold it accountable.³⁹ The very fabric of a self-governing society is woven with the confidence of the community in the operation of that system. If that confidence is lost, the structure will fail for lack of the necessary foundational support.

The public trial also serves as a check on those individuals in positions of authority who might be tempted to abuse their power and influence.⁴⁰ The open door policy in court proceedings serves to further the interests of justice by improving the quality of testimony and inducing unknown witnesses to come forward with relevant testimony.⁴¹ The pressure accompanying the knowledge that all of their conduct within the trials is open to scrutiny causes trial participants to perform their duties with greater care. This pressure also discour-

36. *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966) (Clark, J.) (citing *In re Oliver*, 333 U.S. 257, 268 (1948), which compares secret trials to the Spanish Inquisition). In *Sheppard*, a new trial was ordered because of the amount of publicity in the case which involved the bludgeoning death of the petitioner's wife. The Court recognized that the usual policy for an open trial was outweighed in that case by the probability of unfairness. *Sheppard*, 384 U.S. at 363.

37. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (guarantee of open proceedings in criminal trials extended to the *voir dire* examination of jurors).

38. Lewis, *Keynote Address: The Right to Scrutinize Government: Toward a First Amendment Theory of Accountability*, 34 U. MIAMI L. REV. 793, 805 (1980) (quoting Address by Justice William Brennan, Rutgers Law School (Oct. 17, 1979), reprinted in 32 RUTGERS L. REV. 173 (1979)).

39. *Id.* at 806.

40. Comment, *All Courts Shall Be Open: The Public's Right To View Judicial Proceedings and Records*, 52 TEMP. L.Q. 311, 313 (1979).

41. *Gannet Co. v. DePasquale*, 443 U.S. 368, 383 (1979).

ages perjury and any decisions based upon secret bias or partiality.⁴²

It is readily apparent how important public trials are to a republican system of self-government. Open trials not only serve to reassure the community and provide a cathartic release, but they also serve as a regulator of the conduct within judicial proceedings. The public scrutiny is an effective method of controlling those with authority subject to abuse.

An argument has been raised, however, that all of these goals could be accomplished by the publication of reference decisions or even the release of transcripts of reference proceedings.⁴³ This position is theoretically valid in that a reference transcript contains the entire proceeding as it actually occurred. However, as a practical matter, it can also be argued that a cold record is no substitute for public attendance. It is only the direct, personal observation that gives the public the true picture and the sense of exactly how justice is being done.⁴⁴

2. Media Coverage and Prior Restraint

There is a special need for the press to be present in the courtroom, as media coverage is the facilitator of the public awareness of what transpires inside the courtroom. One of the major goals of open trial proceedings is achieved by subjecting the actions of trial participants to this type of widespread scrutiny.⁴⁵

The element of time is important for press coverage. If the information is to reach the public promptly, it is necessary for the reporters to be able to observe the actual court proceedings. Reference proceedings, however, can be hidden from the public—a characteristic for which the system has received much criticism.⁴⁶ The problem that could potentially arise is that since the reference system is created by state law, state action is present.⁴⁷ It follows that the operation of reference proceedings could be considered a prior restraint on the freedom of the press when neither the public nor the press would be able to locate the proceedings.

Any prior restraint on expression carries a heavy presumption against its constitutional validity.⁴⁸ This kind of restraint on speech and publication is among the most serious and least tolerable in-

42. *Id.* See also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980)(plurality opinion).

43. Pena Interview, *supra* note 11.

44. Comment, *supra* note 40, at 316.

45. *Richmond Newspapers*, 448 U.S. at 569.

46. See, e.g., Note, *supra* note 5.

47. Constitutional prohibitions of the first and fourteenth amendments apply only to actions taken by government. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 10.4, 319-20 (3d ed. 1986) [hereinafter J. NOWAK].

48. *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 558 (1976).

fringements on first amendment rights. It goes beyond the "chilling" of speech; it "freezes" speech for a period of time.⁴⁹ As yet, no one has made such a claim against the reference procedure.⁵⁰ However, this potential problem is a good example of the obstacles an attorney might have to endure when handling a notorious case by reference.

3. Is There a Special Right For the Media to Attend Court Proceedings?

The importance of the role of the media in the legal system raises another question. That is, does the function of the press in reporting trial proceedings to the general public create in the press a special right to attend all court proceedings? The United States Supreme Court has stressed the media's importance in bringing about the beneficial effects of public scrutiny on the administration of justice.⁵¹ The Court has also recognized that the vast majority of society today relies on the press to supply them with any pertinent information regarding governmental actions.⁵² Thus, it is well recognized that the press serves an indispensable function in the structure of self-government.

In spite of this, the press has no more constitutional right to access information in the government's control than does the general public.⁵³ The public and the press also have the same right of access to judicial proceedings.⁵⁴ Since the function of the press is to relay information to the public through which the public can scrutinize government, there is no reason for the press to be privileged to information which cannot be released to the community at large. For the press to be able to adequately carry out its role in society, it only needs to be able to gain that information which is available for those to whom it is reporting.

B. Freedom of Speech and the Right to a Fair Trial

Even though both civil and criminal trials were open to the public

49. *Id.* at 559.

50. Interview with Myrna Oliver, Legal Reporter for the *Los Angeles Times* (July, 1986).

51. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975). "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." *Id.*

52. *Id.*

53. *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978).

54. Comment, *supra* note 40, at 341.

under common law rules, there exists a question today as to whether there is a *constitutional* right to attend such proceedings.⁵⁵ The United States Supreme Court has determined that there is no legitimate expectation of privacy for the parties in judicial proceedings.⁵⁶ Therefore, the parties themselves cannot close the courtroom doors by asserting a constitutional right to privacy. The real question is, however, whether the general public has a right to attend trials.

The Supreme Court addressed this issue in *Gannett Co. v. DePasquale*⁵⁷ within the context of the sixth amendment.⁵⁸ The Court decided that the sixth amendment does not give the general public a constitutional right to attend trials.⁵⁹ It was recognized that while open trials had a long tradition in the common law, there is no right contained in the first or sixth amendments which grants the public access to trials.⁶⁰ Therefore, in a situation in which all the parties have agreed to close the doors to the civil courtroom, the public has no right of access under the sixth amendment.⁶¹

Subsequently, in *Waller v. Georgia*,⁶² the Court recognized that the sixth amendment created a constitutional right for the criminal defendant to demand an open trial. In this decision, the Court stated that before the public could be excluded from a trial, a stringent test had to be satisfied showing that the closure was necessary to protect a particularly articulated and overriding interest.⁶³

This issue was again before the Court in *Richmond Newspapers, Inc. v. Virginia*.⁶⁴ On this occasion the question was framed in terms of the public's first amendment right to attend criminal trials. Chief Justice Burger recognized in the plurality opinion that the right of free speech necessarily carries with it some right to listen.⁶⁵ Therefore, in order for the public to be able to exercise the right of free speech and scrutinize the judicial system, there must exist a right for them to hear what actually goes on in the courts.

There are certain unarticulated rights which are implicit in the enumerated guarantees.⁶⁶ These rights are necessary to put flesh on

55. *Gannett Co. v. DePasquale*, 443 U.S. 368, 382-83 (1979).

56. *Cox Broadcasting*, 420 U.S. at 493-95.

57. 443 U.S. 368 (1979).

58. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. CONST. amend. VI (emphasis added).

59. *Gannett*, 443 U.S. at 384.

60. *Id.* at 385.

61. *Id.* at 387. First amendment concerns cannot be set aside by mere agreement of the parties, however. See *infra* notes 64-65 and accompanying text.

62. 467 U.S. 39 (1984).

63. *Id.* at 45. See also *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984).

64. 448 U.S. 555 (1980) (plurality opinion).

65. *Id.* at 578.

66. *Id.* at 579.

the framework of the express rights and fulfill the true intentions of the draftsmen of the Constitution. "First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted."⁶⁷ Hence, case law has established that there is a right of access to criminal trials implicit in the first amendment.⁶⁸

This right of access recognized by the Supreme Court is not an absolute right, however;⁶⁹ it has certain qualifications. The Court held in *Globe Newspaper Co. v. Superior Court*⁷⁰ that access to a proceeding may be denied, but only if denial is made necessary by a compelling governmental interest, and is then narrowly tailored to serve that interest.⁷¹ The *Globe* Court examined a statute which created a per se exclusion of the public from courtrooms in cases involving victims of sex offenses who were under eighteen years of age. Because of its mandatory exclusion provisions, the statute was held to be violative of the first amendment right of the public to attend criminal trials.⁷² Moreover, the statute failed to provide any standard which the trial court could apply to protect this public right.

A standard was set, however, for courts to follow in cases involving public access to trials in *Press-Enterprise Co. v. Superior Court of California*.⁷³ The *Press-Enterprise* standard provided that "[t]he 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."⁷⁴ The Ninth

67. *Id.* at 576.

68. *Id.* The cases discussing this point, however, have all dealt with criminal trials. Any references made to civil proceedings have been dicta. See, e.g., *id.* at 580 n.17.

69. *Id.* at 581 n.18. The plurality noted that the first amendment interest of the press prevailed only because the decision to close the doors of the court was made wholly upon the fact that the parties to the trial agreed to do so. *Id.*

70. 457 U.S. 596 (1982).

71. *Id.* at 606-07.

72. *Id.* at 610.

73. 464 U.S. 501 (1984). In *Press-Enterprise*, the Court held that *voir dire* proceedings of a rape trial could not be closed to the public unless the trial court made specific findings that some overriding interest, such as the jurors' right to privacy in answering sensitive questions, was being infringed upon. Also, there must be a specific finding that there was no less restrictive alternative, such as censoring from the public only the sensitive questions and answers. *Id.* at 509-13. The Court further held that the trial judge, instead of closing three full days of *voir dire* proceedings, could have informed the jury that they could discuss the sensitive issues *in camera*. The judge could have then determined whether or not the juror should have been excused or the record sealed. *Id.* at 512.

74. *Id.* at 510. See also *Waller v. Georgia*, 467 U.S. 39 (1984). The Court applied

Circuit Court of Appeals went even further to hold that even when the first amendment right of access is in direct conflict with the defendant's sixth amendment right to a fair trial, there must be a showing that closing the trial "is strictly and inescapably necessary in order to protect the fair-trial guarantee."⁷⁵ The trial judge has the responsibility to consider this right of public access even if neither party urges it before the court.⁷⁶

V. EXTENDING THE RIGHT OF ACCESS TO THE CIVIL TRIAL

The foregoing analysis presents a relatively clear public right to attend criminal trials. However, all of the cases discussed above are *criminal* cases, and the Court was speaking directly to the public access issue in the context of *criminal* procedure. Moreover, in the civil context, reference proceedings statutorily exist as mere *alternative* dispute resolution forums.⁷⁷ The question thus arises whether this first amendment right of public access to judicial proceedings extends to civil trials. If so, does the rent-a-judge process violate this right?

In *Richmond Newspapers*, Chief Justice Burger pointed out that the common law presumption of openness extended to both criminal and civil proceedings.⁷⁸ In his concurring opinion, Justice Brennan suggested that the scrutiny of the judiciary and the appearance of fairness to the community is a necessary function in the civil as well as in the criminal arena.⁷⁹ Furthermore, in *Gannett Co. v. DePasquale*,⁸⁰ the Court stated:

Indeed, many of the advantages of public criminal trials are equally applicable in the civil trial context. While the operation of the judicial process in civil cases is often of interest only to the parties in the litigation, this is not always the case. . . . [I]n some civil cases the public interest in access and the salutary effect of publicity may be as strong as, or stronger than, in most criminal cases.⁸¹

These statements, in conjunction with dicta from these two cases, have persuaded some courts to hold that the first amendment right to access should be applied to all court proceedings, criminal and

this rule to a case in which the public was excluded for seven days of evidentiary hearings. This was found to be too extensive since only during two and one-half hours of the seven day hearing was the exclusion of the public actually justified. *Id.* at 49.

75. *Associated Press v. United States District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 440 (1979) (Blackmun, J., concurring)).

76. Comment, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV., 1899 (1978).

77. CAL. CIV. PROC. CODE §§ 638-39 (West Supp. 1987).

78. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980).

79. *Richmond Newspapers*, 448 U.S. at 596 (Brennan, J., concurring).

80. 443 U.S. 368 (1979).

81. *Id.* at 386-87 n.15.

civil.⁸² Some believe it should apply to disputes handled by a rent-a-judge.⁸³

A California Court of Appeal has held that there is no first amendment right of public access to pre-trial discovery orders and protective orders in civil proceedings.⁸⁴ The court in that case distinguished *Richmond Newspapers* by contrasting in-court proceedings with pre-trial proceedings.⁸⁵ However, the opinion does not answer the question of public access to the actual trial. The most recent word from the United States Supreme Court on open civil trials was Justice O'Connor's concurrence in the *Globe Newspaper* case. She said, "I interpret neither *Richmond Newspapers, Inc.* nor the Court's decision today to carry any implications outside the context of criminal trials."⁸⁶ There has been no declaration from the Court, however, that is dispositive of the issue.

It is impossible to predict exactly how the United States Supreme Court would decide the issue if faced with such a case. There is dicta from the Court on both sides of the issue. It would seem that the rationale supporting open criminal trials is sufficiently applicable to the civil arena to justify a right of public access under certain circumstances. However, since the need for access appears stronger in the criminal context, perhaps an easier burden should be imposed in civil proceedings to justify the exclusion of the public. Good faith arguments can be made for either position and an attorney litigating the issue should be able to find policy favorable to his side.

VI. ARE REFERENCE PROCEEDINGS UNCONSTITUTIONALLY SECRET?

Even assuming there were a constitutional right of access to civil trials, and that rent-a-judge proceedings are deemed court sittings, there is nothing in the California statutory provisions that is violative of this right.⁸⁷ By statutory law, all court proceedings are open to the

82. See, e.g., *Westmoreland v. Columbia Broadcasting Sys.*, 752 F.2d 16, 23 (2d Cir. 1984); *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178-79 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

83. Note, *supra* note 5, at 1609.

84. *Coalition Against Police Abuse v. Superior Court*, 170 Cal. App. 3d 888, 216 Cal. Rptr. 614 (1985).

85. *Id.* at 899-900, 216 Cal. Rptr. at 621.

86. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 611 (1982) (O'Connor, J., concurring).

87. See *supra* notes 16-26 and accompanying text.

public.⁸⁸ However, it has been asserted that the public is effectively excluded from reference proceedings by not being informed as to when and where the hearings are held and that this amounts to a violation of the Constitution.⁸⁹

Opponents of the rent-a-judge system point out that there is no published list of filings for reference and no record of the times and places of reference proceedings available.⁹⁰ They contend that these are secret proceedings that are being intentionally hidden from the public.

The only way to find out when and where a certain reference proceeding will take place is to check with the court clerk on a daily basis until the particular case is filed for reference. Once a case has been filed and a judge appointed, the clerk will have only the names of the parties' attorneys and the judge. It is still necessary to persuade one of the people involved to disclose the time and place of the hearing.⁹¹ The only problem, however, is that there is no requirement that they divulge this information. An informal survey conducted by the *Los Angeles Times* has revealed that the reference judges, or referees, are split on the issue; some said they would disclose the information, while others said they would not.⁹²

Once the clerk has been contacted and the judge and attorneys located, the decision over whether or not anyone gets into the hearing is out of the state's hands. First amendment guarantees are only protected against abridgement by federal or state government,⁹³ and thus there is presumably no protection if the attorneys of record refuse to disclose the location of the hearings. In these cases, no explicit state action is involved in denying the public access to the proceedings.

The question is closer, however, when it is the rental judge who refuses to provide the information. Although the parties to the proceeding pay the judge's wages,⁹⁴ the judge is appointed by the court and is carrying out the duties of a state judicial officer in a court proceeding.⁹⁵ Hence, a referee acts under color of law. As such, his act of refusing to disclose the location of the reference proceedings should constitute state action and a consequent first amendment violation.

88. CAL. CIV. PROC. CODE § 124 (West 1982).

89. Comment, *supra* note 28, at 640.

90. *Id.*

91. Pena Interview, *supra* note 11.

92. Oliver Interview, *supra* note 50.

93. J. NOWAK, *supra* note 47, at 319-20.

94. Comment, *supra* note 28, at 626.

95. CAL. CIV. PROC. CODE §§ 638-39, 645.1 (West Supp. 1987).

VII. FIRST AMENDMENT RIGHT TO ACCESS VERSUS PRIVATE
PROPERTY RIGHTS

Rent-a-judge proceedings, by nature, raise an issue regarding private property rights. The question arises since the parties to the reference decide upon the location of the hearing. If they choose to hold the proceeding in an empty courtroom or a public meeting hall, there is no infringement on private property rights. It is common, however, for these hearings to be held in the private offices of an attorney or even in one of the parties' homes.⁹⁶ The question is whether the general public can demand access to reference hearings held at a private home under the first amendment or under state law requiring court proceedings to be public.

The Supreme Court held in *Lloyd Corp. v. Tanner*⁹⁷ that the owners of a shopping center could prevent the distribution of handbills on their land without violating the first amendment.⁹⁸ "[T]he First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only."⁹⁹ Thus, there is no protection of the right of free speech under the federal constitution against a private person.¹⁰⁰

Incumbent upon the private property owner, however, is the requirement that there be no unlawful discrimination. If the landowner is willing to permit one person to exercise free speech rights on his property, he must allow everyone else to do the same.¹⁰¹ Another restriction on private landowners is the requirement that there be an alternative avenue of communication made available through which the first amendment right can be exercised.¹⁰² With respect to reference proceedings, there is no alternative avenue for exercising the right of access other than to permit it. Therefore, closed reference proceedings in a private home arguably violate any first amendment right of access to court proceedings.

The Court in *Lloyd*, referring to a "company town," noted that a private enterprise carrying out all of the functions of a municipality satisfies the state action requirement and is capable of violating the

96. Pena Interview, *supra* note 11.

97. 407 U.S. 551 (1972).

98. *Id.*

99. *Id.* at 567 (emphasis in original).

100. *Id.*

101. *Hudgens v. NLRB*, 424 U.S. 507 (1976).

102. *Lloyd*, 407 U.S. at 566.

first amendment.¹⁰³ A private home or office being used as a state courtroom is analogous to the company town referred to in *Lloyd*. In this context, even the private home may be a limited forum of state action and require the same first amendment protections as the public courthouse.

In California, the protection afforded free speech is even more inclusive than the first amendment of the federal constitution. The California Supreme Court held in *Robins v. Pruneyard Shopping Center*¹⁰⁴ that the public interest in peaceful speech outweighs the desire of property owners for control over their property.¹⁰⁵ This decision by the California court directly contrasts with the United States Supreme Court's ruling in *Lloyd Corp. v. Tanner*.¹⁰⁶ The *Pruneyard* decision stated that the owner of a shopping center could not prevent the peaceful exercise of free speech rights on his premises.¹⁰⁷ The United States Supreme Court upheld the California decision, stating that the states could properly offer greater protection of first amendment rights than the federal constitution.¹⁰⁸

Given the greater protection of first amendment freedom afforded in California, it is apparent that denial of access to rent-a-judge proceedings in this state would violate the right to open trials, if indeed such a right exists. Even though the private home location weighs in favor of an opposite result, it seems clear that any right of access to judicial proceedings attaches to reference hearings, no matter where they are held.

Does this mean that a court may force private individuals who wish to utilize the rent-a-judge procedure to open their private homes to the general public? It seems unlikely that a court would do this.¹⁰⁹ It does not seem unreasonable, however, that a court would enjoin a reference hearing until a more suitable location is selected to accommodate public access.

VIII. CONCLUSION

Do reference proceedings and rental judges violate first amendment rights? As the law currently stands, the answer is no. How-

103. *Id.* at 562.

104. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854, *aff'd*, 447 U.S. 74 (1979). See also CAL. CONST. art. I, § 2. "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." *Id.*

105. *Pruneyard*, 23 Cal. 3d at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860.

106. 407 U.S. 551 (1972). For a discussion of the holding in *Lloyd*, see *supra* notes 97-103 and accompanying text.

107. *Pruneyard*, 23 Cal. 3d at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860.

108. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

109. *Pruneyard*, 447 U.S. at 84 (the Court expressly reserved judgment on the issue that would be raised if a private home were involved).

ever, many issues are raised by this procedure that have not been decided by any court. Among these are the following: (1) whether the reference hearing is a court proceeding; (2) whether there is a first amendment right of access to civil trials; (3) whether the state action, in implementing reference judgments, violates any constitutional rights, regardless of the statute requiring open proceedings; (4) whether the policy behind open trials is strong enough to require these proceedings to be open to the public; and (5) whether or not private property rights have to yield to the demand of the public to attend.

There have been no judicial challenges to the practice of reference procedures being held behind closed doors. It seems inevitable, however, that with the increasing popularity of rent-a-judges, the secret proceeding challenge will soon be made. Considering the strength of the policy against secret judicial proceedings, private reference hearings probably will not be permitted, absent a showing that prejudice would result from opening the hearings to the public.

Nevertheless, the many questions raised by the procedure need to be resolved. Once a resolution is reached, the reference procedure will be able to assume a more stable role in the judicial system. Until that time, those utilizing the rent-a-judge procedure for privacy should be aware of the potential difficulties and be prepared to litigate them in an open court if the challenge does arise.

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