

A Texas Statute Could Help Prevent Backlog In State Courts

By **Michael Massengale** (April 8, 2020, 4:36 PM EDT)

Amid the widespread health, social and economic disruptions caused by the COVID-19 pandemic, lawyers and litigants face the prospect of delays in legal disputes that already may have been waiting years for resolution. Texas courts are meeting the challenge by enabling judges to conduct public proceedings by videoconference.

But the current inability of courthouses to function as usual, the emergence of urgent new controversies and reordering of case priorities, the inevitable knock-on effects for other cases, and an unusually high percentage of Texas judges who are new to their jobs all combine to force litigants to consider options other than waiting for their cases to be called to trial in turn.

The ordinary tools of mediation and consensual arbitration are available. But another option in Texas state courts allows for the appointment of a special judge subject to ordinary court procedures applicable to a bench trial. The procedure is found in Chapter 151 of the Texas Civil Practice and Remedies Code and has been available since 1983.

While not entirely unknown to practitioners — a search reveals less than a dozen related appellate cases — it is arguably underappreciated and underutilized. During the current pandemic, however, it could prove to be an important lifeline for courts and litigants alike.

The special judge procedure can be invoked in civil or family law matters pending in a district court or a statutory probate or county court. Agreement of the parties is required to stay the court proceeding and to refer any or all issues in the case to a special judge.

The agreed motion for referral must waive the right to a jury trial, identify the issues to be referred, and state the time and place for trial. It also must identify the special judge, state that the special judge has agreed to hear the case, and specify the special judge's fee.

Eligibility for appointment as a special judge requires at least four years of experience presiding over a district court, statutory probate or county court, or appellate court. The judge must have substantial experience in his or her area of specialty. Although the ordinary continuing legal education requirement for Texas lawyers is 15 hours per year, the statute requires a special judge to demonstrate completion of at least five days of minimum continuing legal education in the past calendar year. Finally, a former



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judge is ineligible if he or she was removed from office or resigned while under investigation for discipline or removal.

Once appointed, a special judge conducts the trial like any other bench trial, with the same powers of the referring judge except that the contempt power only can be exercised with respect to witnesses before the special judge. A court reporter must be used. The parties jointly bear the special judge's fee and administrative costs, and each party otherwise bears its own costs, including costs for its own witnesses.

While a special judge may not use a public courtroom without authorization by the referring judge, he or she can harness technology to conduct hearings by videoconference. Upon conclusion of a trial, the special judge issues a verdict within 60 days that stands as a verdict of the referring court, subject to the ordinary requirements for a verdict.

Critically, parties using the special-judge process retain the right to review by mandamus or appeal, as provided under the ordinary rules of civil and appellate procedure. (As a prerequisite to appeal, at least one appellate court has stated that the trial court must sign an order memorializing finality of the case.) The process thus retains many of the desirable aspects of litigating in public courts while adding benefits of choosing the adjudicator and controlling the schedule, including the certainty of a firm trial date and the opportunity for an expedited proceeding.

The procedure depends on the parties' ability to agree about who to appoint. This critical initial decision mirrors the advantages of arbitration to the extent it also empowers parties to appoint an experienced former judge with desirable knowledge, experience or other qualifications that are specifically suited to the particular case.

Given the need to agree on the selection, the parties should consider a joint interview of candidates, with an agreed list of questions or outline of inquiry established in advance. Some important considerations for practitioners in selecting a special judge include:

Relevant Experience

An excellent candidate for a complex business dispute might not be the ideal choice for a family dispute, and vice versa. The parties may want a judge who understands a particular industry, field of knowledge, or specialized area of law. Judges develop substantial knowledge while on the bench, so parties should inquire about a candidate's experience presiding over similar cases. A candidate's professional experience before and after service on the bench is also highly relevant.

Impartiality and Independence

A candidate should be asked to disclose material relationships with counsel, the parties and any identified witnesses, along with any other circumstances that might impact the parties' perception of the judge's impartiality.

Availability

Much of the flexibility offered by this procedure will be lost if the special judge cannot satisfy the parties' scheduling expectations. Counsel should confer in advance about a trial date and anticipated needs for pretrial hearings and rulings, so the candidate's availability can be confirmed in advance.

Management Skills

At a minimum, a successful special judge will need the fortitude to set a proper tone and conduct proceedings in a civil, professional and efficient manner. Depending on the needs of the particular case, ability to efficiently manage discovery also may be a consideration.

Eligibility

Given the unique CLE requirement applicable to special judges, parties should take care to specifically inquire about all of the statutory prerequisites. Lawyers can carry over CLE credit from one year to another, but the statute specifically requires a special judge to have five days of CLE completed in the past calendar year. Additionally, parties may not be able to confirm whether a judge resigned while under investigation unless that question is asked directly.

The wide availability of former Texas state judges assures that litigants concerned about coronavirus-related delays have many options available to them to keep their cases in the court system. Appointing a special judge avoids the crowded courthouse and offers many desirable opportunities for a hand-picked adjudicator and a specially tailored process while using familiar rules of procedure and maintaining the right to appeal.

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