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National Private Court: A Proposal for a Free-Enterprise Court System

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NATIONAL PRIVATE COURT: A PROPOSAL FOR A FREE-ENTERPRISE COURT SYSTEM

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LANDLORD-TENANT DISPUTES

The National Private Court (NPC) easily can solve many types of landlord-tenant disputes which now require excessive time expenditures by landlords, tenants and their attorneys, excessive litigation costs and delays due to "court congestion." Because the landlord-tenant relationship usually arises out of contract, a landlord could require use of the NPC or similar quasi-judicial apparatus for resolution of most types of civil disputes in the absence of prohibitory statutory or case law. Speedy evictions, speedy judgments for unpaid rent, and NPC appearances by telephone conference calls should encourage many landlords and their counsel that the NPC can effectively resolve disputes.

Tenants would not have to take time from employment to pursue a claim against the landlord or defend against an eviction proceeding. The costs and inconvenience of the NPC are so low that tenants should welcome the resolutions proposed by the NPC, especially if the party bringing the action pays all "judicial fees."[1]

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1. Landlords may use this method to encourage tenants to consent to NPC jurisdiction.

Landlord-tenant disputes which can be handled by the NPC involve findings of fact, determinations of legal issues, and monetary and injunctive relief. The NPC, like any governmental trial court, deals with claims for monetary recovery, rights to possession, rent deposit disputes, tenant rent obligations, inhabitability of premises, tenant's right to services and compensation for loss of such services. Full criminal cases would not be handled by the NPC[2] yet a governmental criminal court could refer specific parts of a criminal case to the NPC. This procedure would be similar to procedures using a private referee or magistrate service to find facts and to return to the governmental court.

Alaska Pilot Project

Alaska is conducting a model project whereby the state finances private judicial services as a cost saving alternative to the traditionally functioning judiciary. Utilizing the largely untapped resources of the private legal profession[3] to perform state functions on an hourly basis, the "court congestion" problem could be cured almost overnight. Alaska now pays judicial fees to arbitrators handling private disputes.[4] The savings to the state would be substantial, since the state judicial system could expand without incurring costs for constructing new court buildings, furniture, fixtures and files, hiring and training support personnel, eletricity, heat or a telephone system.

The office of Governor Jay S. Hammond is examining the NPC and other alternative judicial proposals to determine which system or systems will meet Alaska's judicial needs in outlying areas of the state. Alaska plans to test the NPC using a small-scale, pilot-project in part of the state. The NPC's success then will be compared with other alternative plans being considered.

Court Congestion Problem

To understand how the NPC could be used to resolve landlord-tenant disputes, it is important to look at the broader picture of which landlord-

2. Alaska, however, is presently considering use of the NPC concept in its criminal justice system. Letter from Roger Lewis, Esq., Office of Governor, to Carl Person (March 2, 1979).

3. Office space, libraries, telephone and copying systems are made available in addition to expert personnel.

4. ALASKA STAT. ANN. § 09.43.100 (1978).

tenant disputes are only a part. Governmental courts desperately need reform; the main impetus behind this reform movement and court reform is unexpectedly coming from the abused litigants and attorneys themselves who suffer from the major problems of existing court systems.

The courts are overworked, underfinanced, and incapable of expanding to render the judical services needed to handle the large number of meritorious civil claims and defenses. As a result, there is a true crisis in our judicial system commonly referred to as "court congestion," with citizens unable to obtain adequate, timely relief at an affordable price.

Our federal and state court systems are small in comparison to the legal profession itself, which consists of about 455,000 attorneys and a higher number of support personnel. There is only one federal judge for every one thousand attorneys in the United States.[5] A federal district court judge typically handles about 454 civil and criminal cases. Because of the federal Speedy Trial Act,[6] which gives absolute priority to federal criminal cases, it often takes years until a civil case goes to trial.

Loss of Constitutional Right to a Jury Trial

Many meritorious cases never are tried because of the court backlog.[7] The courts, by dismissing cases as "insufficiently pleaded"[8] or allegedly because of "insufficient evidence,"[9] deprive plaintiffs of their constitutional right to a jury trial. The judge's ruling cannot be disproved without full discovery and trial and, therefore, in many instances becomes a convenient way for an overburdened court to lessen its

5. The 95 federal district courts have approximately 400 active trial judges, less than the 450 attorneys in Baker & McKenzie, the nation's largest law firm.

6. 18 U.S.C. §§ 3161-3174 (1976).

7. According to federal statistics approximately 61% of all federal civil cases are terminated by the courts before pretrial. The percent of cases reaching trial varies from a high of 29.7% in Rhode Island to a low of 2.0% in the Eastern District of California. Thus, a litigant in Rhode Island has an opportunity 15 times as great to receive a trial as one who brings an action in the Eastern District of California. [1977] DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 335.

8. FED R. CIV. P. 12(b)(6). To dismiss a case, the court merely must assert that the losing party has presented insufficient evidence as a matter of law which prevents a jury from reaching a decision favorable to the plaintiff.

9. FED R. CIV. P. 56, provides for summary judgment, a method for promptly disposing of actions in which there is no genuine issue as to any material fact.

caseload in an apparently lawful way.[10] Such a ruling, however, should only be made after full discovery and trial. Appeals are not able to overcome these trial-court errors because appeals generally tend to ratify the lower-court decisions, whether right or wrong, because of the "congestion" in the appellate and trial courts.

Columnist Jack Anderson summed up the "congestion" problem this way:

> In the last 10 years, the workload of most federal courts has doubled; some courts report it has tripled. There has been no comparable increase in the number of judges or other court resources, which means that our judicial system is forced everywhere, every day, to violate the chief judicial commandment formulated by the late, eminent Judge Learned Hand: "Thou shalt not ration justice."[11]

Legislators should recognize that a certain percentage of the gross national product, perhaps two to five percent, must be devoted to the efficient resolution of disputes. If people know that any dispute will be promptly and justly resolved, they would be more apt to legitimately conduct and expand their endeavors because of the greater opportunies derived from smoothly run operations. The amount of money now allocated by governments to their judicial systems is woefully inadequate.

Uncertainty, delay, and excessive costs attributable to our inefficient system of justice prevent the economy from reaching its full potential. If the legal fees paid for waiting in governmental courts could be used to hire more judges and court personnel and to build additional court facilities, the cases could be decided in two to three months at no additional cost. It seems impossible to get legislators, lacking knowledge in this area, to agree upon a solution affording sufficient funding.

Court congestion forces judges to ration justice by ignoring comparatively weak claims and defenses that require additional judicial time to resolve fairly. By dismissing weaker claims and defenses, the overworked judge disposes of such time-consuming matters and moves on to the stronger part of the case, where the claims or defenses are more obvious and compelling, and more efficient for the judge to handle. Such a pattern particularly occurs when "streamlining" court administrators

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10. The wide variation in the number of case dismissals without trial from one federal court to another strongly suggests that many cases are being dismissed because of "court congestion."

11. Anderson, *Judicial Logjam Crushes your Right to Day in Court*, N.Y. Daily News, Aug. 14, 1977, at 25.

and politicians pressure judges to produce a large number of case terminations without costly, time-consuming trials. Governmental courts and judges have no choice but to violate Judge Hand's injunction against the rationing of justice.

When judges get into the habit of dismissing "weaker" cases, claims are dismissed more often than defenses because the whole action then can be ended. It becomes easy for these judges to begin dismissing meritorious cases for *other* reasons as well: prejudice against a party or counsel, friendship or former association with the opposing party or counsel, adverse political affiliation or orientation, or the desire to leave the bench and obtain higher-paying employment in a local prominent law firm.

Although decisions by trial judges are erroneous at times, they tend to be upheld by appellate judges, who are overworked. Because the trial judge has the power to decide cases either way with little or no risk of reversal in a relatively high percentage of cases, he is encouraged to exercise the powers of a supreme deity instead of the more earthly and constrained powers of an impartial judge.

The problems mentioned are not meant as a critique of governmental judges; they seem to have no alternative.[12] Any judge placed in such a position, no matter how noble his/her intentions, would probably dismiss weaker claims and defenses just as is currently done.

The Remedy: The National Private Court

To cure the "congestion" problem once and for all, this author has set up a free-enterprise court system, called the National Private Court (NPC).[13] The NPC idea originated in late 1977. The NPC is now prepared to market its judicial services to parties with existing litigation in the governmental courts, but the NPC awaits sufficient funding which most likely will come from pending contingent-fee cases. The marketing strategy consists of requests to parties and their attorneys to transfer their pending cases from the governmental courts to the NPC to avoid further delays, high costs, and unfairness. In connection with this marketing effort, clients would receive an NPC sales promotional

12. The author brought an action several years ago on constitutional grounds to attach the highway trust fund to provide independent financing to the federal court system. Person v. Ford, No. 65 C. 1953 (E.D.N.Y., filed Oct. 26, 1976) (this action was voluntarily withdrawn).

13. The NPC is a division of the author's wholly owned business corporation, Paralegal Institute, Inc., which since 1972 has been running a school for legal assistants.

booklet entitled "How to Complete Your Pending Lawsuit in 2-3 Months" and a proposed form of submission agreement. Retired New York State Supreme Court Justice I. Stanley Rosenthal reviewed the submission agreement and other material and expressed his approval of the NPC.[14]

With adequate funding, the planned marketing efforts should permit the NPC to compete successfully for many cases already pending in the governmental courts and to reduce their caseload through this free-market court system. The NPC could easily become a public utility substantially larger in revenues and profits then the Bell Telephone System.[15]

The NPC is a national court system similar to the federal court system, except that litigation, after one permitted appeal, is completed within two to three months. Litigation costs are low, experienced judges are selected and paid by the parties who have sufficient time to hear all meritorious claims and defenses, and NPC proceedings take place by conference telephone call or in the law office of the judge.

Persons wishing to litigate in the NPC choose their own judges from a planned panel of thousands of highly experienced trial and appellate attorneys and retired judges, all of whom are required to complete a detailed questionaire under oath. The judges on the panel, presently numbering thirty-seven, include two retired New York State Supreme Court justices,[16] and represent vast areas of specialized legal expertise.[17]

In landlord-tenant cases, judges experienced in landlord-tenant litigation would be selected, often by computer, using categories of

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14. In a letter from I. Stanley Rosenthal to Carl Person (March 31, 1978), Justice Rosenthal stated:

> I congratulate you, Mr. Person, on the completion of your pioneering effort. You have blazen [sic] new trials and richly deserve commendation for the innovative nature of the project developed by you and its far reaching implications for the future. Your plan carried into fruition should effect tremendous savings to the litigants and our taxpayers, and at the same time relieve our judicial structure from the enormous case load which threatens to strangle it.

15. This should convince one or more giant corporations to take the NPC, hopefully through lawful competition.

16. The New York Supreme Court is the trial court for the state.

17. The judges list the 20 areas of economic activity, 10 fields of law, and 20 types of cases with which they are most familiar. For example, the author's completed questionaire shows familiarily with the enonomic fields of toys and games, motion pictures, automobile distribution, bar and other trade associations, and consumerism; the legal fields of antitrust, intellectual property, and tortious destruction or interference; and cases involving an alleged theft of idea, termination of distributorship, refusal to deal, or conspiracy.

information such as (i) building code violations, (ii) repairs, (iii) commercial or residence, (iv) condominiums, (v) architecture or design, (vi) union contracts, (vii) rent strikes, (viii) heat, (ix) electricity, (x) tenant selection, (xi) discrimination, (xii) loss of services. In other words, in the NPC, parties and their attorneys select judges having experience most suitable for determination of their case.

The private judges legally function as arbitrators and as such have the power to issue subpoenas in accord with federal[18] and state[19] arbitration statutes.[20] Also, under federal[21] and state[22] arbitration statutes, any party to a binding arbitration may enter the arbitrator's award as a final judgment in the appropriate state or federal court. It is then enforced just as any other court judgment would be enforced. Ordinarily, there would be no right to appeal an NPC award in the governmental court system.[23]

The NPC judges follow the federal rules of evidence[24] and civil procedure[25] as well as judicial precedents applied by the federal district court where the NPC judges have their offices, assuming the parties agree to this provision. Local lawyers familiar with federal practice are thus instantaneously familiar with NPC practice. The parties pay the hourly "judicial fee"[26] charged by the NPC judges, thereby assuring that the case will be given as much judicial time as needed. The NPC receives a small percentage of the judicial fees charged by the private judges.

After selecting their trial judge, three appellate judges, and several potential successors, the parties sign a submission agreement giving the judges jurisdiction over the matters in controversy. The submission agreement may place a monetary ceiling on the defendant's liability, provide for confidential treatment of documents and other evidence, allocate payment of the judicial fees among the parties, and place any

18. 9 U.S.C. §§ 1-14, 201-208 (1976).

19. N.Y. CIVIL PRACTICE LAW AND RULES art. 75 (McKinney 1963).

20. For a collection of arbitration statute references as of Feb. 1, 1979, see Ladimer, *Versatility of Arbitration*, N.Y.L.J., March 8, 1979, at 1 col. 1.

21. 9 U.S.C. § 9 (1976).

22. N.Y. CIVIL PRACTICE LAW AND RULES §§ 7510, 7514 (McKinney 1963).

23. The Uniform Arbitration Act provides various bases for upsetting an arbitration award, including fraud, corruption or other illegal means of procuring an award. *See* Ladimer, *Versatility of Arbitration*, N.Y.L.J., March 8, 1979, at 1, col. 1.

24. *See* FED. R. Evid.

25. *See* FED. R. CIV. P.

26. The fee is set in a free market for judicial services.

desired limitations on discovery.[27]

The trial judge then takes control of the case, and directs the parties' attorneys to appear before him at his law office or by telephone conference call at a certain time. At the first pretrial conference, the judge establishes a discovery schedule, adhered to barring extenuating circumstances. The judge may direct attorneys for the parties to appear at this first pretrial conference with proposed requests for documents.[28] While some of these may be denied, the judge may order the other requested documents be produced in five to ten days. In the governmental courts, it may take from six months to several years to get these documents, if a party gets them at all.

Discovery, in the NPC, is completed in less than two months: this includes depositions of witnesses. If necessary, the judge orders local depositions to take place in his law office, permitting rulings on the spot and minimized delays. Without formal rule or statute many judges have adopted similar judicial shortcuts, such as discovery limitations, oral motions, and use of the telephone to determine matters frequently decided by motion in court.

When the parties have finished pretrial discovery, the judge presides over the trial. Without jury, the judge renders a written decision, including findings of fact and legal conclusions. Any objecting parties may appeal the decision to the NPC's three-judge appellate panel previously selected by the parties. The parties submit appellate briefs supported by references to the whole trial record instead of an abbreviated appendix. Thus, the parties need not designate issues or portions of the record for inclusion in an appendix, saving parties thousands of dollars in time and money. Unless the appellate panel reverses the trial-court judge, the decision is affirmed and becomes the final arbitration award to be entered as a final judgment in the state or federal court of appropriate jurisdiction over the matter.

The NPC litigation is more than just another form of arbitration. By following the procedure of the federal court system, NPC litigants can maintain claims and defenses without running the risk of unwanted compromises expected in binding arbitration. Arbitration deliberately avoids adherence to the governmental court rules of evidence and civil

27. An example of this is limiting discovery to no more than four depositions not exceeding three hours each, and no more than 15 interrogatories.

28. These must be mailed to the judge several days earlier if the conference is to be by telephone.

procedure, making appellate review virtually impossible.[29] Binding arbitration, therefore, leaves no room for the hair-splitting distinctions which often make the difference between valid and frivolous claims or defenses in court litigation. Persons submitting to binding arbitration waive such legal niceties and rely upon the arbitrator's sense of justice or compromise.

The NPC litigation is also better than litigation in congested governmental courts because the parties pay for and receive the skilled judicial services they need from judges who are experienced in the field. Instead of being pressured to reduce a staggering caseload, NPC judges are paid to take the time to fully hear and resolve cases. If they do not have enough time available for a case, they simply will not be appointed to the case.[30]

Information concerning the NPC judge's present caseload, length of case dispositions, and aggregate judicial fees are made available to the parties during judge selection. The private judges would receive fees ranging from $25 to $300 per hour, depending on the skills and demand for their time, making the judicial business highly profitable for better judges. This profit motive will induce the private judges to be selected in subsequent matters and thus can be expected to treat attorneys and parties fairly. Judicial excellence is encouraged because the increased demand for the more qualified judges allows those judges to increase their judicial hourly rate.

To insure that the judge will be fair before accepting a case, the private judge fills our forms under oath that certain relationships with the parties and their counsel do not exist. The provisions are substantially stronger and better than the analgous federal statutes provide.[31]

Plaintiffs should use the NPC because of its speed, low cost, and ability to give a full, fair hearing and decision on difficult issues. If plaintiffs need to offer a discount of fifty percent to ninety percent on liability to induce defendants to litigate in the NPC, this represents no more than a free-market way of evaluating the worth of the governmental courts. To avoid the cost, delay[32] and unfairness[33] found in governmental courts, many plaintiffs are willing to accept as little as ten

29. 9 U.S.C. § 9 (1976).

30. A computer will keep track of this by giving information on the length of time it takes for the judge to dispose of cases he has received from NPC.

31. 28 U.S.C. §§ 144, 455 (1976).

32. Often it takes years to settle a court claim.

33. There is an uncertainty of winning even with valid claims due to problems created by the "court congestion" problem.

percent of the reasonable value of their claim, if paid in two to three months.

Defendants should be attracted to the NPC because of the reduced liability. The defendant even can make first-year "profits" by transferring a case to the NPC, if the agreed ceiling on defendant's liability is less than the dollar reserve set aside by the defendant when commenced in governmental court. Additionally, defendants would be attracted to the NPC because all decisions, proceedings, documents, and other evidence are confidential; the information is not made available to other possible claimants, governmental agencies or competitors.[34] Defendants also would be tempted to use the NPC since there would be no injunctive relief, punitive damages, treble damages, class action, or shareholder derivative suits unless the parties agreed otherwise.[35] Since the parties select their own judges, there would be no need for jury trials, which are used as a means of protecting parties from a judge.

The NPC plans to extend throughout the United States and Canada. It promises to be a viable alternative for litigators in housing matters who are displeased with the operation of traditional, governmental courts.

34. Opinions of the NPC judges would not be published, and they would have no precedential value in any other case.

35. Such an agreement would occur, for example, in a class action arising from a lease provision.