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HIGHLIGHTS

CHILD CUSTODY

American Academy of Matrimonial Lawyers." He describes Tracy's "briefs riddled with ... invective," noting that her fourth set of "lawyers set out to undo all that had transpired: to have Perkovich disqualified, to have her orders declared void ...." In a footnote, the justice noted that Tracy's attorneys did a "180-degree change of position manifest by the belated claim of duress," noting that "I do not understand such a blatant change of position to be ethical advocacy." He would have found either no basis for disqualification or that Tracy had waived any right to raise them. Nevertheless, any attorneys doing private judging must ensure that they do not run afoul of any of the requirements of the Code of Civil Procedure or Canon 6.

Commentary

Stacy D. Phillips and Kevin Martin

In a detailed and thorough opinion, the Court of Appeal reiterated the importance of private judges following the requirements set forth in California's Rules of Court, the Code of Civil Procedure, and the Code of Judicial Ethics when making mandatory disclosures regarding their relationships with a party or their counsel and when responding to a statement of disqualification. In *Hayward*, the court-appointed private judge failed to disclose in writing or on the record her relationship with the parties' attorneys and failed to respond properly to the request for her disqualification that was based on her relationship with counsel. The Court of Appeal's 42-page majority decision (there is also a lengthy and vehement dissent) details the havoc that can occur when a private judge fails to satisfy these requirements.

The basis for the Court of Appeal's strict adherence to these requirements is logical. First, an attorney appointed as a temporary judge is not as insulated from conflicts as a permanent judge. Especially in the family law bar, a lawyer sitting as a private judge is likely to have ongoing business relationships with the attorneys appearing before him or her, which can impact the private judge's decisions. As stated by the Court of Appeal in *Hayward,* "[t]he risk of divided loyalty, conscious or unconscious, is considerably stronger where, as here, the temporary judge has a direct professional incentive to favor an attorney who has been and likely again will be in a position to determine the outcome of cases in which the present temporary judge acts as an attorney .... Because private judges operate within a system in which potential conflicts are likely, *adherence to requirements for written or on the record disclosure and waiver is imperative*." (Emphasis added.) Second, for the private judging process to work, the integrity of the system must be maintained and there must be a uniform set of procedures for determining whether to disqualify a private judge, and strict adherence to those procedures. Third, private judges are appointed by the Superior Court and are a reflection on the California judiciary. The California Judiciary cannot be perceived as participating in a judicial process that can be manipulated or perceived to be unfair.

The Court of Appeal warns that *"[a]lthough disclosure may be onerous, matrimonial practitioners* (and other who frequently participate in the private judging process) *have a greater interest in assiduous disclosure than they may realize.* As one such practitioner has pointed out, the use by the 'small and collegial' family law bar 'of our friends, colleagues, and prior opposing counsel as private judges *unwittingly exposes all of us, as a community and as individuals, to potential liability for violations of the various ethical cannons, claims of cronyism, allegations of bias, complaints of self-dealing, and malpractice lawsuits* ...." (Emphasis added.)

The *Hayward* opinion is a strong reminder to all family law practitioners that, no matter our intentions or the strength of what we believe to be our relationships, when push comes to shove, if it is not written down, it never happened. While this general adage is true in many aspects of our practice, when it comes to acting as a private judge, it is especially important. The Court of Appeal makes it clear that when it comes to satisfying the statutory requirements for disclosure and responding to disqualification requests, it is essential to dot your i's and cross your t's. Failing to strictly comply with these procedures creates a risk of potentially devastating consequences, for both the private judge and the litigants.

References: California Family Law Practice and Procedure, 2nd ed. § 111.04 (disqualification of trial judge).