

Alternative Dispute Resolution

The new use of an old tool: The judge pro tem statute

BY ROBERT W. WOOLDRIDGE, JR.

In recent decades the volume of civil matters filed in state and federal courts across the country has risen substantially. At the same time, the capacity of these judicial systems to handle these matters has had trouble keeping pace.

Public resources are increasingly limited; that is especially so as of late, and this trend shows no sign of abating. Criminal dockets consume a dominant and increasing share of those limited resources. As a result, it is becoming increasingly difficult to maintain the level of access to justice in civil matters that we have come to expect and to which litigants are entitled.

Those factors have led many across the country to turn to arbitration, as well as other forms of ADR, as an alternative to our overburdened judicial systems. While arbitration has become the process of choice in many parts of the country, it has been less so in Virginia, where state and federal courts have remained comparatively effective and efficient. In recent years, parties and counsel in Virginia have turned more frequently to mediation – not so much due to constraints on the judicial system – but rather because of the benefits of resolving matters short of trial while avoiding the cost and uncertain outcome of litigation.

The increasing limitations imposed on our judicial system in Virginia have caused many parties and counsel to turn to the new use of an old tool: appointment of a Judge Pro Tempore (“Judge Pro Tem”). Such a mechanism brings together an interesting hybrid of public and private resources.

The statute

Virginia Code § 17.110 provides that all parties or their counsel in a pending circuit court case may enter into a written stipulation appointing a Judge Pro Tem for their matter. Upon approval by a Judge of the Court in which the case is pending and the taking of an oath, the Judge Pro Tem acquires the same power, authority and duties as a Circuit Court Judge. The parties may choose to have the Judge Pro Tem decide their entire matter, or instead limit him or her to specific issues of fact or law.

Advantages and disadvantages

Parties may choose to utilize a Judge Pro Tem with several considerations in mind. First, the parties may choose the particular person they wish to hear their matter. They may do so because both sides have experience and are comfortable with that person. Second, the parties may choose a particular person because he or she has expertise in the specific subject matter at issue. Sitting judges are among the last of the generalists in the legal arena because their job requires it of them. The matters they hear from one day to the next are as varied as the matters that can and do find their way into court. Choosing a person with a particular background or expertise (whether gained in private practice or on the bench) is sometimes preferred, especially in a complex or unusual case. Third, using a Judge Pro Tem often brings a measure of flexibility in terms of scheduling that is not available in the framework of busy court dockets.

A hearing before a Judge Pro Tem, like a trial, is officially open to the public. Yet the timing and location of the hearing before the Judge Pro Tem

is rarely known by or advertised to the public. It may be held in the Courthouse, but the parties may also agree to hold it at another location (e.g., a lawyer’s office). Thus, as a practical matter, there is a measure of privacy in a proceeding before a Judge Pro Tem that does not accompany a trial convened in the traditional way.

A disadvantage of a Judge Pro Tem over trial in the traditional court setting is that parties bear the cost of a Judge Pro Tem. Section 17.1-111 permits the parties to agree on the mode and amount of compensation for the Judge Pro Tem, and allows them to let the Judge Pro Tem allocate those costs as part of his or her decision. At the same time, litigation costs arising in cases handled by using a Judge Pro Tem may be more moderate than in the traditional setting due to the specific expertise of the Judge and the flexibility regarding scheduling, location, and other logistics.

The use of a Judge Pro Tem differs from arbitration in significant respects. In arbitration, the applicable rules of procedure and evidence, if any, may be uncertain. With a Judge Pro Tem, normal Circuit Court procedures and Virginia rules of evidence apply. The substantive law that eventually may be applied in arbitration is often unclear. With a Judge Pro Tem, the law that would otherwise govern the matter in a Virginia court applies. There is virtually no ability to appeal an arbitrator’s decision. A decision by a Judge Pro Tem is as appealable as a decision by any Circuit Court Judge.

The availability of discovery in arbitration is also uncertain. Whether discovery will be allowed, and if so, to what extent, will depend on the terms of the parties’ arbitration agreement, the rules of the arbitration organization chosen, and the discretion of the arbitrator. In contrast, parties using a Judge Pro Tem have the same discovery rights provided under Rule 4 as are available in litigation. Whether having the full panoply of discovery rights is an advantage or a disadvantage will likely depend on the needs and goals of parties and counsel in a particular case.

The use of a Judge Pro Tem also has advantages over the use of a Commissioner in Chancery. Following a hearing and report by a Commissioner in Chancery, either party may file exceptions and have them heard by a Circuit Court Judge. Section 8.01-610 provides that the Commissioner in Chancery’s report “shall not have the weight given to the verdict of a jury on conflicting evidence, but the court shall confirm or reject such report in whole or in part, according to the view which it entertains of the law and evidence.” Case law interpreting the extent of the Circuit Court’s review of and discretion concerning the Commissioner’s report seems to give ammunition to both the party filing and the party opposing the exceptions. On issues of law, the Circuit Court clearly makes its own decision. On issues of fact, the Circuit Court is allowed some, but not unfettered, discretion. This review of the Commissioner’s report by the Circuit Court is avoided entirely by use of a Judge Pro Tem, whose decisions are subject to review only by the Appellate Courts under the same standards as are applied to decisions by traditional Trial Courts.

While the use of a Judge Pro Tem is available for all civil matters, it seems to be used in family law more than in any other single field. (Typically, nearly one-third of circuit court filings in Virginia involve family law.) Being able to select a judge acceptable to all parties and counsel is especially ad-



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vantageous in such emotionally charged cases. The use of a Judge Pro Tem in the family law setting may allow quicker access to a hearing, the ability to adjourn and reschedule as the parties may need, and more convenient scheduling of witnesses (especially experts).

Cases involving the interests of children, while often mediated and arbitrated, are ultimately subject to the purview of the Commonwealth. Thus, relief can be sought from the Circuit Court in such matters. On the other hand, the Judge Pro Tem sits as a Circuit Court Judge and his or her decision in such matters would stand with the same integrity and impact as a Judge sitting in the traditional courtroom.

The future

The traditional courtroom, as it should, remains the principal place to litigate disputes in Virginia. The access to justice that it provides for all is both real and symbolic. But, as the complexity of society increases and the number of disputes grows, the pressure on our limited judicial resources will continue to mount. Alternative means of resolving disputes are likely to be used with even greater frequency in all fields of practice. Along with mediation and arbitration, the use of a Judge Pro Tem as an option for Virginia litigants and lawyers should be given full consideration.

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