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PHYLLIS SHAMPANIER
OF COUNSEL

July 16, 1993

Chief Justice Rosemary Barkett
Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399-1925

Re: Acting Judges and Mediation

Dear Chief Justice Barkett:

I believe there is something "desperately wrong" with anyone currying favor with local practitioners in order to obtain their business as a mediator. This is, of course, even more egregious if that mediator may also sit as an acting judge. I do not know of any questionable instances involving ex-judges whom are still assigned cases.

What I do know of is the underlying premise that mediators curry favor. The business of mediation is booming, and the usual pressures of competition are at work. It is well known that insurance companies have lists of mediators whom they will not accept. I imagine a few plaintiffs' lawyers do likewise. It is obvious that most mediators do not want to get on such a list, because it restricts their selection.

I suspect that mediators pay more attention to the insurance defense bar than the plaintiffs, because there are fewer firms, with a more institutionalized, continuous source of business, since it involves virtual representation of a carrier. Those carriers/firms are obviously going to be back soon with another matter, and some mediators have to appreciate this.

Selection of a mediator is usually a matter of choice, not chance. Even when trial courts force a selection, it is usually by having one side select a slate and then requiring the other side to select from it. There is no random assignment, so it pays a mediator to be known to the consuming attorneys. Free selection invites competition among the selectees. Free

selection, rather than blind assignment, is a crucial distinction between mediators and judges -- how long would you entertain a court system where the litigants selected their judge?

I am not blindly against mediation. It has helped my clients "see the light" on occasion, in a way that neither I, the opponent nor the judge could accomplish. Nevertheless, I've seen little iceberg tips of favoritism. For example, not reporting that parties failed to appear, or blew up and walked out, as long as their [insurance defense] counsel explains that it's their legal advice that they not participate. This piddling irregularity is not reported to the trial court after impasse, because the mediator does not want to offend the sensibilities of his or her customer. Does it prove anything? Not much, but it's a fact of business life. It is another fact of life that mediators with a busy practice are soon on a first name basis with the senior insurance adjusters for all the major liability carriers or general agencies. This is just an unavoidable way that capitalism works. I would just rather that judges, even part-time judges, not be part of this.

You know how law firm consultants have all preached that firms must become businesses. Mediation firms will react the same way, and begin considering advertising, "cross-selling" and every manner of practice you do not want to see associated with judges, even temporary ones. Let's leave acting judges unburdened with concerns over their popularity as mediators.

Very truly yours,

Richard C. Smith

RCS:ejb

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