In the Supreme Court of Florida

<u>In Re</u>: **Report of the Alternative Dispute Resolution Rules and Policy Committee on Senior Judges as Mediators**

Case Number SC04-2482

COMMENT ON THE REPORT

I support the intent and most of the recommendations of the Committee. However, Recommendations 1, (B) and (C) [1] give me concern.

While I support the concept of "full disclosure," I submit, as drafted, it is a practical impossibility. To require pre-hearing/pre-mediation disclosure of ANY earlier mediation or judicial "contact" with any "party, attorney or law firm" is not practical.

Consider: I sat as a Circuit Judge for more than 13 years and have been a mediator since 1987. I have no idea how many persons and attorneys have appeared before me as judge then or now as a senior judge. After mediating in excess of 3200 matters statewide, how many "part(ies), attorneys(s) or law firms" have been involved in mediations I have conducted is just not possible to know. This has occurred over 32 years. To identify them so as to be able to disclose them is just not possible.

I also submit to reduce a judge to asking parties to let him know if he/she has anything that needs disclosing, is unwise.[2] Further, does the suggestion work any better when the judge, as mediator, asks the parties the same question?

Disclosure would be workable if the required disclosures related to present or recent contact <u>i.e</u>. contact within a reasonable period-- perhaps one to three years. (What is the period that a new judge should disclose or not hear cases involving former partners or former adversary attorneys?...of former clients?)

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[1] " (B) If a mediator who is a senior judge has presided over a case involving any party, attorney, or law firm in the mediation, the mediator should obligated to disclose that fact prior to the mediation.

(C) A senior judge should be required to disclose if the judge is being utilized or has been utilized as a mediator by any party, attorney, or law firm involved in the case pending before the senior judge. Absent express consent of all parties, a senior judge should be prohibited from presiding over any case involving any party, attorney, or law firm that is utilizing or has utilized the judge as a mediator within the previous three years."

[2] See Report, Comments, page 15, second paragraph.

In my "judge hat", I see problems with the "within three years" *per se disqualification*. The must-disclose contact is not in earlier cases before the judge, but only in matters mediated. Does it apply when the person was retained for mediation but the matter settled before mediation? When a particular insurance carrier was not a named party but was the carrier involved in a mediation? When the named party was a closely held corporation and the "real" principal was the sole stockholder? When counsel was an employee of a "captive" firm which represented a certain carriers' insureds exclusively? When counsel was an associate of a nationwide law firm? When sitting on a criminal docket call, should inquiry be made of all defendants and all counsel whether one has ever mediated a case for them or any member of any firm they are, or were, associated with? Would failure to so disclose be grounds for relief under 3.850 Fla. R. Crim. Procedure? Would the judge's failure to recall the previous contact be grounds alone or only if the defendant or the attorney "reminded" the judge?

In my "mediator hat", I see other problems: When I receive a call seeking to engage me, must I ask for a complete list of the firm's present and former attorneys to determine a disclosable conflict? ...a corporation's name/merger/subsidiary history? ...a party's litigation history? Should I inquire of each firm whether I have mediated a case for it? Should I ask the firm to inquire of their client and to advise me whether I have mediated a case involving that client so I can inform the others to be involved in the mediation in a timely manner?

I support a prohibition of the judge mediating a case for a party he is or recently has sat on the case of, or who was recently a party in a mediation in which the judge was the mediator. I support the prohibition of a mediator/judge sitting on cases for counsel the judge is presently retained to mediate another matter for or was retained to do so for a reasonable period thereafter. I'm not sure it is necessary to extend that to other members of his/her firm carte blanc. (eg. nation wide firms) There is also the logical problem of NOT imputing to the judge the activities of other members of the judge's "mediation group"in any disclosure requirement. Is it consistent to require the judge to disclose only his mediation contacts and not those of other members of his group when the judge may profit, if indirectly, from those activities?

There is no problem with judges hearing successive and simultaneous cases for the same counsel or involving the same parties, but some perceive a problem if the judge has ever mediated a case for that counsel or those parties. If there is a justifiable difference, it must lie not in the work, but the payment for the work. The Report suggests this is the problem[3] I submit it is demeaning and insulting to suggest a judge would compromise judicial integrity to gain mediation work. .

Would the appearance of impartiality be improved by allowing, perhaps requiring, active

[3] See Report, Comments, page 15, last paragraph.

senior judges who also mediate to use the services of the state or circuit court administrator, or the circuit ADR office, to attend to matters concerning the judges's mediation practice? It could,

for example, provide scheduling, billing and collections for a reasonable percentage of the billings to defray the cost. The collections could be "blind" to the judge–much as donations to judges' reelection campaigns are. This would also assure the question of conflicts could be dealt with adequately and this data accessible to the Court Administrator for judicial assignment purposes. Since almost everything is computerized now, this function may be easily added.

I don't presume to tell the Committee it is wrong, however there may be ramifications that it had not considered. The rules that are adopted now will affect many, many retired judges in the future. Should we be giving these judges an incentive to continue their service both as judges and as mediators, or should we make it so difficult for them to do both that as a practical matter they must choose which?

Respectfully submitted,

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I certify a copy hereof has been served upon Judge Shawn Lee Briese, Committee Chair by U.S. Mail to 125 East Orange Avenue, Suite 106, Daytona Beach, Fl 32114-4420, this 15 March, 2005.

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R. A. Green