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Senior Judge
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February 24, 2005

Mr. Thomas D. Hall, Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399-1925

RE: Committee Recommendations on Senior Judges as Mediators

Dear Mr. Hall:

In today's mail, I received a copy of "The Resolution Report" prepared by the Florida Dispute Resolution Center, indicating that the ADR Rules and Policy Committee has submitted its report and recommendations relating to Senior Judges who also serve as mediators. This letter is submitted for consideration by the Supreme Court of Florida when it reviews and evaluates recommendation made by the Committee .

Having been extended the courtesy by the Senior Judge Review Board for the Fourth District, to appear before it on the subject matter of Senior Judges serving as mediators. I had the opportunity to discuss many aspects of the Board's concerns.

It appears to this writer that despite the distinction between a Senior (Trial) Judge and Senior (Appellate) Judge, all of whom are designated as Senior Judge, the Committee's final recommendations inadvertently overlook this distinction in formulating its recommendations. This is apparent from the way these recommendations are written; they are more appropriately directed towards a Senior Judge mediator who sits as a single judge at the trial level.

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This is also more clearly is evident when reviewing the commentary section to the Application Section of the Code of Judicial Conduct, which is quoted verbatim by the Committee. In endeavoring to explain the Application Section the commentary points out:

... This provision is intended to prohibit a Senior Judge from soliciting lawyers to use his or her mediation services when those lawyers are or may be before the judge in proceedings where the Senior Judge is acting in a judicial capacity...

This is a practical impossibility where a Senior Judge mediator sits at the appellate level on assignment. Query? When does that solicitation occur? Is it done from the bench while two other colleagues are present? Does the commentary contemplate that a Senior Judge mediator will race out to the parking lot to begin his/her solicitation process? Is the mere presence of that Senior Judge a potential concern to lawyers - if so, how? And if so, it should be specifically addressed. The absurdity of the foregoing examples only underscores the fact that appellate judges who are Senior Judge mediators and are assigned to the Appellate Court, need to be examined in a different light than a Senior Judge who presides as the sole judge at the trial level.

While I have no objection to and advocate disclosure even if not required where any perception of fairness is involved, is it the Supreme Court's intention, as is suggested under Recommendation I(B) that a Senior Judge who sits with two other judges must inform all counsel prior to a mediation that he sat on a panel in which one of the lawyers or the law firm was involved? Is it the Supreme Court's intention, as mentioned in Recommendation I 8) that a Senior Judge who had sat on a panel which presided over a case involving a party or attorney to a mediation, be required to obtain express consent of all parties before that Senior Judge can proceed with the mediation?

These comments are made solely to point out that the proposed recommendations do not fully address situations involving Senior Judge mediators who have previously served on the appellate bench and who desire to be assigned to that bench. It would seem to this writer that although there should be rules or standards applicable to appellate judges on senior status serving as mediators, the present recommendations do not adequately and practically address that situation.

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As I previously indicated to the Review Board before whom I appeared, I wish to reaffirm my commendations to the Committee and to the Supreme Court for their sensitivity to the situation and for their well-intentioned action to create an atmosphere among the Bench, Bar and general public, that underscores the notion that even the slightest perception of partiality or prejudice cannot and will not be tolerated.

Thank you for your courtesy in reading this letter.

Sincerely,

Gerald Mager

GM/snb

cc: Justice Charles T. Wells