

IN THE SUPREME COURT OF FLORIDA

Case No. SC04-2482

**IN RE: REPORT OF THE SUPREME COURT COMMITTEE
ON ALTERNATIVE DISPUTE RESOLUTION RULES AND POLICY**

**RESPONSE OF THE FAMILY LAW RULES COMMITTEE
TO SENIOR JUDGES AS MEDIATORS, AMENDED FINAL REPORT**

Henry H. Harnage
Attorney at Law
Chair, Family Law Rules Committee
Greenberg Traurig
1221 Brickell Avenue
Miami, FL 33131
(305) 579-0779

Raymond T. McNeal
Circuit Judge
Family Law Rules Committee
Committee Liaison
110 N.W. First Avenue, Room 3058
Ocala, FL 34475
(352) 401-6755

John F. Harkness, Jr.
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5600

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STATEMENT OF THE CASE AND FACTS

The Committee on Alternative Dispute Resolution Rules and Policy recommended an amendment to Rule 12.741(b)(6)(A)(ii), Florida Family Law Rules of Procedure, to eliminate the right of parties to choose a senior judge to mediate their case who is not certified under to Rule 10.100, Florida Rules for Certified and Court-Appointed Mediators. The relevant part of the proposed rule provides as follows:

(6) Appointment of the Mediator.

(A) Within 10 days of the order of referral, the parties may agree upon a stipulation with the court designating:

(i) a certified mediator; or

(ii) a mediator, other than a senior judge, who ~~does not meet the certification requirements of these rules~~ is not certified as a mediator, but who in the opinion of the parties and upon review by the presiding judge, is otherwise qualified by training or experience to mediate all or some of the issues in the particular case.

In order to effect this change in the Family Law Rules of Procedure, the Committee also proposed changes in the Florida Rules for Certified and Court Appointed Mediators and the Code of Judicial Conduct. Those changes are:

Florida Rules for Certified and Court-Appointed Mediators

Rule 10.100, General Qualifications

(e) Senior Judges Serving as Mediators. A senior judge may serve as a mediator in a court-ordered mediation only if certified by the Florida Supreme Court as a mediator for that type of mediation.

Code of Judicial Conduct

Canon 5 A Judge Shall Regulate Extrajudicial Activities to Minimize the Risk of Conflict With Judicial Duties.

F. Service as Arbitrator or Mediator.

(2) A senior judge may serve as a mediator in any case in which the senior judge is not presiding, only if the senior judge is certified pursuant to rule 10.100, Florida Rules for Certified and Court-Appointed Mediators.

Both of these rules prohibit senior judges from serving as mediators in court-ordered mediation unless the senior judge is a certified mediator in Florida.

The proposed change to Canon 5 is broader. It prohibits a senior judge from serving as a mediator in “any case,” whether the mediation is court-ordered or not.

The Committee on Alternative Dispute Resolution Rules and Policy cites four specific reasons for requiring certification: 1) senior judge mediators might compromise self determination of the parties because the judicial function is

antithetical to the role of a mediator; 2) senior judges might compromise the mediation process to obtain future mediation business from one of the attorneys; 3) senior judges might compromise the adjudicatory process to obtain future mediation business from one of the attorneys; and 4) attorneys may compromise the mediation process by being more deferential to a senior judge mediator who may be assigned to future litigation involving the attorneys. Supreme Court Committee on Alternative Dispute Resolution Rules and Policy, *Senior Judges As Mediators, Amended Final Report*, (2004) (hereinafter cited as *Report*), at 7. The last three reasons are different variations of potential conflicts of interest. While citing the need for both mediator and judicial ethical controls, the Committee reported that there is “no evidence that the current Code of Judicial Conduct is not working properly in relation to the practice of senior judges serving as mediators.” *Report*, at 8. The Report did not elaborate on any specific practices by senior judges who are not certified that would support the assertion that both mediator and judicial ethical controls are necessary to protect consumers of mediation services from incompetence or misconduct by senior judges.

The Family Law Rules Committee voted 21 to 1, with 1 abstention, to oppose the proposed change in Rule 12.741, Florida Family Law Rules of Procedure. The Family Law Rules Committee also voted 22 to 1, with no

abstentions, to recommend substituting “including a senior judge” for the proposed language, “other than a senior judge.”

The Family Law Rules Committee does not oppose the proposed disclosure or educational requirements.

SUMMARY OF ARGUMENT

The Family Law Rules Committee contends that requiring senior judges who intend to mediate to be certified by the Florida Supreme Court as a mediator pursuant to Rule 10.100, Florida Rules for Certified and Court-Appointed Mediators, is unnecessary. First, the Florida Rules for Certified and Court-Appointed Mediators provide ethical standards of conduct for all “court-appointed mediators.” Rule 10.200, Florida Rules for Certified and Court-Appointed Mediators. Thus, the proposed changes in Rule 12.741(b)(6)(A)(ii), Florida Family Law Rules of Procedure, and Rule 10.100, Florida Rules for Certified and Court-Appointed Mediators, are redundant.

The proposed change to add Canon 5F(2) prohibiting senior judges from mediating “any case” without being a certified mediator is much broader. This change prohibits senior judges who are not certified mediators from mediating a pending case at the request of the parties, even if the mediation is not court-ordered. There are no facts or policy that requires the Supreme Court to interfere with the right of individual parties to contract for mediation services. In fact, the proposed change is contrary to the announced public policy of Florida of allowing self-determination in mediation and in family law litigation.

ARGUMENT

A. Requiring senior judges who perform mediation services to be certified by the Supreme Court as mediators pursuant to Rule 10.100, Florida Rules for Certified and Court-Appointed Mediators, is unnecessary.

The Family Law Rules Committee argues that both mediator and judicial ethical controls are unnecessary to protect consumers from the incompetence of or misconduct by senior judges or to protect the integrity of the mediation process. It is unnecessary because parties are protected in all court-ordered mediation by the ethical standards of conduct in the Florida Rules for Certified and Court-Appointed Mediators, whether the mediator is certified or not. Rule 10.200, Florida Rules for Certified and Court-Appointed Mediators. Parties are also protected by Rule 12.741(b)(6), Florida Family Law Rules of Procedure, which requires the court to appoint a certified family law mediator unless the parties select someone else by agreement. Most importantly, the changes are unnecessary because there is absolutely no evidence that senior judges are performing or will perform mediation services unethically or incompetently.

The Committee on Alternative Dispute Resolution Rules and Policy is concerned that senior judge mediators might compromise self-determination by the parties because the judicial function is antithetical to the role of a mediator.

However, the roles of other professionals who furnish mediation services are also antithetical to the role of a mediator. The risk that senior judge mediators will compromise self-determination is no greater than the risk that any other mediator will compromise the mediation process. All mediators must learn to apply new skills that encourage and allow the parties to develop unique solutions to their problems. See Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-adversarial Approach to Problem Solving Mediation*, 28 Fordham Urb. L.J. 935 (April, 2001) (discusses transforming the ethics of zealous advocacy to the ethics of mediation). To impose additional requirements on senior judges based on a belief that they will be unethical or incompetent otherwise, ignores the intelligence, competence, high ethics, and extensive education of the Florida judiciary. Of all professionals, judges have the best foundation to become quality mediators.

All new judges receive mandatory education when they take office and all judges are required to take continuing education courses, including ethics. Florida judicial education is the best in the world. Each course or workshop is based on specific learning objectives and presented by instructors who are trained in adult education.

The courses are not confined to substantive law. For example, judges

hearing family cases (domestic relations, domestic violence, dependency, and delinquency) are educated in a wide variety of nonlegal subjects such as the dynamics of domestic violence, child development, family systems, psychological testing, alcohol and drug dependency, taxation, listening skills, and problem solving. *See In re Report of the Family Court Steering Committee (Family Courts IV)*, 794 So. 2d 518, 533 (Fla. 2001) (family judges should have training in nonlegal subjects affecting their work).

The Family Law Rules Committee supports mediation training, but training and certification are separate issues. The Code of Judicial Conduct could be amended to require senior judges to attend mediation training without requiring certification. This is probably unnecessary. All of the evidence suggests that senior judges and others who practice mediation will obtain mediation training voluntarily because it is valuable to the practice of their profession. This is a basic concept of adult education.

B. Ethical concerns are appropriately and adequately addressed in the Code of Judicial Conduct and, when mediation is court-ordered, by the Rules for Certified and Court-Appointed Mediators.

The Committee on Alternative Dispute Resolution Rules and Policy is concerned about the potential conflicts of interest that may be created when a

senior judge mediates a case. The Committee listed three potential conflicts: 1) senior judges might compromise the mediation process to obtain future mediation business from one of the attorneys; 2) senior judges might compromise the adjudicatory process to obtain future mediation business from one of the attorneys; and 3) attorneys may compromise the mediation process by being more deferential to a senior judge mediator who may be assigned to future litigation involving the attorneys. All of these concerns involve the relationship between a senior judge mediator and the attorneys. The Family Law Rules Committee notes that 70% of domestic relations cases do not involve attorneys.

The Code of Judicial Conduct, Canon 3E, addresses the responsibility of judges, including senior judges, to disclose conflicts of interest and disqualify themselves whenever “the judge’s impartiality might reasonably be questioned.” The Commentary provides, “A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.” Judges and attorneys are fully aware of conflicts of interest and how they might arise in litigation, the practice of law, and mediation. Senior judges should not be singled out for certification to address this concern, especially when the Committee found “no evidence that the Code of Judicial Conduct is not

working properly in relation to the practice of senior judges serving as mediators.”
Report at 8.

Moreover, senior judges who are conducting court-ordered mediation are subject to the mediation rules. Rule 10.340, Florida Rules for Certified and Court-Appointed Mediators, requires the mediator to disclose potential conflicts of interest. Rule 10.330, Florida Rules for Certified and Court-Appointed Mediators, includes a commitment to avoid even the appearance of impartiality. These rules are consistent with the Code of Judicial Conduct.

C. Requiring senior judges who perform mediation services to be certified by the Supreme Court as mediators pursuant to Rule 10.100, Florida Rules for Certified and Court-Appointed Mediators, violates the public policy of Florida favoring self-determination.

Mediator certification is not needed to protect consumers from unethical or incompetent behavior by senior judge mediators because mediation is voluntary. Although the court may refer the parties to mediation, the parties are not required to mediate. The parties are permitted to select their own mediator without regard to training or qualifications. If the parties do not agree to a mediator, the court is limited to appointment of a certified family mediator. The parties are not required to mediate in good faith or to reach an agreement.

The ability of the parties to control the mediation process originated in an early recommendation of the Special Committee on Mediation and Arbitration Rules. “[T]he committee sought to enhance the overall consensual atmosphere of ADR in Florida by putting more control of the process in the hands of the parties involved. Hence, suggested modifications of the rules have been made to allow more direct involvement by the parties in initiating mediation, selection of mediators, timing of the mediation conference, and initiating enforcement procedures.” *In re Amendment to Florida Rules of Civil Procedure*, 563 So. 2d 85 (Fla. 1990).

The question of certification is related to whether parties are permitted to choose whether to engage in mediation and to select the mediator who meets their needs. The Society of Professionals in Dispute Resolution (SPIDR), Commission on Qualifications, stated, “The need for protection against incompetence rises as the parties’ ability to protect themselves by freely choosing or rejecting particular dispute resolution processes, programs or neutrals diminishes.” Report of the Commission on Qualifications (1989). It is illogical to limit their right to choose a senior judge, but allow them to select a mediator who has no training, education, or experience in mediation skills.

The right of parties to choose persons and processes to resolve their disputes is reflected in guiding principles of a model family court approved by the

Florida Supreme Court. *In re Report of the Family Court Steering Committee (Family Courts IV)*, 794 So. 2d at 519. Guiding Principle 6 provides, “Whenever possible, parties and their attorneys should be empowered to select processes for addressing issues in their cases that are compatible with the family's needs, financial circumstances, and legal requirements.” *Id.* at 522. The opinion also approved Guiding Principle 5 that requires courts to “offer a variety of dispute resolution forums where the family can resolve problems without additional emotional trauma.” *Id.* The additional options benefit both families and the legal system. *See Jeffrey Stempel, Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator’s Role*, 24 Fla.St.U.L.R. 949 (Summer 1997) (advocating a more flexible definition of mediation to meet the needs of parties and the legal system).

Retired and senior judges are selected by parties and attorneys to mediate based on their reputation and skill as mediators, not as jurists. Many retired judges are in great demand for mediation, and they must perform competently and professionally. Judges who are incompetent or unethical mediators will have little or no repeat business. Thus, the market and the mediator’s professional reputation in the community are the best regulators of ethical behavior.

D. Requiring senior judges to take a course for judges who intend to

serve as mediators approved by the Florida Court Education Council is sufficient to educate senior judges in areas of ethical behavior which could be violated in the mediation process.

Requiring senior judges to attend an educational course to alert them “to various ethical problems which could arise from service as both a senior judge and a mediator,” *Report* at 14, is appropriate. Requiring certification in addition to this education is redundant. The Family Law Rules Committee supports adoption of the education requirement for senior judges who intend to serve as mediators. Recommendation 1(D), *Id.* at 13.

CONCLUSION

The Family Law Rules Committee argues that the Supreme Court should reject proposed Canon 5 F(2) because it restricts the freedom of parties to select a senior judge mediator in all circumstances. The change is contrary to Supreme Court policies that promote self-determination in selection of processes that will meet the unique needs of the individual family, allow families self-determination in selection of mediators and participation in mediation, and provide families with alternatives to adversarial litigation. These ideals meet the needs of Florida’s families and advance the Court’s family initiative. It is clear that many of these families and their attorneys do not want the protection of both judicial and ethical

controls and there is simply no evidence to suggest they are wrong.

Finally, the Court should not discourage senior judge services by requiring certification. If Canon 5 F(2) is adopted, the best retired judges will forego senior judge service, depriving smaller counties of much needed services. The judiciary needs the best retired judges to volunteer to serve as senior judges because in many cases, senior judges are used as troubleshooters to hear problem cases. They do not work full time and are not assigned a regular docket. Senior judges are used to fill in for sitting judges who cannot serve on a particular case or on a particular day or to resolve specific docket problems. A retired judge can earn more in a few hours as a mediator or lawyer than they can sitting a full day as a senior judge. Therefore, choosing to sit as a senior judge is a community service to the legal system that should be encouraged.

Respectfully submitted _____,

Henry Harnage
Attorney at Law
Chair, Family Law Rules Committee
Greenberg Traurig
1221 Brickell Avenue
Miami, FL 33131
(350) 579-0779
Florida Bar No.: 140835

Raymond T. McNeal
Circuit Judge, Fifth Circuit
Committee Liaison
Marion County Judicial Center
110 N.W. First Avenue, #3058
Ocala, Florida FL 34475
(352) 401-6755
Florida Bar No.: 163824

John F. Harkness, Jr.
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5600
Florida Bar No.: 123390

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I furnished a copy of the Response of the Family Law Rules Committee to Amended Final Report on Senior Judges as Mediators to the Honorable Shawn Lee Briese, 125 East Orange Avenue, Suite 106, Daytona Beach, FL 32114-4420 on _____, 2005.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Times New Roman 14 point font, and complies with the requirements set forth in Rule of Appellate Procedure 9.210(a)(2).
