

The Florida Supreme Court, on its own motion, is considering amending the Code of Judicial Conduct, the Florida Rules for Certified and Court-Appointed Mediators, and various rules of procedure to no longer allow senior judges to serve as mediators. Since first authorizing senior judges to serve as mediators, in In re Code of Judicial Conduct, 643 So. 1037 (Fla. 1994), and reaffirming the practice in In re Report of the Alternative Dispute Resolution Rules and Policy Committee on Senior Judges as Mediators, 915 So. 2d 145 (Fla. 2005), the Court has been mindful of concerns about the propriety of such dual service and has continued to monitor the practice. The Court is considering this change because of continued concerns about the ethical implications of the dual service. The Court is especially concerned about the potential that a senior judge who serves as a paid mediator could be seen as exploiting the judge's judicial position or lending the prestige of judicial office to advance the private interests of the judge or a mediation firm with which the judge may associate, or otherwise running afoul of the Code of Judicial Conduct.

The Court invites all interested persons to comment on the amendments under consideration, which are reproduced in full below, as well as online at <http://www.floridasupremecourt.org/decisions/proposed.shtml>. The Court specifically seeks comments from the conferences of judges, the senior judges, the Supreme Court's Alternative Dispute Resolution Rules and Policy Committee, the Judicial Ethics Advisory Committee, and the various Florida Bar rules committees whose bodies of rules are affected by the proposed change. All comments must be filed with the Court on or before November 15, 2013. If filed by an attorney in good standing with The Florida Bar, the comment must be electronically filed via the Portal in accordance with In re: Electronic Filing in the Supreme Court of Florida via the Florida Courts E-Filing Portal, Fla. Admin. Order No. AOSC13-7 (Feb 18, 2013). If filed by a non-lawyer or a lawyer not licensed to practice in Florida, the comment must be electronically filed via e-mail in accordance with In re Mandatory Submission of Electronic Copies of Documents, Fla. Admin. Order No. AOSC04-84 (Sept. 13, 2004). Electronically filed documents must be submitted in Microsoft Word 97 or higher. Any person unable to submit a comment electronically must mail or hand-deliver the originally signed comment to the Florida Supreme Court, Office of the Clerk, 500 South Duval Street, Tallahassee, Florida 32399-1927; no additional copies are required or will be accepted.

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE CODE OF JUDICIAL CONDUCT; THE FLORIDA RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS; THE FLORIDA RULES OF CIVIL PROCEDURE; THE FLORIDA RULES OF JUDICIAL ADMINISTRATION; THE FLORIDA RULES OF JUVENILE PROCEDURE; AND THE FLORIDA FAMILY LAW RULES OF PROCEDURE —SENIOR JUDGES AS MEDIATORS, Case No. SC13-1732

CODE OF JUDICIAL CONDUCT

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

A. – E. [No Change].

F. Service as Arbitrator or Mediator.

(1) A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law or Court rule. A judge may, however, take the necessary educational and training courses required to be a qualified and certified arbitrator or mediator, and may fulfill the requirements of observing and conducting actual arbitration or mediation proceedings as part of the certification process, provided such program does not, in any way, interfere with the performance of the judge's judicial duties.

(2) ~~A senior judge may serve as a mediator in a 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. Such senior judge may be associated with entities that are solely engaged in offering mediation or other alternative dispute resolution services but that are not otherwise engaged in the practice of law. However, such senior judge may in no other way advertise, solicit business, associate with a law firm, or participate in any other activity that directly or indirectly promotes his or her mediation services. A senior judge shall not serve as a mediator in any case in which the judge is currently presiding. A senior judge who provides mediation services shall not preside over the same type of case the judge mediates in the circuit where the mediation services are provided; however, a~~

~~senior judge may preside over other types of cases (e.g., criminal, juvenile, family law, probate) in the same circuit and may preside over cases in circuits in which the judge does not provide mediation services. A senior judge shall disclose if, when the practice was allowed, the judge is being utilized or has been was 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 is 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. A senior judge shall disclose any negotiations or agreements for the provision of mediation services between the senior judge and any of the parties or counsel to the case.~~

G. [No Change]

COMMENTARY

Canon 5A – Canon 5E(3). [No Change]

Canon 5F(1). Canon 5F(1) does not prohibit a judge or senior judge from participating in arbitration, mediation or settlement conferences performed as part of judicial duties. An active judge may take the necessary educational and training programs to be certified or qualified as a mediator or arbitrator, but this shall not be a part of the judge's judicial duties. While such a course will allow a judge to have a better understanding of the arbitration and mediation process, the certification and qualification of a judge as a mediator or arbitrator is primarily for the judge's personal benefit. While actually participating in the mediation and arbitration training activities, care must be taken in the selection of both cases and locations so as to guarantee that there is no interference or conflict between the training and the judge's judicial responsibilities. Indeed, the training should be conducted in such a manner as to avoid the involvement of persons likely to appear before the judge in legal proceedings.

Canon 5F(2). Canon 5F(2) no longer allows a senior judge to serve as a mediator. The purpose of these admonitions in this canon is to ensure that the impartiality of a senior judge's impartiality who served as mediator when such dual service was allowed is not subject to question. ~~Although a senior judge may act as a mediator or arbitrator, a~~Attention must be given to relationships with lawyers and law firms which may require disclosure or disqualification. ~~These provisions are 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.~~

Canon 5G. [No Change]

Application of the Code of Judicial Conduct

This Code applies to justices of the Supreme Court and judges of the District Courts of Appeal, Circuit Courts, and County Courts.

Anyone, whether or not a lawyer, who performs judicial functions, including but not limited to a civil traffic infraction hearing officer, court commissioner, general or special magistrate, domestic relations commissioner, child support hearing officer, or judge of compensation claims, shall, while performing judicial functions, conform with Canons 1, 2A, and 3, and such other provisions of this Code that might reasonably be applicable depending on the nature of the judicial function performed.

Any judge responsible for a person who performs a judicial function should require compliance with the applicable provisions of this Code.

If the hiring or appointing authority for persons who perform a judicial function is not a judge then that authority should adopt the applicable provisions of this Code.

A. [No Change}

B. Retired/Senior Judge

(1) A retired judge eligible to serve on assignment to temporary judicial duty, hereinafter referred to as “senior judge,” shall comply with all the provisions of this Code except Sections 5C(2), 5E, ~~5F(1)~~, and 6A. A senior judge shall not practice law or serve as an arbitrator or mediator, and shall refrain from accepting any assignment in any cause in which the judge's present financial business dealings, investments, or other extra-judicial activities might be directly or indirectly affected.

(2) If a retired justice or judge does not desire to be assigned to judicial service, such justice or judge who is a member of The Florida Bar may engage in the practice of law and still be entitled to receive retirement compensation. The justice or judge shall then be entitled to all the rights of an attorney-at-law and no longer be subject to this Code. A retired justice or judge who serves as a mediator is subject to the Florida Rules for Certified and Court-Appointed Mediators.

FLORIDA RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS

RULE 10.100. CERTIFICATION REQUIREMENTS

(a) – (f) [No Change]

~~**(g) 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.~~

(hg) Referral for Discipline. If the certification or licensure necessary for any person to be certified as a family or circuit mediator is suspended or revoked, or if the mediator holding such certification or licensure is in any other manner disciplined, such matter shall be referred to the Mediator Qualifications Board for appropriate action pursuant to rule 10.800.

(ih) Special Conditions. Mediators who are certified prior to August 1, 2006, shall not be subject to the point requirements for any category of certification in relation to which continuing certification is maintained.

RULE 10.340. CONFLICTS OF INTEREST

(a) – (d) [No Change]

(e) Senior and Retired Judges. A senior judge may not serve as a mediator. If a mediator who is a ~~senior~~retired judge not eligible for assignment to temporary judicial duty has presided over a case involving any party, attorney, or law firm in

the mediation, the mediator shall disclose such fact prior to mediation. ~~A mediator shall not serve as a mediator in any case in which the mediator is currently presiding as a senior judge. Absent express consent of the parties, a mediator shall not serve as a senior judge 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. A senior judge who provides mediation services shall not preside over the same type of case the judge mediates in the circuit where the mediation services are provided; however, a senior judge may preside over other types of cases (e.g., criminal, juvenile, family law, probate) in the same circuit and may preside over cases in circuits in which the judge does not provide mediation services.~~

COMMITTEE NOTES

[No Change]

FLORIDA RULES OF CIVIL PROCEDURE

RULE 1.720. MEDIATION PROCEDURES

(a) – (i) [No Change]

(j) Appointment of the Mediator.

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

(A) a certified mediator; or

(B) a mediator, ~~other than a senior judge~~, who 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.

(2) – (3) [No Change]

(k) [No Change]

FLORIDA RULES OF JUDICIAL ADMINISTRATION

RULE 2.320. CONTINUING JUDICIAL EDUCATION

(a) [No Change]

(b) **Education Requirements.**

(1) – (2) [No Change]

~~(3) **Mediation Training.** Prior to conducting any mediation, a senior judge shall have completed a minimum of one judicial education course offered by the Florida Court Education Council. The course shall specifically focus on the areas where the Code of Judicial Conduct or the Florida Rules for Certified and Court Appointed Mediators could be violated.~~

(c) – (e) [No Change]

FLORIDA RULES OF JUVENILE PROCEDURE

RULE 8.290. DEPENDENCY MEDIATION

(a) – (d) [No Change]

(e) **Appointment of the Mediator.**

(1) [No Change]

(2) **Party Stipulation.** Within 10 days of the filing of the order of referral to mediation, the parties may agree upon a stipulation with the court designating:

(A) another certified dependency mediator to replace the one selected by the judge; or

(B) a mediator, ~~other than a senior judge,~~ who 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.

(f) – (q) [No Change]

FLORIDA FAMILY LAW RULES OF PROCEDURE

RULE 12.741. MEDIATION RULES

(a) [No Change]

(b) General Procedures.

(1) – (5)

(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 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.

(B) – (C) [No Change]

COMMENTARY

[No Change]