

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 Number SC13-1732

**JUDICIAL ETHICS ADVISORY COMMITTEE’S
COMMENTS IN RESPONSE TO PROPOSED AMENDMENTS**

At the Court’s request, the Judicial Ethics Advisory Committee (“JEAC”) files this response to the Court’s proposed amendments to the Code of Judicial Conduct, the 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, which proposed amendments would no longer allow senior judges to serve as mediators. The JEAC believes that the proposed amendments are unnecessary at this time.

Like the Court, the JEAC is mindful of concerns about the propriety of such dual service. The JEAC also is 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 because of such dual service.

However, the JEAC believes that the proposed amendments to wholly prohibit senior judges from serving as mediators are unnecessary at this time for five reasons.

First, Canon 5F(2) of the Code of Judicial Conduct, as currently drafted, already provides adequate prohibitions to warn a senior judge against the exploitation of such dual service. Canon 5F(2) currently states, in pertinent part:

[A senior judge who is associated with entities that are solely engaged in offering mediation] 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 who provides mediation services shall not preside over the same type of case the judge mediates in the circuit court 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.

Second, the Commentary to Canon 5F(2), as currently drafted, also provides an adequate warning to senior judges against the exploitation of such dual service. The Commentary currently states, in pertinent part:

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.

Third, in the nearly ten years since the Court authorized senior judges to serve as mediators when it enacted Canon 5F(2), *see In re Code of Judicial Conduct*, 643 So. 2d 1037 (Fla. 1994), the JEAC has received only four inquiries relating to such dual service, and the JEAC has understood those inquiries as seeking guidance to comply with Canon 5F(2) as currently drafted. *See Fla. JEAC Op. 2011-11* (a senior judge who has contracted with a mediation group may permit the mediation group to display the judge's image in its advertisements or to display the judge's name or professional biography on its website); *JEAC Op. 2009-10* (a senior judge may not preside over the trial of a civil case when the senior judge currently is providing mediation services in the same circuit in the same type of cases, even where the senior judge has not previously provided mediation services to the attorneys or parties involved in the trial, and the attorneys and parties on both sides of the case have requested that the senior judge preside over the trial); *JEAC Op. 2007-12* (a senior judge may not advertise mediation services to unrepresented persons in publications not directed to lawyers, even if the senior judge does not indicate that the senior judge ever served as a judge); *JEAC Op. 1999-16* (a retired judge who mediates

in circuit court cases may be recalled to serve as a county judge in an outlying district).

Fourth, despite the fact that the Court first authorized senior judges to serve as mediators nearly ten years ago, the JEAC is not aware of any instance in which a senior judge who serves as a mediator has been accused of exploiting such dual service.

Fifth, if the Court is aware of unreported, isolated instances of exploitation of dual service of which the JEAC is unaware, then the proposed amendments to wholly prohibit such dual service may be overbroad. A more narrow solution may be to allow senior judges to continue to serve as mediators, but amend Canon 5F(2) and the related rules to expressly address the Court's concern by adding the following sentence to Canon 5F(2):

A senior judge shall not exploit the judge's judicial position or lend the prestige of judicial office to advance the private interests of the judge or a mediation firm with which the judge may associate.

Respectfully submitted this 31st day of October 2013.

/s/ Roberto Arias

Honorable Roberto Arias

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CERTIFICATE OF SERVICE

The undersigned hereby certifies a true and correct copy of the foregoing Comments in Response to Proposed Amendments was forwarded this 31st day of October 2013, by e-service, to the following:

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CERTIFICATE OF TYPEFACE COMPLIANCE

The undersigned further certifies this response complies with the font requirements of Florida Rule of Appellate Procedure 9.100 (l).

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