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SUPREME COURT OF FLORIDA

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No. SC13-1732

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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.

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**COMMENTS OF THE CONFERENCE OF  
CIRCUIT JUDGES OF FLORIDA, INC.  
IN OPPOSITION TO PROPOSED AMENDMENTS**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF CITATIONS..... ii

COMMENTS ..... 1

CONCLUSION ..... 7

CERTIFICATE OF SERVICE ..... 8

CERTIFICATE OF COMPLIANCE..... 10

## **TABLE OF CITATIONS**

### **Cases**

<i>In re: Certification of Need for Additional Judges,</i> 105 So. 3d 1271 (Fla. 2012) .....	2
<i>In re: Certification of Need for Additional Judges,</i> 76 So. 3d 932 (Fla. 2011) .....	2
<i>In re: Amended Certification of the Need for Additional Judges,</i> 980 So. 2d 1045 (Fla. 2008) .....	2
<i>In re Certification of Need for Additional Judges,</i> 3 So. 3d 1177 (Fla. 2009) .....	2
<i>In re: Report and Recommendations of the Committee on the Appointment and Assignment of Senior Judges,</i> 847 So. 2d 415 (Fla. 2003) .....	2, 3

### **Rules of Court**

Florida Rule of Judicial Administration 2.320 .....	5
Florida Rules of Civil Procedure .....	4
Rules for Certified and Court Appointed Mediators .....	5, 7
Code of Judicial Conduct .....	4, 5
Rules of Judicial Administration .....	4, 5

## Other Authorities

### Opinions of the Florida Judicial Ethics Advisory Committee

JEAC Op. 2011-11 .....	6
JEAC Op. 2009-10 .....	6
JEAC Op. 2007-12 .....	6
 Martha Weinstein, <i>Mediation: Fulfilling the Promise of Democracy</i> , Fla. B.J., JANUARY 2000 .....	 2
 Francisco R. Angones, <i>Blessed Are the Peacemakers</i> , Fla. B.J., December 2007 .....	 3
 Douglas E. Ray, Professor of Law, <i>The Seven Important Roles Judges Play in Our Society, A Tribute to Our Alumni in the Judiciary</i> .....	 3

**THE CONFERENCE OF CIRCUIT JUDGES OF FLORIDA, INC.'S  
COMMENTS IN OPPOSITION TO THE PROPOSED AMENDMENTS**

By notice published in the Florida Bar News on October 15, 2013, the Court invited all interested parties to comment on the proposed amendments to the Code of Judicial Conduct, Florida Rules for Certified and Court-Appointed Mediators, and various other rules of procedure ("Proposed Amendments") to no longer allow Senior Judges to serve as mediators. The Court specifically sought comments from the conferences of judges whose rules would be affected by the proposed change. The Conference of Circuit Judges of Florida, Inc. ("the Conference"), whose members include active and retired circuit judges of Florida, respectfully responds to the invitation to comment on the Proposed Amendments to prohibit senior judges from serving as mediators. The Conference requests that the Court withdraw its Proposed Amendments in the above-styled matter, and in support thereof, states:

1. The Proposed Amendments prohibit Senior Judges from serving as mediators, and the Conference believes that change will effectively reduce the pool of Senior Judges; negatively impact the processing of the backlog of foreclosures;

and adversely affect the administration of justice by significantly reducing the number of available Senior Judges.<sup>1</sup>

2. Senior Judges are effective mediators, mainly because of the skill set acquired from years of judicial service. Effective mediation is beneficial to reduce the backlog in the court system and to ensure the administration of justice.<sup>2</sup> The availability of Senior Judges improves the services that Florida courts are able to

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<sup>1</sup> *In re Certification of Need for Additional Judges*, 105 So. 3d 1271 (Fla. 2012); *In re Certification of Need For Additional Judges*, 76 So. 3d 932 (Fla. 2011); *In re Certification of Need for Additional Judges*, 3 So. 3d 1177 (Fla. 2009); *In re Amended Certification Of Need for Additional Judges*, 980 So. 2d 1045 (Fla. 2008); *In re: Report and Recommendations of the Committee on the Appointment and Assignment of Senior Judges*, 847 So. 2d 415, 418 (Fla. 2003) (“Senior Judges perform the work of approximately thirty-five full-time judges at a small fraction of the cost of that number of full-time judges”).

<sup>2</sup> Martha Weinstein, *Mediation: Fulfilling the Promise of Democracy*, Fla. B.J., JANUARY 2000, at 35, 36:

[Mediation] also permits the opportunity for people to vent without hostility. People are asked to put themselves into the other party's position to begin to know who the other person is and why he or she feels a certain way. With the mediator's skilled application of specific techniques, the parties can begin to see one another as human, and they feel heard and validated.

A mediator helps the parties explore their deeper interests while concomitantly helping them hear the other person's interests, which ultimately results in finding mutual interests and common ground. Bringing people together in this manner and encouraging an exploration of creative solutions in a safe and confidential setting allows people to generate meaningful solutions and develop a necessary bond to carry out the agreed-to tasks. Justice is created rather than dictated and the mediator is viewed with trust and respect. . . . Mediation is a means of restoring public trust and confidence in our legal system. When citizens feel empowered to resolve their own disputes or work together in the pursuit of justice, they feel more connected to the process and the system.

provide citizens.<sup>3</sup> Temperance, integrity, and attentiveness are polished for judges, and these skills are valuable in the mediation setting.<sup>4</sup> Senior judges are trusted and respected people that enable each side to tell their story and “make order out of chaos.”<sup>5</sup>

3. The Court has acknowledged the invaluable service of Senior Judges to the judicial system,<sup>6</sup> but the Proposed Amendments deprive the circuit courts of this invaluable assistance that Senior Judges provide in handling caseloads, especially for foreclosures. Seasoned judges who are ready to retire have indicated

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<sup>3</sup> See *In re: Report and Recommendations of the Committee on the Appointment and Assignment of Senior Judges*, 847 So. 2d 415, 417 (Fla. 2003) (“we would be remiss if we did not emphasize that senior judges play a vital role in Florida’s judicial system. . . Parties have better and speedier access to courts, trial calendars are shortened, backlogs are reduced, and interruptions caused by absences due to illness or vacancies in office are avoided because of the continued public service of senior judges”).

<sup>4</sup> See Francisco R. Angones, *Blessed Are the Peacemakers*, Fla. B.J., December 2007, at 6; See *In re: Report and Recommendations of the Committee on the Appointment and Assignment of Senior Judges*, 847 So. 2d 415, 420 (Fla. 2003) (a retired judge’s eligibility for senior judge service should be guided by “scholarship, communication, case management and productivity, temperament, work ethic, good health, and integrity”).

<sup>5</sup> See Douglas E. Ray, Professor of Law, *The Seven Important Roles Judges Play in Our Society, A Tribute to Our Alumni in the Judiciary*.

<sup>6</sup> *In re: Certification of Need for Additional Judges*, 105 So. 3d 1271, 1273 (Fla. 2012).

that they would chose mediation over serving as a Senior Judge, destroying the influx of Senior Judges.<sup>7</sup>

4. While the concern of the Court of the “ethical implications of dual service”<sup>8</sup> is understandable, it is not realistic as it relates to members of the Conference. For retired circuit judges serving as Senior Judges, there are sufficient safeguards in place to ensure that the ethics and impartiality of Senior Judges are maintained.<sup>9</sup>

5. Senior Judges spend a significant amount of time and money obtaining mediator certification – Senior Judges are required to complete a judicial education course offered by the Florida Court Education Council, “specifically focus[ed] on the areas where the Code of Judicial Conduct or the Florida Rules for Certified and Court-Appointed Mediators could be violated.”<sup>10</sup>

6. In 2005, the Alternative Dispute Resolution Rules and Policy Committee found “no published authority relating to complaints against senior judges serving as mediators” and “no evidence that the Code of Judicial Conduct was not working properly in relation to the practice of senior judges serving as

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<sup>7</sup> Honorable Thomas McGrady, Chief Judge, Sixth Judicial Circuit.

<sup>8</sup> The Florida Bar News, October 15, 2013, Proposed Rule Would Prohibit Senior Judges from Serving as Mediator.

<sup>9</sup> Code of Judicial Conduct; Florida Rules of Judicial Administration; Rules Regulating the Florida Bar, Fla. R. Civ. Pro. 1.720(j)(1)(B).

<sup>10</sup> Fla. R. Jud. Admin., Rule 2.320(b)(3).



mediators.”<sup>11</sup> In a survey made by the Conference among its membership, there remains no evidence that the practice is not working properly as it relates to members of the Conference. The practice is working as anticipated by the Code of Conduct and Rules. The Dispute Resolution Center of the Office of State Court Administrator has had no formal grievances specific to Senior Judges serving as mediators.<sup>12</sup> Likewise, the Judicial Ethics Advisory Committee (JEAC) has published very few opinions in this area.<sup>13</sup>

7. To mediate, Senior Judges must be certified by the Court.<sup>14</sup> All mediators are prohibited from mediating a matter which involves a clear or undisclosed conflict of interest.<sup>15</sup> Additionally, a Senior Judge is bound by the Canons in the Code of Juridical Conduct and the Rules for Certified and Court-Appointed Mediators, which provide that “a senior judge who provides mediation services shall not preside over the same type of case the judge mediates in the

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<sup>11</sup> *In re: Report of Alternative Dispute Resolution Rules and Policy Committee on Senior Judges as Mediators*, 915 So.2d 145, 147 (2005).

<sup>12</sup> Office of State Courts Administrator, November 6, 2013.

<sup>13</sup> See JEAC Op. 2011-11 (senior judge who has contracted with mediation group may permit group to display judge’s image in advertising); JEAC Op. 2009-10 (senior judge who mediates in civil cases may not preside over a civil trial within circuit, even with parties’ consent because of potential conflicts in the same geographical area); JEAC Op. 2007-12 (senior judge may not advertise private mediation services, even if senior judge status is not mentioned).

<sup>14</sup> Code of Judicial Conduct 5F(2); Florida Rules for Certified and Court-Appointed Mediators, Rule 10.100(g).

<sup>15</sup> Fla. R. Cert. & Ct.-Apptd. Mediators 10.340(a).

circuit where the mediation services are provided.”<sup>16</sup> Senior judges who mediate are prohibited from “advertis[ing], solicit[ing] business, associat[ing] with a law firm, or participat[ing] in any other activity that directly or indirectly promotes his or her mediation services.”<sup>17</sup> These safeguards are powerful ethical protections that permit Senior Judges to serve Florida’s families.

8. Senior Judges are subject to the Standards of Professional Conduct present in the Florida Rules for Certified and Court-Appointed Mediators.<sup>18</sup> This dissipates the appearance of any conflict or impropriety.

9. As a practical matter if the Court prohibits Senior Judges from serving as mediators and arbitrators, the pool of available Senior Judges will be severely impacted. Based upon the survey conducted by the Senior Judges Committee of the Conference in the two weeks prior to the filing of these comments, all but seven respondents answered that they would not continue to serve as a Senior Judge.<sup>19</sup> That’s a 72% decrease in the amount of current Senior Judges who also mediate.<sup>20</sup>

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<sup>16</sup> Fla. R. Cert. & Ct.-Apptd. Mediators 10.340(e); *see also*: Canon of Judicial Conduct 5F(2).

<sup>17</sup> Code of Judicial Conduct 5F(2).

<sup>18</sup> Part II, Florida Rules for Certified and Court-Appointed Mediators.

<sup>19</sup> Senior Judges Committee, Conference of Circuit Judges of Florida, Inc., Survey Results to: “As both a Senior Judge and a Certified Mediator, if the Supreme Court prohibits Senior Judges from serving as mediators, would you continue to serve as a Senior Judge?” October 30, 2013.

<sup>20</sup> *Id.*

10. Mediators are required to maintain impartiality, defined as “freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual.”<sup>21</sup>

11. Currently, Florida sits with the overwhelming majority of states which permit Senior Judges to serve as mediators.<sup>22</sup>

12. The Conference endorses and adopts the Comments of the Circuit Chief Judges of Florida.

### CONCLUSION


The Conference of Circuit Judges of Florida, Inc. believes that the Proposed Amendments will adversely impact the administration of justice at the trial court level and is opposed to the Proposed Amendments. WHEREFORE, it is respectfully requested that the Court withdraw its Proposed Amendments prohibiting Senior Judges from serving as mediators.

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<sup>21</sup> Fla. R. Cert. & Ct.-Apptd. Mediators 10.330(a).

<sup>22</sup> In 2005, this Court observed that “the clear majority” of states allowed senior judges to serve as mediators. *See Senior Judges as Mediators*, 915 So. 2d at 146 (citing *Nat’l Ctr. For State Courts, Regulation of Retired Judges Serving as Arbitrators and Mediators* (1999)).

Respectfully submitted this 13<sup>th</sup> day of November, 2013.



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### **CERTIFICATE OF SERVICE**

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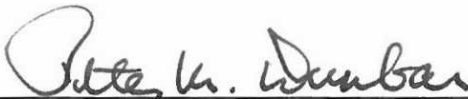
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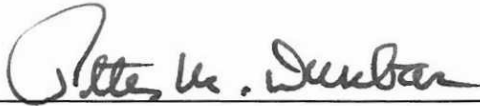
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY this Comment complies with the requirements of  
Florida Rule of Appellate Procedure 9.100 and is printed in Times New Roman 14-  
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