

Patrick W. Border
Circuit Judge, 16th Division
Circuit Court of the First Circuit Hawaii
September 1, 2005

Rule 4.06 Service as Arbitrator or Mediator

Judge Border recommends that Rule 4.06 be modified to include the following language at the end of the rule: Nothing within this rule shall prohibit a judge from providing free mediation either *ad hoc*, or as a volunteer mediator for a non-profit community mediation center, so long as no compensation of any type is provided to the judge arising from the service provided, and so long as the judge is not otherwise involved as a judge in litigation on the same or similar subject matter.

He further recommends that the commentary to Rule 4.06 be changed to provide that volunteer mediation by judges shall be permissible *unless expressly prohibited by law*.

Judge Border notes that the commentary currently denotes a concern with providing mediation services free of charge by noting the following:

...Even when performed without charge, dispute resolution services provided by a judge in an extrajudicial capacity *may interfere* with the proper performance of the judicial office, and is therefore permitted *only when authorized by law*...[Emphasis added].

Although it is a very vague expression, the phrase “unless expressly authorized by law” demonstrates one fact--that free mediation by a judge on a voluntary basis is not *per se* impermissible. However, this draft of the commentary provides no real guidance for what is “expressly authorized by law”. Prohibiting a judge to serve as a volunteer mediator “unless expressly authorized by law” is also counterproductive, for the judiciary, the judge, the litigants and the general public. By failing to identify what specific situations would permit mediation, the commentary sidesteps the issue of service on a volunteer basis.

The judge points out that the form of volunteerism which this clarification would allow would help to de-mystify judges within the larger community. He suggests that seeing judges providing volunteer services to the community would enhance respect for the legal system.