March 25, 2004

George Kuhlman
ABA Ethics Counsel
ABA Center for Professional Responsibility
541 N. Fairbanks Ct.
Chicago, IL 60611

Dear Mr. Kuhlman,

As a United States Magistrate Judge in the District of Oregon I have expended the bulk of my energy and time as a settlement judge. On average, I conduct over 100 settlement conferences per year. I view mediation as a vitally important public service: assisting litigants to fashion an agreed-upon resolution to their dispute not only benefits them but also everyone affected by the expense and uncertainty of any system that would rely exclusively or primarily on outcome-by-trial.

I doubt that there are many who would dispute the positive aspects of Alternative Dispute Resolution and, specifically, the critical role judicial settlement conferences play in the ADR process.

By their very nature, settlement conferences are voluntary, relatively informal, non-binding (except where an agreement is reached at the end of the process), and of no precedential value. When I "preside" over a settlement conference as a judicial officer, I do not "decide" any issues in the case, I make no dispositive rulings, I impose no result on the parties. Rather, I simply assist them to fashion their own solution, if that is possible.

This brings me to the issue of § 4.4(b) of the Compendium to Canon 5E of the Code of Conduct for United States Judges, which states that "Canon 5E precludes a judge from serving as a mediator for cases in state court."

I must confess that I am puzzled regarding the rationale underlying this interpretation of Canon 5E, especially in that no fee is assessed for our services.

To begin with, it is not uncommon for federal judicial officers to preside over settlement conferences in federal cases wherein jurisdiction may be seriously questioned (e.g., is there

complete diversity among the parties?). Nothing requires us to reach the merits of any jurisdictional issues as a prerequisite to conducting a settlement conference.

Secondly, we often find ourselves addressing purely state law issues in cases where there is diversity jurisdiction or which present a federal claim with a variety of supplemental state law claims.

Third, in the District of Oregon, we have a rich and valued tradition of cooperation with our state court colleagues. I have, for example, benefitted greatly from the expertise of the Honorable Lyle Velure, a state circuit court judge, in mediating several federal court cases. Judge Velure is an invaluable resource in medical malpractice cases, complex commercial litigation, and cases involving difficult questions of insurance coverage. To be unable to return his gracious willingness to help with like willingness is difficult to explain, to say the least.

As I am aware of no parallel state canon of ethics which bars state judges from conducting settlement conferences in federal cases,[1] this begs the inevitable question of why Canon 5E is being interpreted to preclude federal judges from serving as mediators in state cases. It would be most helpful if the ABA could clarify that it finds nothing unethical in such proceedings.

Sincerely,

Thomas M. Coffin

[1]The typical manner in which these "cross-over" settlement conferences occur is that the attorneys for the parties request a particular judge to mediate the case, either because the attorneys feel the judge has particular expertise for the type of case and/or has a particular style that would be best suited for the settlement of the case.