

March 31, 2004

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

Re: Model Code of Judicial Conduct

Dear Mr. Kuhlman:

I write to support whatever rule changes are necessary to permit federal judges to act as mediators in both state and federal court cases. I do so because I have been involved in extremely complex state court litigation which has been successfully mediated because of the cooperative and skillful teamwork of federal and state court judges. Permit me to relate two examples.

The first example is The Capes litigation. The Capes is a beautiful, high-end townhouse development located on the Oregon Coast. It was built in the 1990's, and sales peaked at approximately \$450,000 per townhome. The development was built on a huge sand dune several hundred feet above the beach with panoramic views of the ocean. The front row of the development's townhomes was situated ten feet from the edge of the bluff.

During the winter of 1997, ocean storms caused major erosion at the base of the bluff at The Capes. Landslides occurred which resulted in several of the townhomes losing the ground up to the edge of their foundations, leaving decks suspended in open space. Several townhomes were declared uninhabitable by Tillamook County. It was feared that some of the townhomes would literally fall into the ocean. The plight of The Capes was a major news event as evidenced by the satirical cartoon in *The Oregonian* dated February 28, 1998, a copy of which is enclosed.

Many lawsuits were filed by homeowners and the homeowners' association in state court in Portland alleging property damage because of the landslides and also construction defects which affected all of the several hundred townhomes at The Capes. My law firm was appointed to defend The Capes Development Company.

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Early on in the litigation process, we successfully filed a motion to change venue from Portland to Tillamook County. If the case had gone to trial in Tillamook, Oregon, the size and complexity of the case would have overwhelmed the resources of that small Oregon county. The trial judge in Portland was given special permission by the Oregon Supreme Court to handle all pretrial hearings.

It soon became apparent to me, and several other defense counsel, that this case could not be successfully resolved in the traditional litigation manner. The financial costs would be enormous, and the time involved would be years, while several townhomes remained precariously perched on the razor's edge of a cliff. An alternative dispute resolution solution was needed.

One of the first steps in the process was to solicit U.S. District Court Judge Ann Aiken and Oregon Circuit Court Judge Lyle Velure as a team to mediate the differences between the defendants. The first stage of the mediation process was held in U.S. District Court in Portland among the defendants and their insurers on June 29, 1999. Just prior to this mediation, I had hired geologists and geotechnical engineers to develop a remedy for the landslide ("the fix"). Our experts did so. At the defendants' mediation, I was asked by Judges Aiken and Velure to make a presentation of the fix to the defendants and their insurers. The multi-million dollar fix would consist of a sheet pile wall near the beach and upper slope anchors near the crest of the bluff.

Judges Aiken and Velure decided that three things needed to occur. First, we needed to calculate the cost of the fix. Second, we needed to sell the concept to the homeowners. Third, we needed to aggregate the necessary funds from the insurers to pay for the fix.

The next step was to schedule a meeting with all of the homeowners which occurred in the ceremonial courtroom in U.S. District Court in Portland on July 20, 1999. I was asked to give a presentation about the fix with our experts. We prepared an elaborate power point presentation to do so.

This presentation to the homeowners was one of the most interesting events of my legal career. Several hundred homeowners and their attorneys packed the ceremonial courtroom for the presentation. I was the only defense lawyer present. Many prominent Oregonians were present, including retired U.S. Senator Mark O. Hatfield. We put on a presentation explaining in detail how the landslide and erosion at The Capes could be halted and the homes saved through a very expensive engineering and construction

project. After the presentation, a two-day mediation session occurred.

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Several more mediation sessions ensued with Judges Aiken and Velure. These mediation sessions occurred twice in October, November and December of 1999 and January and March of 2000 when the enormously complex issues between the homeowners, the homeowners' association, the defendants, and the insurers were finally agreed. Even after this, more mediations were necessary to resolve the differences of some recalcitrant homeowners.

The second example is the first round of The Archdiocese of Portland child sexual abuse litigation. Judges Aiken and Velure, working as a skilled team, successfully mediated over twenty child abuse cases in July of 2000. The mediations occurred in U.S. District Court in Portland and lasted for four straight days ending late on a Saturday night. The mediation process was astonishing.

The twenty-plus plaintiffs became a band of brothers intent on securing justice. I had never experienced anything quite like it. As each case settled, the settling plaintiff would enter the courtroom where all the plaintiffs were located and the remaining plaintiffs would exalt with joy and support for the plaintiff that settled. In turn, this apparently reinforced in the remaining plaintiffs their desire to succeed by settling. The teamwork of Judges Aiken and Velure was the key to resolving these cases. Judge Aiken spent hours at times with each plaintiff in order to provide the emotional support for a settlement. Judge Velure, in turn, worked with The Archdiocese and its insurers to aggregate the necessary funds to settle the cases.

In my opinion, the success of The Capes and The Archdiocese mediation processes teaches us several lessons: (1) Lawyers in complex cases need skilled and knowledgeable mediators to take on these complex cases and work them methodically towards a resolution. Often these skilled and experienced mediators are federal and state court judges. They should be available to help in this alternative conflict resolution process, either individually or as a team. The teamwork of federal and state court judges Aiken and Velure have achieved remarkable success because they compliment their skills so well. (2) The resolution of complex state court cases may have a positive effect on federal court litigation as well. One example is avoiding complex insurance coverage litigation in federal court between insurers. (3) As with any team, it is the correct combination of mediators that enhances the chances of success. (4) The cooperation of federal and state court judges in resolving complex cases is extremely positive for the parties, the lawyers, the county, and the community at large.

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It is my pleasure to relate two wonderful success stories to you. If you have any questions, I will be most pleased to respond.

Very truly yours,

John L. Langslet

JLL:ms

Enclosure

cc: The Honorable Anne Aiken
The Honorable Lyle C. Velure