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Via Federal Express

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

Re: Participation of Federal Judge/Mediators in State Court Cases

Dear Mr. Kuhlman:

I understand you are the person to whom this letter of concern should be addressed. I have been a practicing attorney in Oregon since 1982. My practice has been solely one of civil litigation and, primarily, medical malpractice litigation. I spent my first eighteen years defending such cases, and for the last four years have acted primarily as a plaintiff's attorney. The vast majority of my cases have been in state court.

I have recently learned that the federal judiciary has announced a prohibition against local federal judges participating as mediators or settlement judges in state court litigation. This development is unfortunate and, in my opinion, very concerning. I send this letter, therefore, to voice my opinion on this important issue.

The last several years have brought significant cutbacks to our state court judicial system. The financial constraints placed upon our state court civil justice system have been compounded by an ever-expanding criminal docket. As a result, those of us who practice solely civil litigation, and in particular, complex tort litigation, have seen a "right to jury trial" gradually become more a matter of chance. This increasing pressure has made alternative dispute resolution through settlement conferences and mediation a matter of utmost importance to the clients whose interests we serve to protect.

The strain on the state court system has left little time for many state court judges to develop effective settlement conference/mediation programs for complicated cases, including medical malpractice cases. Simply put, it is my belief that most state court judges often no longer have the time to devote to the complicated, emotional multi-party medical cases and the mediations which inevitably result. Parties, therefore, need to rely upon other sources for mediation assistance. We are extremely fortunate in Oregon to have members of the federal judiciary who are highly skilled judges/mediators and who have, historically, willingly assisted parties in complicated state court litigation to facilitate settlement of cases.

I can speak from personal experience as both a long-time insurance defense attorney and now a plaintiff's attorney when I say that having a federal judge (or magistrate) assist in mediating a state court case has a powerful impact with clients on both sides of the case. The insurers respect the authority and experience of the federal bench, and the parties, including physician defendants and plaintiffs, have an immense amount of respect for a mediator who is a sitting judge. Even when the rare mediation of a state court medical negligence case is conducted by a state court judge, that judge shares the bench with the ultimate trial judge, causing parties (particularly lay parties) to have concerns over being completely candid in the mediation process for fear of information "getting back to the trial court judge." This impediment to settlement is obviously non-existent when federal judges assist in resolving state court cases.

There is also the significant issue of expense when private mediators are retained. The cost of mediation through the services of a "private mediator" sometimes becomes an unfortunate factor in final negotiation of cases during the course of a mediation. This factor is a non-issue in cases involving a judge/mediator. Eliminating issues between the parties, such as who will pay the mediator and how much, facilitates the ultimate objective of settling the case.

Finally, use of federal judges as judge/mediators in state court cases fosters a healthy and dynamic relationship between the federal bench and the state bar. Unfortunately, in my experience, this relationship is not shared in other jurisdictions. I have had the privilege of trying cases in other states (Idaho and Florida) and handling cases short of trial in other states (Washington and California). When colleagues from other states hear that members of the federal judiciary in Oregon participate as judge/mediators in Oregon state court cases, they are often astonished at the "willingness" of the federal judiciary to provide this assistance. As a now long-time practicing lawyer in Oregon, I have come to appreciate the alienation that lawyers who practice rarely in the federal courts feel toward the federal judiciary. My partner, Bob Wagner, practices almost exclusively in the federal courts. He feels the same alienation from much of the judiciary in state court. The involvement of the federal judge/mediators in the resolution of

George Kuhlman
ABA Center for Professional Responsibility
March 8, 2004
Page 3

significant state court cases lessens this unfortunate alienation and, ultimately, leads to better relationships and more efficient litigation of claims.

For all of the above reasons, I would ask those charged with considering the issue to once again permit our federal judiciary to again participate in the mediation of significant state court cases.

Thank you for your consideration.

Very truly yours,

David K. Miller
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