

September 1, 2005

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Via E-mail:

RE: ABA Model Code of Judicial Conduct

Dear Ladies/Gentlemen:

I am a trial judge in the Circuit Court of the First Circuit, State of Hawaii, the court of general jurisdiction in this state. I am writing to you to suggest clarification of Rule 4.06 of the Preliminary Draft, ABA Model Code of Judicial Conduct. That provision is styled as follows: "Rule 4.06 Service as Arbitrator or Mediator".

The draft provision presently reads as follows:

A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

In the commentary, there are two reasons given for not allowing judges to mediate. The central reason for the rule is established as follows:

...The integrity of the judiciary is undermined however, *when judges take financial advantage of their offices by rendering private dispute resolution for pecuniary gain as an extra-judicial activity...*[emphasis added].

The major objection behind the prohibition on serving as arbitrator or mediator is clearly established. It is the *financial gain*, not the rendering of the service, which is objectionable. As such, the rule has a clear purpose which should be promoted. That *purpose is to prevent judges from making money, or appearing to profit by becoming an arbitrator or mediator for hire.*

The commentary further specifies a more secondary 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, the commentary provides no real guidance for what is “expressly authorized by law”.

In Hawaii, there appears to be no statute, case, or rule (other than Rule 4.06 itself) that addresses whether a judge may mediate community center cases for free. Although unclear, it is arguable that the absence of a prohibition from providing volunteer mediation services would satisfy the rule, thereby allowing volunteer mediation by a judge.

Prohibiting a judge to serve as a volunteer mediator “unless expressly authorized by law” is both meaningless as useful guidance, and 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.

Absent resort to the commentary, the bare text of the draft rule is broad enough to exclude participation by judges even as volunteer mediators for community organizations and non-profit mediation centers.

BENEFITS TO THE COMMUNITY OF ALLOWING VOLUNTEER SERVICE BY A JUDGE

In the United States there are now hundreds of volunteer centers where mediation services are offered, at no profit for the mediator, and at minimal cost to the parties seeking mediation services. Where there is a charge for the mediation, it is to cover the administrative costs to the center, not to pay the volunteer mediators.

I refer you to the National Association for Community Mediation, www.nafcm.org. This organization presently has 353 member mediation centers across the nation, offering low-cost mediation at the community level, using volunteer (unpaid) mediators. These mediators typically are trained at the center, and provide their mediation services for free. As volunteers they create healthy communities by promoting peaceful resolutions for peoples’ disputes. Mediators have the satisfaction of guiding people to solutions that resolve disagreements. There is nothing intrinsic to this process which is inconsistent with a judge’s participation. To the contrary, such participation would lend prestige to the profession by showing a willingness to provide volunteer services.

The purpose of my letter is to ask that the rules unambiguously allow participation by a judge as a volunteer mediator, as long as there is no compensation provided for the service, and no litigation with the same parties or issues before the mediator/judge.

Typically the cases which are mediated at these volunteer centers are matters where the parties cannot afford to litigate (except in small claims court, where jurisdictional limits are often miniscule) and where mediation may be the only alternative to unresolved conflict. The increasing expense of litigation makes it unlikely that a mediation center case would ever evolve into litigation. Conversely, the larger cases that are begun through the filing of a lawsuit are practically never referred to a volunteer community center. These cases are generally regarded as more complicated than volunteer mediators would be capable of handling. Complicated cases, such as those which commence with a lawsuit are referred to paid mediators for resolution. Thus the litigated case mediations and volunteer mediations almost never overlap.

As the commentary for the draft rule acknowledges, it is always possible that a mediated dispute could evolve into a lawsuit that, in turn, could end up before the court of the mediator/judge. However there are judicial precautions in place to prevent that from happening.

The mediator/judge would need to examine the file and make a threshold determination whether the amount in controversy and the circumstances of the dispute would be within the court's jurisdiction and could end up in the judge's court. If the judge is satisfied that the matter is unlikely to become a lawsuit in that judge's court, then the judge should be allowed to serve as volunteer mediator. Of course, if the matter ended up as one which ultimately was assigned to the mediator/judge, then recusal would be necessary.

The fact that a judge might need to resort to recusal arising from earlier mediation service is not a reason to prohibit service as a volunteer unpaid mediator. Any number of functions in a judge's social schedule including attendance at church, golf at the local country club, and a visit to the grocery store or mall could result in the judge meeting new people and developing conflicts that require recusal from a later case involving the same people. If the ultimate goal is to insulate our judges from having to recuse themselves from cases, it would be necessary that they reside in monasteries.

As with attorney/mediators, the mediator's status as a judge would not be revealed to the parties. At volunteer centers, the mediators are assigned randomly with the parties not permitted to choose mediators. Mediators do not provide resumes, nor are their backgrounds revealed to the parties. Most mediation centers are well aware of liability considerations which would arise from offering legal advice to the parties, and are therefore quite careful not to represent their volunteer mediators as consultative experts or technical specialists.

Parties are instructed at the very outset of a mediation that its purpose is not to provide legal advice, nor to impose a solution on the parties, but instead to facilitate a solution crafted by the parties. Attorneys frequently serve as volunteer mediators at community centers in order to hone their talents to the point where they can add mediation to their own repertoire of skills. Often, the attorney is motivated, in part, by the added satisfaction of using acquired skills to bring peace to others' lives.

In all but the smallest communities, most mediating parties would not recognize a judge (or for that matter, an attorney). If a party were aware that the mediator was a judge, and objected, then a replacement mediator could be assigned. These challenges are details for the mediation center administration, rather than a justification for a blanket prohibition for judges providing volunteer services.

BENEFITS TO THE JUDGE AND JUDICIARY OF ALLOWING VOLUNTEER SERVICE BY A JUDGE

One of the challenges for a judge is to remain a productive member of the community within which he or she lives. The existing prohibitions on a judge's conduct are far-reaching and sufficient enough to force most jurists into a shell, effectively discouraging participation in most civic activity except voting. I believe we need rules to prevent judges from becoming compromised or from exerting undue influence on others because of their position. Yet, the rules should not be so stringent as to prevent a judge from providing volunteer assistance, and even in an unobtrusive way, from using professionally acquired skills to help people.

Moreover, the judge, and the judiciary as a whole, can also benefit from a judge voluntarily providing free mediation services. In order to be able to work effectively to facilitate civil settlements, judges need to hone their own settlement skills. Often in larger cities, the courts are organized so that judges work for periods of time exclusively on civil or criminal calendars, alternating back and forth over the years. A judge may one day be assigned to a civil calendar after years of having handled only criminal cases. Without practice in civil calendars, the judge can lose the skill to help resolve civil disputes.

The attorneys for civil litigants are well aware of this situation, involving as it does the added challenges and cost in the presentation of their clients' cases before a judge whose experience is most recently, primarily, or even exclusively, criminal law. Assessing liability and damages and comprehending the dynamics of settlement negotiations are skills that are not enhanced by serving on the criminal bench. Where a judge is not experienced at conducting settlement conferences or in mediating settlements, the parties are forced to resort to the added expense of private mediation. This proves particularly costly to litigants in small and medium size cases where attorney fees and liens threaten to consume the plaintiff's recovery. Having a talented settlement judge can make the difference in attempts to obtain cost effective settlements.

Allowing the judge to “stay in the game” by providing free service as a mediator helps the judge to keep (or in some cases, develop for the first time) the skills of a good settlement judge. To impose a blanket prohibition on a judge from voluntarily assisting in resolving disputes only guarantees that the judge’s settlement skills will either never be developed, or will grow stale during the time the judge is assigned to the criminal calendar. Such a result benefits no one—neither the community, nor the civil litigants nor the judge. Indeed, isolating a judge from civil disputes only makes the transition back to civil court that much more difficult for the reassigned judge and the parties who appear before that judge.

Prior to becoming a judge, I provided free mediation services for seven years, as a mediator at the Mediation Center of the Pacific in Honolulu. I am proud of the fact that I twice won an award as Mediator of the Year. I felt tremendous satisfaction changing frowns, mutual suspicion and tension into smiles and even camaraderie. Satisfied parties left our center to go about their lives, having left a problem behind them, and with a newfound respect for mediation. I was never paid for that work; yet I was able to use skills acquired in my years as a lawyer to help others resolve disputes. When I was appointed to the bench by my state’s governor, she expressly cited my prior mediation experience as one of her bases for making the appointment.

The legal profession should not make rules so strict that judges cannot use their skills to assist people for free. It is possible to maintain the dignity of the judicial role, without completely sidelining a judge from community service that involves use of professional skills acquired over a number of years.

Moreover, it is the responsibility of the legal community to make certain that its judges have access to the educational opportunities that allow the judge to improve his or her skills. As stewards of the law, we must constantly reexamine the roles of the participants with a view toward better serving our public. Providing judges who are not only qualified on the day they are sworn in, but who continue to remain increasingly qualified as they continue to serve, is a necessity; not an option.

For many of the judicial functions, including settlement of civil cases, there is no training ground or school within which to learn the art of settlement. Numerous books on the topic can facilitate the learning process. However, absent volunteer mediations, there is no method for a judge assigned to the criminal bench, to develop or improve settlement skills. There are three day courses available at a few universities and mediation centers, but, after having attended several of those courses, I am satisfied that none of those courses provides hands-on real life experience. Ultimately only the experience of assisting in the settlement of cases prepares judges for that vitally important task.

Any meaningful improvement in a judge's overall capability to handle civil as well as criminal cases will only happen when this training challenge is answered by the legal community. The changing landscape of lawsuits and mediation services make volunteer mediations an ideal solution to two problems: Keeping judges proficient in settlement skills, while providing low cost mediation services where a lawsuit is not economically feasible. These are two mutually complementary goals which would be accomplished simultaneously by employing the solution which I suggest.

RECOMMENDED ACTION

I recommend 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.

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

Please feel free to contact me if I can be of further assistance in discussing this proposed amendment. I feel very strongly that judges should not be so stifled by rules that they cannot serve their communities as volunteers, nor improve their own skills as settlement judges. Civil litigants are entitled to the services of judges whose skills in settlements remain sharpened by real life experience. Often that entitlement is unfulfilled, with the result that parties are required to seek justice outside the courthouse, at significant additional expense.

The form of volunteerism which this clarification would allow would achieve these goals and help to de-mystify judges within the larger community. Seeing judges providing volunteer services to the community would enhance respect for the legal system. I urge your assistance in accomplishing these goals.

Very Truly Yours,

/S/

Patrick W. Border

**Circuit Judge, 16th Division
Circuit Court of the First Circuit
State of Hawaii**

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