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FORMAL

JUDICIAL ETHICS OPINION JE-115

April 6, 2007

The Committee has received inquiries from two Senior Status Judges on the subject of their ability, or restrictions on their ability, to market themselves as mediators. The specific questions were as follows:

QUESTION 1: Since serving as a mediator is allowed by Senior Judges may I advertise myself as a "Senior Judge" or Retired Judge"?

ANSWER 1: No.

QUESTION 2: If not, may I state in my advertisements that I have "23 years of judicial experience" or "experienced as a trial and appellate judge"?

ANSWER 2: Yes.

QUESTION 3: May I contact attorneys directly, either in person, by phone, or by letter, of my availability to serve as a mediator?

ANSWER 3: Qualified No.

QUESTION 4: If not, is the position of the committee that I may only promote myself as available for mediations by printed advertisements in newspapers or bar association newsletters?

ANSWER 4: No, subject to the response to Question 3.

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QUESTION 5: Would having a printed advertisement with my name and photograph along with other retired judges, who are not serving as Senior Judges, under a heading "Retired Judges Mediation & Arbitration" be allowed?

ANSWER 5: No.

QUESTION 6: May I be photographed wearing my robe in printed advertisements?

ANSWER 6: No.

The growth of mediation services as a means for dispute resolution has been substantial in recent years and is in fact promoted by the Supreme Court as a valuable tool for economic disposition of controversies. Retired judges have sought to become part of this movement, and the Guidelines for the Senior Judges Program for Special Judges specifically authorizes Senior Judges to offer their services in the various forms of alternative dispute resolution. (See: "Application of the Code of Judicial Conduct" Section A "Part-Time Judges" that exempts Part-Time Judges from compliance with Canon 4F containing the prohibition against serving as a mediator.) The Committee also notes that the Kentucky Supreme Court Guidelines for Senior Status Judges state that by electing Senior Judge status, Senior Judges continue to be governed by the Judicial Code of Conduct, SCR 4.300. Senior Status Program Guidelines, Section 8(b), (Entered by Order of the Chief Justice Joseph E. Lambert, Kentucky Supreme Court, September 24, 2004).

The Committee has concluded that the answer to question 1 is "no". First, a Senior Judge is not the same as a fully retired judge, because he or she continues to be governed by the Code of Judicial Ethics. Second, a Senior Judge advertising himself or herself as such would be promoting his or her self interest, *i.e.*, the judge's mediation business. Canon 2D prohibits a judge from lending the prestige of judicial office to advance the judge's private interests. Canon 4D(1)(a) prohibits a judge from engaging in business dealings that may reasonably be perceived as exploiting the judge's judicial position. The Committee concludes that Senior Judges should not include a reference to themselves as "Senior Judge" in materials or statements designed to solicit mediation business, as this would amount to a special pleading that the Senior Judge's services were in some way different or better than those offered by others.

The Committee answers question 2 in the affirmative, and agrees that a Senior Judge may make strictly factual statements regarding his or her judicial experience in advertisements or similar promotion materials. Thus, a Senior Judge is not prohibited from stating his or her judicial experience. There is no contradiction between the responses to questions 1 and 2, because a factual listing of judicial experience places the Senior Judge on a "level playing field" with others who are in the alternative dispute resolution business, and allows a prospective customer to select a mediator through the use of common criteria.

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Questions 3 and 4 can best be answered together. The Committee concludes that General advertisements, as in a Bar Journal or a "flyer," are acceptable, but are not the only means by which advertisement of services can be made. A Senior Judge may send a general letter to bar members, addressing the recipient as "Dear Bar Member..." but the judge may not solicit mediation business from attorneys directly, either in person, by phone, or by letter personally addressed to a specific lawyer. Of course, once the Judge has been hired as a mediator by particular attorneys, he or she may have whatever contact is necessary for the completion of the assignment.

The Committee has concluded that the answer to question 5 is "no". A Senior Judge is not the same as a retired judge, and to pose in a photograph that purports to portray *retired* judges would be a misstatement of fact.

The Committee has concluded that the answer to question 6 is "no," because wearing the robe would be a means of exploiting the judicial office. If an argument were to be made that the truly retired judges posed in robes, the answer to that is that they are no longer governed by the Canons of Judicial Ethics.

It has been suggested that Canon 4D(1)(b), prohibiting a judge from having business relationships with lawyers, contradicts the right of the Senior Judge to conduct a mediation business, but the Committee disagrees. First, the Guidelines specifically allow alternative dispute resolution services, and both the Guidelines and the Canons were created by the Supreme Court, which is capable of all things but a contradiction. Second, the Committee believes that the more appropriate Canons under the circumstances discussed in this opinion are 4D(1)(a), prohibiting exploitation of a judicial position, and 2D, prohibiting the use of the judicial office to advance one's private interests. Third, the Committee notes that this opinion limits only the ability of a Senior Status Judge to advertise himself or herself as a "Senior Status Judge Mediator," and to contact local attorneys directly and personally.

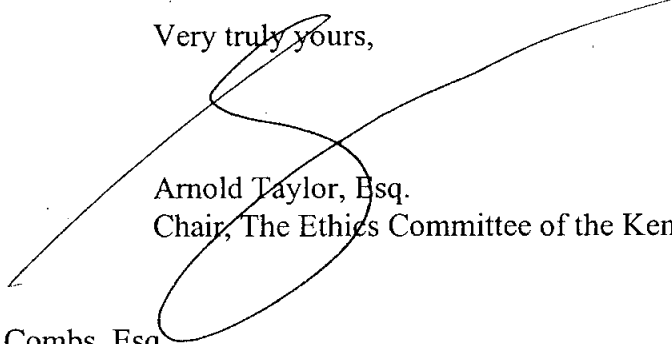
Regarding this last point, the comment has been made that attorneys conducting a mediation business are able to communicate directly with other attorneys, the implication being that a restriction on Senior Judges doing the same is unfair. One answer to that concern is that attorneys are not governed by the Canons of Judicial Ethics. The other answer, which equally applies to all the reasoning in this opinion, is that reasonable limits can be placed on commercial speech, and the Committee believes that the restrictions of the Canons, as interpreted by the Committee, are reasonable. Nationwide research conducted by this Committee indicated that most jurisdictions restrict full-time judges from engaging in continuing business relationships with attorneys who practice in front of them and part-time judges are at least limited in their business relationships with local attorneys. Further, some jurisdictions prohibit judges from engaging in a business all together. 48A C.J.S. Judges Section 86 (Westlaw Database updated February 2007).

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Very truly yours,



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Chair, The Ethics Committee of the Kentucky Judiciary

cc: Donald H. Combs, Esq.
The Honorable Laurance B. VanMeter, Judge
The Honorable Jean Chenault Logue, Judge
The Honorable Jeffrey Scott Lawless, Judge
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