

Memorandum

To: SCAC
From: Jim M. Perdue, Jr.
Date: October 8, 2015
Re: Report to Supreme Court Advisory Committee re Deliberations of Subcommittee re:
Decision on Judge Tom Pollard's Request Concerning Compensated ADR for
Constitutional and County Court Judges

This report is an outline of the information to help the committee prepare for the analysis of issue number 4 in the "Referral of Rules Issues" letter. Issue 4 is entitled "ADR and the Constitutional County Judges." There is no conclusion section as this is a conglomeration of research to help best prepare the SCAC in arriving at their own independent opinion and conclusion concerning these issues. The subcommittee did not vote on the issue and does not bring any recommendation forth. It appears there are potential stake holders in the issue that may merit input into the consideration by the entire committee.

Issue #4 for 10/16/15 Meeting: ADR and Constitutional County Court Judges

The Court has received the attached letter from the Hon. Tom Pollard, county judge of Kerr County. Judge Pollard points out that under Canons 4(F)-(G) and 6(B)(3) of the Code of Judicial Conduct, a constitutional county court judge is permitted to maintain a private law practice but is prohibited from acting as an arbitrator or mediator for compensation. Judge Pollard asks the Court to revise the Code of Judicial Conduct to permit a constitutional county court judge to serve as an arbitrator or mediator for compensation in a case that is not pending before the judge. The Court requests the Advisory Committee's recommendations on whether and how the Code should be amended to permit a constitutional county court judge to serve as a private arbitrator or mediator.

Judge Pollard's Specific Request

Judge Pollard requests an update to canon 4F by adding: "Constitutional County Judges may be mediators and/or arbitrators for compensation SO LONG AS the matters being mediated and/or arbitrated are not, and never have been, pending in said Judge's Court."

Discussion on the Relevant Code of Judicial Conduct Sections and any other applicable and relevant legal research

Canon 4(F) states the following: “An active full-time judge shall not act as an arbitrator or mediator for compensation outside the judicial system, but a judge may encourage settlement in the performance of official duties.” TEX.CODE JUD. CONDUCT, CANON 4(F). Canon 4(G) states: “A judge shall not practice law except as permitted by statute or this Code. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.” *Id.* at 4(G)

Canon 6(B)(3) lays out an exception for county judges concerning Canon 4(G), and states the following:

A County Judge who performs judicial functions shall comply with all provisions of this Code except the judge is not required to comply:

...

(3) with Canon 4G, except practicing law in the court on which he or she serves or in any court subject to the appellate jurisdiction of the county court, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

Id. at 6(B)(3).

Judge Pollard is asking the advisory committee to take note of Canon 4(G) and the exception given to county judges outlined in Canon 6(B)(3), and then try to apply a similar sort of exception to Canon 4(F) to allow judges to also mediate and arbitrate for compensation.

In brief, Canon 4F prohibits a judge from acting as an arbitrator or mediator. However, it contains qualifications not in Canon 4F of the Model Code. Texas Canon 4F begins by including only active full-time judges (which seems like overkill, since Canon 6 specifies the applicability of all of the Canons), while the Model Code does not (apparently relying on its Canon 6 to address the applicability of various sections to retired judges). The Texas version specifies that the judge is not to act as an arbitrator or mediator for compensation outside the judicial system, while the

Model Code version does not (its reference to “private capacity” seems a synonym for “outside the judicial system”). Texas' Canon 4F provides that a judge may encourage settlement in the performance of official duties; the Model Code says that in commentary.

Texas Judicial Ethics Advisory Opinions make clear that the permission to encourage settlement does not include the judge actually mediating cases in order to expedite the settlement process or conducting settlement conferences for cases filed in his court or in other courts in which he conveys settlement offers and asks questions. Op. No. 120 (1988); *Compare* Op. No. 62 (1982) (serving as consultant for compensation for private nonprofit corporation probably would not contravene Canon 4F); Op. No. 212 (1988), <http://www.txcourts.gov/media/678096/JudicialEthicsOpinions.pdf>. These advisory opinions tend to allude to the idea focused around compensation for such mediation or arbitration as being at the forefront of the disallowance. However, Judge Pollard did specifically request that part of the amendment read “*so long as* the matters being mediated and/or arbitrated are not, and never have been, pending in said Judge’s Court ” (emphasis added).

In deciding in an early opinion that a trial judge may not appoint another sitting judge to serve pro bono as a mediator of a dispute that is the subject of a pending case, the Judicial Ethics Committee looked to the language of the 1990 Model Code:

Texas Canon 5E [now Canon 4F], which prohibits an active full-time judge from acting as a mediator for compensation outside the judicial system but permits a judge to encourage settlement in the performance of official duties, should be construed to have the meaning stated by the corresponding ABA Code provision, which provides that a judge shall not act as a mediator in a private capacity. ABA Canon 4F. Texas Canon 5E [now Canon 4F] does not permit a judge to be a mediator without compensation outside the judicial system. A judge's statutory duty to encourage parties to attempt out of court procedures to resolve a dispute does not imply authority to act as a statutory mediator. Op. No. 161 (1993).

The Committee revisited that topic five years later and concluded that a sitting judge may, without compensation, serve as a mediator:

In light of this growing reliance on ADR procedures as an adjunct to traditional forms of adjudication, and in light of the favorable experience of many judges in encouraging and participating in alternative dispute resolution procedures, we withdraw in its entirety our former Opinion 161 and find in the Code no prohibition against an active judge serving as a mediator or arbitrator without compensation so long as the judge follows the guidelines of Canon 3B(8)(b).

Op. No. 233 (1998). Canon 3(B)(8)(b) states:

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

...

(b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;

TEX. CODE JUD. CONDUCT, CANON 3(B)(8)(b).

One of the main arguments against allowing judges to mediate and/or arbitrate for compensation seems to be that an active judge may have too much on his plate to give his most efficient attention to any ADR he or she is going to get involved in. The Canons, along with the stated advisory opinions, indicate that amendments have been made, and possibly will continue to be made, as the reliance on ADR continues to grow. Moreover, in accordance with Canon 3(B)(8)(b), so long as there is correct notice and consent in these forms of arbitrations and/or mediations, then each parties should be well aware of the conditions of having an active judge take on their ADR, of which little concerns compensation.

The Judicial Ethics Committee has twice been asked whether a former district judge, qualified to accept judicial assignments, may act as a mediator or arbitrator when not on judicial assignment. The Committee initially considered such a judge to be the same as a “retired judge subject to recall,” and said the judge could act as a mediator or arbitrator so long as not on judicial assignment. Op. No. 99 (1987). A year later the Committee compared a former district judge with a senior judge and said she could act as a mediator or arbitrator as long as she refrained from performing judicial services at the time. Op. No. 124 (1988). These advisory opinions thus seem to be leaning towards disallowing an actively busy judge from engaging in ADR.

One argument to be made for amending Canon 4(F) in the manner Judge Pollard requests would be that Canon 6 exempts from Canon 4F “Justices of the Peace, unless the court on which the judge serves has jurisdiction of the matter or parties involved in the arbitration or mediation.” TEX. CODE JUD. CONDUCT, CANON 6(C)(1)(c); *Compare* Op. No. 208 (1997). Opinion no. 208 states that a justice of peace may serve as a CASA (Court appointed special advocate) in the county in which she serves as a justice of the peace. However, he or she must always comply with Canon 3A (requiring that the judicial duties of a judge take precedence over the judge's other activities). So the argument can be made that there have been provisions to allow Justices of the Peace to be arbitrators and mediators, which the proposed amendment seeks for “Constitutional County Judges”, so long as we make sure the court on which the judge serves does not have jurisdiction over the matter, which is also alluded to in Judge Pollard’s amendment request.