IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ADOPTION OF RULE 16 OF THE NEVADA RULES OF APPELLATE PROCEDURE GOVERNING SETTLEMENT CONFERENCES IN CIVIL APPEALS.	)	ADKT NO. 244

FILED

FEB 21 1997

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

OPPOSITION TO ORDER RE: IMPLEMENTATION OF CIVIL SETTLEMENT CONFERENCE PROGRAM UNDER NRAP 16 AND OPPOSITION TO ORDER APPOINTING SETTLEMENT JUDGES FOR SETTLEMENT CONFERENCE PROGRAM

I decline to sign the orders implementing the civil settlement conference program under NRAP 16 and appointing settlement mediators in appellate cases because I not think that sufficient attention has been given to the qualifications and experience of the named settlement-conference mediators. Although a quick survey of the names included in the order appointing settlement judges tells me that some of those mentioned may have the skills and experience necessary to conduct appellate settlement conferences, there is no "quality control" built into the process and no assurance that only properly qualified mediators will be employed in the mediation process.

During the court's discussion of the orders being issued today, a comment was made that if any of the designated mediators "do not know how to do it," then it is a "total waste of time and money." The same commentator observed that merely being a judge does not qualify one to do appellate mediation and further expressed the opinion that eighty percent of the judges probably were not qualified to act as mediators.

In submitting this opposing viewpoint, I certainly am not putting down any of the appointees; and, I must say that I do not consider myself, even after over sixteen years on the appellate bench, to be a qualified mediator of contested appellate cases and would not consider myself

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qualified without having some additional training or experience in the field of mediation. Senior Justice Zenoff is the only one on the list that I see who has had experience in this field. I see some others on the list who, no doubt, have the general qualifications which I mention below; but that is not the point. The point is that we should have some assurances and credentials presented to the court before we rush into the appointment of a "hand-picked" slate of mediators who have been selected rather arbitrarily by a majority of the court. I have been presented with no data relating to the persons named in the order.

As I see it, there are two kind of qualifications that should be presented by prospective appellate mediators before we make these kinds of appointments. One is a special qualification to deal with appellate conflicts; the other is a general qualification to act as a mediator.

Persons who have experience as appellate judges or as appellate advocates have the kind of special qualifications that I have in mind. A person who has no experience in the appellate field does not have the capacity to evaluate the risks inherent in settling one's appellate claim or opposition to a claim. A person who has never tried a personal injury case would not make a very good mediator in personal injury cases; and we would not ask a person to mediate an admiralty dispute if that person had no familiarity of any kind with admiralty cases. We should have some assurance of these special qualifications before appointments are made.

By general qualifications I mean training or equivalent experience in the field of mediation. There are a number of tried-and-true principles that apply to the mediation process. In my opinion, ignorance of these principles and failure to apply them necessarily hamper

amateur mediators to the extent suggested above -- their attempts are a total waste of time and money until such time as they might, by trial and error, become useful in the mediation process.

The order provides that "any person" can be a settlement judge by submitting an appropriate "application" and completing a course at the National Judicial College. Although I am told that most of those appointed have attended a five- or six-hour course at the Judicial College, such a short course does not a mediator make.

My colleagues tell me that we "have to start somewhere"; but this is not good enough for me. I do not want to waste time and money; I do not think this is necessary in order to accomplish the goals of appellate conflict mediation envisioned by the court. I see no reason why, instead of hand-picking the group of nice, interested persons appointed by the order now going into effect, we do not proceed by first setting definitive standards -- general and special qualifications -- and then set about inviting all members of the bench and bar (and perhaps others who are discovered to have the general and special qualifications necessary in order to do the job) to apply for appointment to the mediators' roster. We could then make an intelligent selection of the best-qualified persons to do the job.

I have one other comment to make and that is that it is generally agreed that the mediation process is much more successful when the opposing parties have a hand in selecting the mediator. I do not see this as part of the process now going ahead. If my suggestion were followed, counsel for the parties would agree upon a mediator and then happily proceed with the mediation process with a mediator agreeable to both sides. As things stand, counsel for parties in an appellate

conflict will more frequently than not find themselves called to mediation with a mediator who has neither the general nor the special qualifications which I discuss in this document.

I wish the court success in its attempts to renew the appellate settlement and mediation process, but, respectfully, I do not think that it is going about it in the right manner.

Springer, J.