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

Nevada Supreme Court
Janette M. Bloom
Clerk of the Supreme Court
101 South Carson Street
Carson City, Nevada 89701

Re: Nevada Supreme Court Settlement Conference Program

Dear Ms. Bloom:

I have enjoyed the honor of serving as a Nevada Supreme Court settlement judge. I state my goals in serving as having a worthwhile endeavor to keep involved in our justice system during my retirement from the private practice of law and seek to reduce the Supreme Court's caseload by mediating settlements, thus conserving judicial time for our justices in a system without an intermediate Court of appeal.

I have reviewed the Nancy Neal Yeend evaluation and recommendations of the Supreme Court Appellate Settlement Conference Program, which is clearly a mediation program and understood by counsel for the parties as such.

I agree and disagree with the report's recommendations as follows, suggesting some changes as stated:

Recommendation:

1 Agree.

2 Agree.

3 Agree, and suggest 120 days maximum in program without the administrator's extension of up to an additional 60 days, after which the case is automatically removed from ADR program and briefing schedule resumes by Court order.

4 Agree, and suggest 30 to 90 days to hold first mediation, allowing time for a second mediation before 120 days maximum is reached without need for an extension form the Court administrator.

5 Disagree, suggest Court briefing schedule be suspended during the mediation ADR process

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as an asset to the settlement process because costs for attorney's fees for both appellant and responded are suspended, providing an added incentive to settle to both parties.

6 Agree.

7 Agree.

8 Agree.

9 Agree.

10 Agree, however, allow settlement judges to mail their reports as an alternative method.

11 Agree.

12 Disagree. No one will want to be a Supreme Court mediator. Your panel will become very small very quickly. The judges enjoy the honor and prestige of being a Supreme Court settlement judge, and as such, I use mediation as the sole method of settlement. I believe as a paid employee judge of the Supreme Court, I should have judicial immunity from suit by the participants insomuch as attorney errors and omissions insurance policies do not cover judicial functions whether or not denominated as mediation. I believe the settlement judges can recommend appropriate sanctions for failure to mediate in good faith and/or determine if an appeal is frivolous simply stating the basis so long as the rules make it clear that the basis is an exception to th rule of nondisclosure so long as the Supreme Court reviews the recommendations only after they decide the failed (failed to settle) sanction after the case in chief is decided, so as not to prejudice the decision by disclosure of the basis for the sanction. Thus no rule 16 confidentiality breach. Failure to allow sanctions in the form of awarding attorney's fee against the offending party as a penalty for misbehavior or failure to have a legitimate basis for appeal (including an attempt to modify an existing rule of common law) would have the settlement judge in a position of not being able to control the mediation process, which is often heated among the parties and counsel.

You must remember you are dealing on the appellate level with winner and loser, where a middle ground is exceedingly difficult to find. This leaves the leverage of ongoing costs of appeal, especially attorney's fees for both parties. The major basis for settlement (avoiding briefing and oral argument costs) one can remain neutral and still hold power of sanctions for persons who become abusive, belligerent and uncooperative. This is not to say that a party cannot in good faith say we won in the trial Court and there is no basis for settlement because the trial Court judge was correct in the law and the facts and did not abuse his discretion. Therefore, as the winner, the prevailing party has no basis to settle unless the opposing party dismisses its frivolous appeal to avoid having to pay respondent's attorney's fees and costs.

13 Disagree. I have settled a case that was clearly a frivolous appeal. I do not consider a party refusing to mediate a verdict as bad faith simply because they want to preserve the trial court's decision on appeal. That simply becomes a case that cannot be settled by mediation. There can be bad faith mediation, such as demanding settlement by requesting the other party to do something they are legally not required to do, such as pay a creditor that they discharged in bankruptcy. You have to rely on the expertise of your settlement judges. Its too complex a system to have a rule for every conceivable situation.

14 Disagree. The settlement judge would have no authority to control behavior of parties. I have had counsel during mediation call the appellant a nut. I had to caution him to refrain from hostile and insulting comments. The person was a highly respected Nevada attorney.

15 I advise the parties no disclosure is confidential except that disclosures are not admissible in subsequent Court proceedings. I suggest this be amended to no disclosure in subsequent judicial proceedings until the appellate case is decided and then only for a basis of sanctions in favor of attorney's fees and costs awarded against the offending party.

16 Agree.

17 Agree.

18 Agree.

19 Agree

20 Agree. However, some counsel will say no possibility of mediation and the client may disagree so to try to mediate does not harm and I have settled the impossible case due to client of attending counsel not advising client of the liability to continue and lose., i.e., pending motion in trial Court for award of $40,000 in winning party attorney's fees which appellant would have had to pay if case did not settle, and waived collection of fees.

21 Agree. If settlement judges are not Court employees and do not enjoy judicial immunity, you will lose most of your panel because the attorney E&O insurance does not cover judicial or arbitration ADR functions.

22 Agree.

23 Agree.

24 Agree.

25 Agree.

26 Agree.

27 Agree.

28 Agree. However, caution should be used in using Evaluation Ratings of Participants. Some are hostile to the process but agree to settle to save money when they fear their appeal is going nowhere simply trying to mitigate their losses.

29 Agree.

30 Disagree. No study is needed to set up a pilot program. All attorneys have experience dealing with pro se opponents. While admittedly not fun, they can be advised of the law and treated fairly.

31 Agree. Settlement judges just as trial Court judges and Supreme Court justices can be instructive in the law and maintain a fair distance to protect litigant's rights. We cannot afford a civil defender system for monetarily poor litigants.

32. Disagree. No added training needed. All settlement judges have had experience dealing with persons uneducated in law, their own clients as well as pro se opponents.

I believe as does your evaluator, the program is successful. Make changes only where needed. One must be careful not to destroy a good thing. Tom Harris and your Court staff do a remarkable and excellent job.

Sincerely,

JOHN W. HAWKINS
Nevada Supreme Court Settlement Judge

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