January 16, 2002

Re: JIC Advisory Opinion 2002-01

Dear :

In a recent letter to Counsel to the Judicial Investigation Commission you asked for an advisory opinion. In that correspondence you asked whether a senior status judge may be engaged as an expert witness for the purpose of issuing an opinion and testifying therein if necessary before a special master as to the reasonableness of attorneys' fees requested upon the settlement of a civil action and subject to court approval. The Commission has had an opportunity to review your inquiry.

In addressing the question which you have raised, the Commission reviewed the relevant Sections of Canon 2 and Canon 6 of the Code of Judicial Conduct. Canon 2 states in relevant part:

> Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

> B. A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or knowingly permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

The relevant portions of Canon 6 of the Code of Judicial Conduct state as follows:

Canon 6. Application of the Code of Judicial Conduct.

B. Retired judges. - (1) A retired judge admitted to senior status but who does not engage in the practice of law is not required to comply with Section 4E.

(2) A retired judge admitted to senior status but who engages in limited law practice is not required to comply with Sections 4E and 4G.

(3) A retired judge not admitted to senior status but who is recalled for specific cases or specific periods of service shall be deemed a pro tempore part-time judge subject to Section 6E.

(4) A retired judge, whether or not admitted to senior status and whether or not engaging in law practice, may be employed as a mediator or an arbitrator notwithstanding the provisions of Section 4F.

This Section of Canon 6 which applies the Code of Judicial Conduct explicitly excepts senior status judges from Section 4E, 4F and 4G of the Code of Judicial Conduct. These Sections of the Code deal with the practice of law, service as a mediator, and involvement by a judge in certain fiduciary activities. Interestingly, this Section of the Canon does address the exceptions to the Code of Judicial Conduct afforded to a retired judge not admitted to senior status. A retired judge not admitted to senior status who is recalled for specific cases or specific periods of service is deemed a pro tempore part-time judge subject to Section 6E. Section 6E explicitly excepts a pro tempore part-time judge from numerous Sections of the Code of Judicial Conduct.

It is therefore the opinion of the Commission that senior status judges would be subject to the provisions of Canon 2 of the Code of Judicial Conduct and under the provisions of Canon 2B, a judge shall not lend the prestige of judicial office to advance the private interest of the judge or others. It is the opinion of the Commission that appearing as an expert witness in a case would, at least by appearance, encroach on that provision of Canon 2. See, Opinion 95-35, (Florida) and Opinion 88-8, (Utah), which are attached hereto.

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For the reasons set forth herein, it is the opinion of the Commission that you should not become an expert witness for the purpose of issuing an opinion and testifying as to the reasonableness of attorneys' fees. It is hoped that this opinion fully addresses the question which you have raised. If you have any further question involving this matter do not hesitate to contact the Commission.

Very truly yours,

Donald H. Cookman, Chairperson
Judicial Investigation Commission

DHC:nb

Enclosures