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Highest and best use?

Retired judges often are called on to help clear dockets in South Florida, but Broward's policy of handing them the most complex cases is under fire

Judges call them “docket busters.” They are complex cases in state court that last more than just a couple of weeks, that require a judge to push aside everything else on his or her calendar, and that leave in their wake a backlog of work.

To get around the problem, retired or semi-retired judges historically have been called in by state administrative judges to help pick up the slack. In most state judicial circuits, including those in Miami-Dade and Palm Beach counties, retired judges are called upon to handle a sitting judge's morning motion calendar, conduct hearings or try smaller, less complicated cases. They fill in for judges who become ill, go on vacation or otherwise must be away from the bench.

Not in Broward. There, retired judges make up what has become known in legal circles as the 17th Judicial Circuit's “complex litigation division.” A half-dozen judges, most of whom were forced into retirement when they reached age 70, are called upon each year to preside over lengthy civil litigation cases, many involving complex medical malpractice disputes.

With caseloads growing faster than the number of judgeships, and proposed budget cuts rendering the fulfillment of requests for additional judges doubtful, retired judges present a welcome relief in most judicial circuits. But in Broward, a

growing movement is under way to prevent retired judges from presiding over trials — or least to prevent them from being part of the county's loosely defined complex litigation division.

The reasons cited by those who oppose the use of retired judges to hear these complex cases vary. Some suggest judges who aren't elected in Broward have no right to sit in judgment on local cases. Others are harsher in their criticism: They complain that some retired judges aren't mentally or physically competent to handle the kinds of trials that require their full attention for eight hours a day, five days a week.

The dispute has prompted the Florida Supreme Court to create a committee to review the use of retired judges to determine whether they should be required to go through a certification process and whether a more uniform system should be created to ensure that the various judicial circuits are assigning retired judges in a way that is permitted by the state constitution. The committee, comprising lawyers, judges and others in the legal community, has until February to report back to the court.

But lawyers representing a Hollywood



Fort Lauderdale lawyer Gary Farmer says using retired judges for complex cases is better than having sitting judges juggle crowded dockets.

hospital and a group of Broward doctors who were sued in a medical malpractice case are hoping to force the justices' hand and get the matter resolved even sooner. In recent weeks they filed petitions with the Florida Supreme Court, asking that Broward's complex litigation docket be declared unconstitutional.

“We are dealing with the most complex cases in the system and it was our feel-

ing that [senior judges'] resources could be better allocated to other types of cases that don't involve evolving complex legal, medical matters,” says Michael Rotundo, a partner with Bunnell Woulfe Kirschbaum Keller McIntyre & Gregoire in Fort Lauderdale. His firm filed one of the petitions with the Supreme Court on behalf of an emergency room doctor and Memorial Regional Hospital in a medical malpractice lawsuit.

Another firm, McIntosh Sawran Peltz & Cartaya in Miami, which represents an insurance company and two doctors being sued in the same malpractice case, has filed a separate petition with the Supreme Court.

The lawyers cite numerous reasons why Broward's use of retired judges should be

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deemed unconstitutional. Among them: That Broward's chief judge violated a constitutional provision prohibiting the creation of specialized divisions. They question whether judges who are elected to serve in one circuit should be allowed to, upon retirement, serve in a different circuit where they were not elected. They suggest their clients' right to access to the courts is being violated because they are placed on a special docket and often forced to wait months and sometimes years before their cases are heard, resulting in significant additional costs to both plaintiffs and defendants. And, they argue, while the constitution allows for the "temporary assignment" of judges, Broward's use of retired judges is anything but temporary.

Gary Farmer, a name partner with Gillespie Goldman Kronengold & Farmer in Fort Lauderdale who represents the plaintiff in the Memorial Regional malpractice case, defends the use of retired judges. He says because they don't have to worry about the day-to-day challenges of running a docket, they have more time to concentrate and focus on the case before them.

"The petitioners' complaint is full of hyper-technicalities and ignores the realities of the difficulties our legal system faces to get cases tried and resolutions on the merits," Farmer says.

The petition grows out of an order issued in November by Broward's Chief Judge Dale Ross, who refused a request from lawyers to transfer two medical malpractice civil trials from the retired judges' docket back to a sitting judge's docket.

In his seven-page order Ross wrote that the method of assignment "ensures the speedy, efficient and proper administration of justice within this circuit" and that as chief judge he had the constitutional authority to assign senior and retired judges.

But noting that the issue was "of great legal importance," Ross invited the lawyers to seek review from the Florida Supreme Court.

The justices apparently are interested. They recently invited lawyers for the couple suing the hospital and doctors in the medical malpractice case to argue in favor of the senior judges' docket.

With budget cuts looming and no new judicial appointments on the horizon, the state's high court is going to have some dif-

icult decisions to make, notes George Brescher, administrative judge for the Broward Circuit's civil division. It's Brescher's job to make senior judge assignments.

"Nothing is perfect, but what we have tried to accomplish is to get these cases tried where otherwise we wouldn't have been able to get them tried in nearly the time as we have now. If we have to go the other way, you can expect there will be some serious delays," he warns.

Each October, Broward's retired judges' docket is set for the following year. At that time, lawyers are told whether their cases will be heard in the next 12 months. They are not given a trial date; instead they are told in what order their cases will be heard. The process, complain lawyers, results in delays and uncertainty.

"There is no knowing when you will go to trial," says Sheldon Schlesinger, a Fort Lauderdale medical malpractice lawyer. "The biggest cases are the ones getting the shortest shrift. That's not the way to accommodate litigation."

Currently, there are 39 cases on the next senior judge calendar call, which is set for Oct. 26. Broward is second only to Miami-Dade in the number of days the state court administrator has allotted to use retired judges. Broward gets 892 days; Miami-Dade gets 1,179 days; Palm Beach gets 523 days. Retired judges are paid \$300 per day.

Brescher says the county has more than 20,000 cases pending in the civil division and only 14 judges to handle them. Each judge, he says, is working as expeditiously as possible, resolving more than 100 cases a month. Without senior judges to handle the complex cases, Brescher says, it would be "next to impossible ... to keep our case flow current."

If the Supreme Court nixes Broward's complex litigation division, he says "we would have some real serious choices to make as to what we are going to do with these lengthy cases and how their priority would figure in."

Judge Eli Breger, a retired Miami-Dade County Court judge, has presided over circuit civil cases in Broward since he left the bench in 1996. He says allowing retired judges to handle lengthy trials "benefits the public by allowing that [sitting] judge to continue on with their daily work."

But Walter Colbath, who was chief

judge in Palm Beach Circuit Court until his retirement in July, believes the sitting judge who has been handling a case, conducting hearings and familiarizing himself or herself with the arguments as the case winds its way through the legal system, is best suited to handle the case once it gets to trial.

Turning a case over to a retired judge after a sitting judge has made pretrial rulings and heard motions "has the danger of changing the complexion of a case," says Colbath

In Palm Beach, senior judges are summoned to handle a sitting judge's day-to-day work, while the sitting judge is free to handle lengthy complex litigation cases.

"We could cover the other judge's division by dividing [cases] up among a few senior judges and it would keep things moving without interruption where continuity was not necessary," Colbath said.

Palm Beach Court Administrator Susan Ferrante agrees. "The way we handle it seems to be an acceptable procedure. We felt it works best, and the judges are responding to the local needs," she said.

Responding to a local community's needs is the least of Theodore Babbitt's worries. As a lawyer whose firm handles many complex medical malpractice cases, Babbitt says he's tried cases before retired judges with "less than satisfactory results," and has had at least two overturned on appeal.

"There is a reason we have a mandatory retirement age. One of those reasons is that when people get older they lose both physical and mental ability to handle extremely stressful and complicated matters," says Babbitt, a partner with Babbitt Johnson Osborne & Leclainche in West Palm Beach and a member of the newly formed Supreme Court committee. "That's not true of every retired judge, but it's true of some of the judges I have tried cases in front of."

Don't count Judge Allen Kornblum among them. The 72-year-old former Miami-Dade Circuit judge says he's successfully presided over trials that have lasted up to six or seven weeks. He's currently in the fourth week of a lengthy dispute between a developer and builder in Broward.

"At the end of the week I am tired, but most of my marbles are still there," he said with a chuckle.