

NC Dispute Resolution Commission

Minutes

December 3, 2004

**Smith Moore Law Offices
Greensboro, NC**

Members present: Steelman, Bernholz, Carroll, Conley, Criner, Gumbiner, Hudspeth, Isenhower, Lee, Lewis, Seigle, Taylor, and Turner. Ex-officio members present: Beason, Laney, Little, Morris, and Van Der Puy. Staff present: Ratliff.

Judge Steelman called the meeting to order and thanked everyone for attending. He administered the oath of office to the following new and re-appointed members whose terms commenced October 1, 2004: Bernholz, Carroll, Conley, Gumbiner, Hudspeth, Lee, and Turner. Judge Steelman then called for approval of the minutes from the September meeting. Mr. Little asked to reserve the right to amend the minutes at some future date to add remarks that he had made on the occasion of the conclusion of his term as Chair. There was no objection to this request. There being no further comments, the minutes were adopted.

Ms. Ratliff presented the office report. She first noted that the Commission's Annual Report for 2003/04 had been distributed last month and asked anyone who did not receive a copy to call her. Ms. Ratliff next called attention to the caseload statistics in the Annual Report. She noted that she was concerned that the total number of filings referred to superior court mediation had been dropping the past few years while, during the same period, the total number of civil filings had grown. She suggested this might simply be a failure to capture the data since some districts had not reported during the period, but she suggested the Commission might want to monitor the situation. Ms. Ratliff added that Mr. Van Der Puy had advised her that in the future the AOC may be interested in collaborating with the Commission's office on data collection. Ms. Ratliff also noted that the FFS Program seemed to be in a holding pattern and was not expanding, *i.e.*, no new districts had been added this year. Next, she reported that the Supreme Court had adopted the Commission's recommendation for revisions to the Standards of Conduct. They were adopted, she reported, on October 6, 2004, with an effective date of October 20th. She reported that all certified mediators and trainers had been either e-mailed or mailed a copy. Lastly, Ms. Ratliff noted that she was concerned because she had been advised by Tom Nevlud at the AOC that the Commission's project to post mediator profiles on its web site had been put on indefinite hold pending completion of an AOC project with priority status. Ms. Ratliff noted that she specifically asked Mr. Nevlud whether the Commission's project would be reactivated pending completion of the priority project and was told, "no", that someone would have to specifically tell him to

reactive it. At that point, it was suggested that perhaps the Commission should contact Judge Walker.

Next, Judge Steelman called for Committee Reports and noted that the **Executive Committee** had circulated drafts of proposed changes to statutes and rules in the meeting packet. He asked Mr. Little to walk the Commission through the drafts. Ms. Little began with Draft #15 of Commission Rule VIII which sets out a process for investigating and hearing complaints regarding applicant, mediator, or trainer conduct or ethics. Since the Commission had seen earlier drafts, Judge Steelman suggested that perhaps the group ought to focus directly on subsection B.2.(d) where alternative language asked Commission members to decide whether disciplinary hearings should be conducted in private or be open to the public. After some discussion, Judge Turner moved for adoption of the second alternative which provided for the hearings before the Commission to be public. Ms. Bernholz seconded and the proposal was unanimously approved.

With regard to Draft 15, Mr. Isenhower asked about the status of sanctions pending the appeal period. Mr. Little explained this was not really an issue as the Committee would only be recommending a proposed sanction. Those sanctions would only be imposed if the affected person agreed. After some additional discussion, Mr. Criner moved for the adoption of Draft #15 of Rule VIII, Mr. Hudspeth seconded, and the revisions to Rule VIII were unanimously approved.

Next, Mr. Little suggested that the group look at the draft of Commission Rule IX which sets out a process to review and hear matters relating to qualifications for certification or certification renewal not pertaining to conduct or ethics. He pointed out that in this case, Rule B.2.(f) provides for hearings before the Commission to be conducted in private. Mr. Little explained this was different from Rule VIII in that here the Commission is functioning as a “licensing” and not a regulatory body and applicants had a greater expectation of privacy. After a short discussion, Mr. Criner moved for adoption of Rule IX and Mr. Gumbiner seconded. The revisions to Rule IX were unanimously approved.

Mr. Little next outlined the changes to N. C. Gen. Stat. § 7A-38.2. These changes to the statute were necessary to implement Commission Rules VIII and IX. First, he noted that the Committee is proposing to flip the first two existing sections of the statute. He suggested that it made more sense to provide for certification of mediators first before addressing their regulation. Next, he noted that Section (c) was revised to authorize the Commission to employ staff and to hire special counsel when necessary or to call upon the Attorney General to furnish counsel to the Commission to assist the Commission with hearings. New subsection (d) authorizes the Commission’s chair or his/her designee to administer oaths/affirmations and to sign and issue subpoenas in the Commission’s name again in connection with investigations and hearings. New (e) was necessary to insure enforcement of subpoenas issued pursuant to section (d). Language in Section (f) provides for the Commission’s files to be maintained as confidential except that disciplinary files will be open to the public after probable cause is found. New section (g) provides for the review and hearing of matters not pertaining to conduct or ethics to

be conducted in private. Mr. Little explained that meetings and hearings where the Commission is functioning solely as a licensing and not a regulatory body may be treated as confidential. New section (h), he continued, provides for the initial review of matters pertaining to conduct or ethics to be conducted privately, but if the findings are appealed to the full Commission, the hearing is to be open to the public since the Commission is functioning as a regulatory body. Lastly, Mr. Little noted that (i) provides for appeals of final determinations by the Commission to be to the Wake County Superior Court.

Judge Taylor added that (j) had also been revised to provide for a fifteenth member of the Commission who would be a Clerk of Superior Court. She added this revision was occasioned by the *Ad Hoc* Committee's plan to soon introduce legislation to create a new program for mediation of matters pending before Clerks.

There followed some discussion of the proposed changes to 7A-38.2 and Mr. Little answered questions. At the end of the discussion, the revisions were approved unanimously. Ms. Ratliff noted that this statute had not yet been before the ADR Committee of the State Judicial Council.

Next, Mr. Little brought to the group's attention proposed changes to 7A-38.1(l) and 7A-38.4A(j) addressing inadmissibility of statements made and conduct occurring in mediation. He reminded the group that the Commission had previously adopted revisions to these statutes and forwarded them to the ADR Committee. The Committee had expressed concerns about the inclusion of a fraud exception. The Committee suggested that including an express exception for fraud would be productive of litigation in that the revisions permitted mediators to testify in actions to rescind agreements for fraud. Mr. Little noted that the Executive Committee was now suggesting additional revisions to address the Committee's concerns. The new version strikes express references to fraud and adds "or rescind" to the language in Sections (1)(b) of both statutes. In this way, attorneys could introduce evidence of fraud occurring in mediation in another civil proceeding, but the mediator would be precluded from testifying. Mr. Little suggested that this approach would address lawyer/mediator concerns about fraud being perpetrated in mediation and also the Committee's concerns about an express fraud provision and mediator testimony being productive of litigation. Following Mr. Little's explanation, there was considerable discussion about the issue of fraud perpetrated in mediation. At the close of the discussion, Judge Taylor moved to adopt the revised 7A-38.1 and 7A-38.4A containing the "or rescind" language. Mr. Hudspeth seconded and the motion passed unanimously.

Next, Mr. Criner reported for the **Mediator Certification and Training Committee**. He noted that his Committee had met in connection with Rule IX. He noted also that there were a number of matters currently pending before his Committee, but that they were not yet ready for Commission consideration and action. He did note that with Don McKee's departure, his Committee was short-handed. Judge Carroll said that he was willing to serve on this Committee.

Judge Lee next reported for the **Program Oversight Committee**. He noted that Judge DeRamus had done a great job of clearing this Committee's decks before his departure. Judge Lee added that there were, however, a couple of matters on the Committee's agenda, including complaints about the use of short lists relative to mediator appointments and concerns expressed about recently adopted time frames for finalizing agreements reached in mediation and reporting to the court. Ms. Ratliff called the group's attention to the new form in their packet to facilitate requests for extensions of deadlines set for completion of mediation. She added that the form was developed by this Committee.

Ms. Bernholz reported for the **Standards and Discipline Committee**. Ms. Bernholz and Ms. Ratliff noted the Committee had considered an application for certification involving an applicant who had been censured by the State Bar for having sex with a client. The Committee determined to certify him. Ms. Ratliff noted it was a consensual relationship, the State Bar found no evidence of coercion, and it was the only disciplinary action taken against him. Ms. Ratliff noted that the Committee had recently found no probable cause in connection with one complaint filed by a *pro se* party and, in the coming weeks, would be considering two additional complaints filed against mediators by *pro se* parties. Ms. Bernholz reported that Ms. Ratliff had asked the Committee for assistance in developing a protocol for conducting investigations of complaints, *e.g.*, should the office forward an actual copy of the complaint to the mediator and or to any witnesses contacted? The Committee would, Ms. Bernholz said, be working on this in the coming weeks.

Lastly, Ms. Bernholz noted that Mr. Little had been asked to chair an *Ad Hoc* Committee to look at the roles of the ADR Committee and the Commission. She noted that her Committee had asked Mr. Little to have this group also consider whether some agency or body should be assigned responsibility for the regulation of arbitrators. It was pointed out that Canons of Ethics for Arbitrators exist. Ms. Bernholz responded that that is precisely the problem; the Canons exist but no one is really enforcing them. Ms. Ratliff noted that recently a local court had told a litigant that the Commission regulated arbitrators and cited her to the Commission's complaint form. Ms. Ratliff further noted when she sent the litigant back to the local court, the litigant was again told to contact the Commission. Judge Carroll reported that his office received these kinds of complaints periodically and simply suggested to the parties that if they are not happy they can seek a trial *de novo*. Mr. Little acknowledged that during his term as chair, questions had come up regarding arbitrator conduct. He asked whether the Commission was willing to take on the job of regulating arbitrator conduct. He noted the Canons are in place, but there are no procedures or forms. Mr. Little's inquiry was, overall, positively received. Judge Steelman suggested that it was very important that the Conference of Chief District Court Judges be consulted on this matter.

The Committee reports being concluded, Judge Steelman reminded Committee Chairs of the need for their Committees to meet early enough to get their agenda items to Ms. Ratliff at least two weeks prior to the next scheduled Commission meeting. He next asked Mr. Little to report for the *Ad Hoc* Committee working to develop a statute and rules to implement a mediation program for matters pending before Clerks of Superior

Court. Mr. Little began with some history noting that Ms. Seigle's office, Carolina Dispute Settlement Services, had been a driving force behind this project. The original focus, he noted, had been adult guardianship cases, but the focus had now broadened to include other matters pending before Clerks, including estate and boundary/partition disputes. He observed that the *Ad Hoc* Committee had been unable to rely too heavily on the MSC and FFS statutes and rules in its drafting, since the Clerks' situation was different. For example, the issue of who could be required to attend the mediation took on a wholly different dimension here. Mr. Laney noted that there is also a significant difference in that the Clerk is required by statute to enter an order in some types of cases and that the agreement can only serve as a recommendation. Judge Lewis asked who will initiate the mediation? Mr. Little replied that the Clerk will order it and the mediator will do the scheduling. He added that he does not envision that the Clerk will be routinely referring cases to the extent that Senior Resident Superior Court Judges do. Mr. Gumbiner asked about payment of the mediator. Mr. Little responded that this program will operate on the party pay model, but that unlike the MSC program the Clerk will ultimately decide who will pay on a case-by-case basis. Mr. Little added that they are still working on certification criteria, but as it stood now, anyone certified to mediate superior court cases would be eligible to mediate Clerk cases with the exception of adult guardianship and estate cases where additional training would be required. The Commission would be responsible for certifying estate and adult guardianship mediators. Mr. Laney observed that Section members had some concerns about the proliferation of mediation specialties within the field. Judge Steelman thanked Mr. Little and Mr. Laney for their efforts on behalf of this new Program

Judge Steelman next called for **Liaison Reports**. Mr. Laney reported for the **Dispute Resolution Section** that they had ordered a reprinting of the ADR Book and now had some 2,000 copies in stock. He and Ms. Seigle noted that the ABA Dispute Resolution Section planned to have a panel presentation on the Book at its next annual meeting. Mr. Laney also noted that the Section will be working on a project to see whether mediation can help facilitate the settlement of escrow disputes. Mr. Laney also reported that the Section would be sponsoring a CLE on collaborative law and that Ms. Seigle would sit on the panel. Lastly, he noted that the Section is interested in working with Mr. Van Der Puy who was spearheading efforts in the area of permanency mediation. Ms. Seigle reported for the **MNNC** that Mr. McKee had left as the Director and that they were recruiting now for his replacement. She added that two Centers, the Piedmont Center and the Blue Ridge Center, had left the Network due to disputes regarding the apportioning of State funding for member Centers. She noted that the MNNC was still working on a funding formula acceptable to the remaining members.

There being no further business, Judge Steelman noted that the next meeting would be February 11th in Raleigh and the meeting was adjourned.