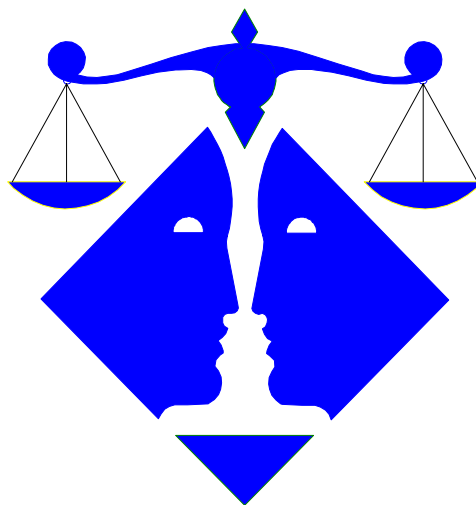


REPORT OF THE

**NC DISPUTE RESOLUTION
COMMISSION**

FOR FISCAL YEAR 2003/2004



JUDGE SANFORD L. STEELMAN, JR., CHAIR (FY 2004/05)
J. ANDERSON LITTLE, CHAIR (FY 2003/04)

Prepared By:
Leslie Ratliff, Executive Secretary
N.C. Dispute Resolution Commission

I. Introduction: N.C. Gen. Stat. § 7A-38.2 established the North Carolina Dispute Resolution Commission effective October 1, 1995. The Commission is charged primarily with administering mediator certification and with regulating the conduct of mediators serving North Carolina's Mediated Settlement Conference (MSC), Family Financial Settlement (FFS), and Pre-litigation Mediation Farm Nuisance (Farm) Programs. The Commission also certifies mediation trainers, recommends rules and rule revisions to the Alternative Dispute Resolution Committee of the State Judicial Council, seeks to promote mediator education and skills development, and interfaces with court personnel, attorneys, litigants, the public, and other state agencies offering mediation services or seeking to provide such services. This annual report, which is the ninth submitted by this body, will review the programs the Commission monitors and describe the activities and accomplishments of the Commission for the period July 1, 2003, through June 30, 2004.

II. Membership: The Commission is a fourteen-member body. In accordance with G.S. § 7A-38.2, its membership consists of: five judges, including two superior and two district court judges; four mediators, including two certified to conduct family mediation conferences in district court and two certified to conduct conferences in superior court; two practicing attorneys not certified as mediators, one of whom shall be a family law specialist; and three citizens knowledgeable about mediation. Members who served during fiscal year 2003/04 and their appointing authorities are listed below:

J. Anderson “Andy” Little, Chair -- (Chapel Hill) family mediator, re-appointed by the Chief Justice through September 30, 2004.

Dorothy C. Bernholz -- (Chapel Hill) knowledgeable citizen, appointed by the Governor through September 30, 2005.

Sherman Lee Criner -- (Wilmington) superior court mediator, appointed by the Chief Justice through September 30, 2005.

George C. Cunningham -- (Wilkesboro) family mediator, re-appointed by the Chief Justice through September 30, 2004.

Judge Danny E. Davis -- (Waynesville) district court judge, appointed by the Chief Justice through September 30, 2003 (held over through September 30, 2004).

Judge Judson D. Deramus, Jr. -- (Winston-Salem) superior court judge, re-appointed by the Chief Justice through September 30, 2004.

Kenneth J. Gumbiner -- (Greensboro) superior court mediator, appointed by the Chief Justice through September 30, 2004.

C. Randall Isenhower -- (Newton) family law attorney who is not certified as a mediator, re-appointed by the State Bar President through September 30, 2005.

Judge Robert D. Lewis -- (Asheville) knowledgeable citizen, appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives through September 30, 2006.

Judge Michael R. Morgan -- (Raleigh) district court judge, re-appointed by the Chief Justice through September 30, 2004.

Diann Seigle -- (Raleigh) knowledgeable citizen, appointed by the General Assembly upon recommendation of the President Pro Tem of the Senate through September 30, 2005.

Judge Sanford L. Steelman, Jr. -- (Weddington/Raleigh) judge member, appointed by the Chief Justice through September 30, 2005.

Judge Kimberly S. Taylor -- (Hiddenite) superior court judge, appointed by the Chief Justice through September 30, 2004.

J. Merritt White, III -- (Concord) attorney who is not certified as a mediator, appointed by the State Bar President through September 30, 2004.

During fiscal year 2003/04, Commission member, **Barbara Ann Davis** of Asheville, completed her term of appointment to the Commission. She was replaced by **Judge Robert D. Lewis**. Judge Lewis served on the superior court bench before retiring and is an active mediator.

A number of ex-officio members also attend Commission meetings and provide expertise on matters before the Commission. Ex-officio members do not have a vote on the Commission. Serving as ex-officio members this fiscal year, or some portion of the year, were:

Robert A. Beason -- Member, State Judicial Council's ADR Committee
Betsy McCrodden -- Chair, NCBA Dispute Resolution Section
Frank C. Laney -- Mediator, US Circuit Court of Appeals for the Fourth Circuit
Donald I. McKee -- Executive Director, Mediation Network of North Carolina
Mark Morris -- Professor, North Carolina Central University School of Law
John Schafer -- Deputy Commissioner, NC Industrial Commission
Carmon J. Stuart -- Former Clerk of the Federal Middle District of North Carolina
Judge Ralph A. Walker -- Chair Emeritus
Ella Wrenn -- Court Support Staff Liaison

Due to his declining health, ex-officio member **Carmon Stuart** withdrew from the Commission early in the fiscal year. Sadly, Mr. Stuart, a former FBI agent and former Clerk of the U.S. District Court for the Middle District of North Carolina, passed away late this summer. He will be remembered in part as a founding member of this Commission and as an early and steadfast proponent of dispute resolution efforts in our State's courts.

III. Office: The Commission's office operates with a three-quarter time Executive Secretary, Leslie Ratliff, and two part-time administrative assistants, Sharon Corey-Laue (35 hours) and Karen K. Griffith (20 hours). The office is located in Suite 126 of the WoodOak Building at 1100 Navaho Drive in Raleigh. Office staff maintain the Commission's website which can be viewed at www.ncdrc.org.

IV. Interface with Other Agencies or Programs: The NC Industrial Commission, the NC Office of Administrative Hearings, and the federal Middle and Western Districts have established mediation programs as have a number of smaller state and federal agencies. These programs all rely on mediators certified by the Commission.

V. Budget: This year, formerly separate budgets for the MSC and FFS Programs were collapsed into a single budget, numbered Fund 1715 (Dispute Resolution Commission). This was done to simplify accounting and to allow for more flexibility in the exchange of funds between the two programs.

The Commission's budget is comprised of fees collected from mediators and mediation training programs for certifications and renewal of certifications. Certifications and renewals for FY 2003/04 generated \$160,315 in revenues. This fiscal year as in past fiscal years, the Commission fulfilled its charge to fund its operations from revenues only and without expenditure of tax dollars.

VI. Program Status: Both the Mediated Settlement Conference and Family Financial Settlement Programs ran smoothly this year. Caseload statistics collected by the Administrative Office of the Courts for the **Mediated Settlement Conference Program** reveal that 11,138 cases were ordered to mediated settlement in superior court this fiscal

year. Of those cases, 3,498 were resolved in mediation. An additional 3,387 cases were settled or otherwise disposed of prior to mediation. The Commission believes that the MSC Program acted as a catalyst for these very early settlements. All told, statistics reveal that 6,885 cases were impacted positively by the MSC Program in fiscal year 2003/04. However, the Commission does not believe that even this number tells the full story. Many cases which impasse in mediation later go on to settle short of their trial date, as attorneys and parties continue the dialogue begun in their conferences. At the end of this fiscal year, 1,063 mediators were certified to serve the MSC Program.

Caseload statistics collected by the Administrative Office of the Courts for the **Family Financial Settlement Program** reveal that 1,388 cases were ordered or voluntarily submitted to mediated settlement or some other form of dispute resolution in district court this fiscal year. Of those cases, 474 were either fully or partially resolved in mediation. An additional 395 cases were settled or otherwise disposed of prior to mediation. All told, 869 cases were impacted positively by the FFS Program in fiscal year 2003/04. As with the MSC Program, the Commission does not believe that even these numbers tell the full story since many cases which impasse in family financial mediation later go on to settle as attorneys and parties continue the dialogue begun in their conferences. At the end of this fiscal year, 215 mediators were certified to serve the FFS Program. The FFS Program is continuing to expand statewide and is now operating in 24 judicial districts encompassing nearly all the more urban parts of the State.

VII. Commission Activities in FY 2003/04: This Commission operates with four committees:

Executive Committee -- Mr. Little, Chair. Among other things, this Committee is charged with considering matters affecting dispute resolution policy and also with overseeing matters relating to Commission personnel and budget.

Program Oversight Committee -- Judge DeRamus, Chair. This Committee is charged with insuring that mediated settlement conference programs operate smoothly and with recommending any necessary revisions to the statutes and rules to achieve that end.

Mediator Certification and Training Committee -- Ms. Davis, Chair. This Committee is assigned responsibility for considering issues that arise in connection with the trainer and mediator certification processes. This Committee is also responsible for overseeing the Commission's continuing mediator education reporting requirement.

Standards and Discipline Committee -- Mr. Cunningham, Chair. This Committee reviews disciplinary matters self-reported by mediators or applicants for mediator certification and investigates and reviews complaints filed by litigants, attorneys, and others regarding mediator conduct.

The committees undertake the work of the Commission and make recommendations to the full body. Committee members meet as needed. The full Commission met four times this fiscal year. During fiscal year 2003/04, the Commission and its four Committees undertook a number of projects designed to improve operations of the Mediated Settlement Conference and Family Financial Settlement Programs and to facilitate the work of our State's certified mediators. Highlights of fiscal year 2003/04 follow:

- 1) **Investigative and Disciplinary Hearing Rules Re-Drawn.** The Commission is beginning to address an increasing number of disciplinary issues. This is due in part to new requirements for the reporting of disciplinary matters adopted by the Commission three years ago. Under the new reporting requirements, applicants for certification and certification renewal must disclose on their applications any of the following: convictions, pending grievances filed against them with professional licensing/certification bodies, sanctions imposed on them by professional

licensing/certification bodies, and judicial sanctions. Also, this year the Commission saw an increase in the number of formal complaints filed against mediators by third parties such as litigants and attorneys. This increase may be due to the fact that there are now simply more mediators working in the courts or it may be due to the growing familiarity of the Bar and litigants with the mediation process and the Standards of Conduct. More experience with disciplinary matters led the Commission to re-evaluate its current investigative and hearing procedures. That review, in turn, resulted in efforts begun this fiscal year to re-draft the Commission's rules to both strengthen and clarify its investigative and hearing procedures and to insure due process rights of applicants and mediators. Though underway, this task will carry over to FY 2004/05.

- 2) **New Rule to Address Staff Denials.** In re-drafting its rules addressing disciplinary matters, the Commission determined that it also needed to craft a rule to provide for a formal appeals process when Commission staff deny an application for certification or certification renewal for reasons not relating to conduct, *e.g.*, a lack of education or training. Though underway, this project will carry over into FY 2004/05 as well.
- 3) **Final Distribution of ADR Book.** Nearly two years ago, the Commission contributed \$25,000 toward an effort to develop and publish a book on the history and practice of dispute resolution in North Carolina. That effort culminated in the book, *Alternative Dispute Resolution in North Carolina: A New Civil Procedure*, which was published last fiscal year. Beginning last fiscal and carrying over into this fiscal year, copies of the book were distributed gratis to all certified mediators, state court judges, and state legislators. Copies of the book were also mailed to supreme courts and law libraries of all 50 states. A number of Commission members and ex-officio members assisted with the project, including the late Carmon Stuart, John Schafer, Judge Ralph Walker, Frank Laney, and Andy Little. Ms. Jackie Clare served as the book's editor, refining and compiling the many chapters that North Carolina mediators, judges, lawyers, law professors, court administrators, and others contributed. This fiscal year the NCBA Dispute Resolution Section's Annual Meeting showcased the book. The book has proved so popular that the Section has now ordered a reprint for even wider distribution.
- 4) **Self-Determination Standard Revised.** This fiscal year the Commission tackled a thorny issue that has been the subject of debate at Commission meetings for several years, *i.e.*, whether mediators should offer opinions on proposals under consideration or suggest how a judge or jury might decide a case. Though the Standards of Conduct clearly forbade the giving of such opinions or evaluations, the practice was widespread because many mediators felt obliged to respond to the requests of parties for such information. Over time, a number of Commission members had come to believe that the Standard should be changed to reflect the realities of practice. Those members were uncomfortable with the notion that the Commission might someday be asked to discipline a mediator for giving such an opinion. Others felt strongly that the Standard should remain as it was. They believed that a good mediator could make his impressions of a case known without the need for an express statement of opinion or evaluation. Moreover, they were concerned that softening the Standard would simply be an invitation to mediators to pursue a more directive approach to mediation, substituting their judgment for that of the parties. After much debate, the Commission resolved the matter in true mediator fashion, crafting a compromise that met the needs of both perspectives. The Commission's proposal, which was adopted by the Supreme Court early in FY 2004/05, provides that a mediator may give an opinion or evaluate a case, but only when the opinion is expressly requested and only when the mediator has first made every effort to settle the case short of giving his/her opinion or evaluation.
- 5) **Ad Hoc Committee Established.** During this fiscal year, the Commission's Chair determined

to establish an *ad hoc* committee to make a recommendation to the Commission regarding establishment of a mediated settlement conference program to promote resolution of matters pending before Clerks of Superior Court, including estate, adult guardianship, boundary, and partition disputes. This initiative subsequently evolved to become a joint project of the Commission and the NCBA Dispute Resolution Section. This committee is scheduled to meet in the coming fiscal year.

6) New Advisory Opinions Adopted: The Commission issued three advisory opinions this year pursuant to its Advisory Opinion Policy. The opinions addressed important questions raised by mediators:

- **Bankruptcy.** *Mediator inquired as to whether he should proceed to hold a mediated settlement conference after one of the parties filed for bankruptcy?* Commission responded that a bankruptcy filing results in an automatic stay of any judicial proceeding and cautioned the mediator to report to the court that a bankruptcy has been filed and to request that the court advise the mediator as to any further action he or she should take. (Opinion #07-04, adopted on March 18, 2004.)
- **Separation of Mediation from Legal or Other Professional Practice.** *Mediator inquired whether he could represent the wife in divorce proceedings given that he had earlier served as the mediator in an effort to help the wife and her husband draft a separation agreement?* Commission responded that the mediator may not represent either the husband or wife in their ensuing divorce litigation. Couples who meet with a mediator have adverse as well as common interests in regards to their separation and divorce. A mediator who works with them as a neutral and who then becomes the representative of only one calls into question the mediator's neutrality and the confidentiality of the mediation process. This appearance of impropriety, if not impropriety itself, can undermine not only a party's confidence in a mediator and the mediation process, but that of the larger public as well. (Opinion #06-04, adopted February 6, 2004.)
- **Confidentiality.** *Mediator asked whether he may have ex parte communications with a party following impasse in an effort to clarify a misconception that he understands the party holds about what transpired at the mediation and to encourage further discussions or settlement?* Commission responded that it is not unusual for parties to contact a mediator following an impasse and seek some clarification or other assistance and the mediator may speak with them. Through such *ex parte* conversations, mediators can sometimes play an important role in reviving or furthering settlement discussions. While mediators are not required or obligated to provide additional assistance or information once a case has impassed, they may do so if they believe it will assist the parties and lead to further settlement discussions and there is no violation of confidentiality. (Opinion #05-03, adopted November 7, 2003.)

The Commission's Advisory Opinion Policy and Advisory Opinions adopted by the Commission to date are posted on its website and available in hard copy through its office.

7) Rule 3.1 Revised. This fiscal year the Commission heard from a number of mediators who were frustrated by requests from attorneys to postpone conferences on or near their scheduled date because the attorneys had been unexpectedly summoned to court. In response to these concerns, the Commission considered whether it should recommend revisions to Rule 3.1 of the General Rules of Practice for the Superior and District Courts which establishes guidelines for resolving scheduling conflicts among appellate, superior, and district court proceedings. Existing guidelines did not recognize the institutionalization of mediation in North Carolina's courts over

the past decade nor did they factor court-ordered conferences into the priority determinations established under the rule. The Commission made recommendations for revisions to Rule 3.1 and submitted them to the Supreme Court. On March 4, 2004, the Court adopted those revisions and the Rule now provides that when settlement proceedings have been ordered in superior or district court cases, only trials, hearings upon dispositive motions, and hearings upon motions scheduled for counties with less than one court session per month shall have precedence over settlement proceedings.

- 8) **Continuing Mediator Education Reporting Requirement Implemented.** This fiscal year the Commission concluded the first cycle of reporting under its new continuing mediator education (CME) reporting requirement. As mediators renewed their certification, they were required to report their efforts to obtain continuing education in areas relevant to their work as mediators. The Commission is asking all mediators to complete at least six hours of CME every two-year cycle. Approximately half of all certified mediators voluntarily complied with the Commission's request that they complete at least six hours of CME every two years.
- 9) **Credibility of Mediator Reports Addressed.** In years past, the Commission has heard concerns expressed by some superior court judges that they could not always rely on mediator reports that cases had settled. In lieu of consent judgments or voluntary dismissals for such "settled" cases, they sometimes instead received requests to schedule the matter for trial. The Commission responded to these concerns by recommending revisions to the MSC and FFS Rules for the finalizing of agreements and mediator reporting. These recommendations were adopted by the Supreme Court on March 4, 2004. The new rules make it incumbent on the mediator to do more to insure that a case has, in fact, settled before making that representation to the court.
- 10) **Technology Use.** This year the Commission began to distribute its newsletter on-line thereby eliminating the need for printing and mailing with the result that: 1) the speed of distribution was accelerated and 2) costs were cut drastically.

VIII. Plans for Fiscal Year 2004/05: In the coming fiscal year, the Commission will focus on the following projects:

- Completing the work begun to draft new investigative and hearing procedures to address conduct and ethics matters;
- Completing the work begun to draft a procedure for review of staff determinations to deny an application for certification or renewal of certification;
- Exploring whether to establish a mediation program to promote settlement of cases filed before Clerks of Superior Court, including estate matters, adult guardianship cases, and boundary disputes;
- Working to encourage mediators to voluntarily complete continuing mediator education hours; and
- Posting biographical information about mediators on the web so that it is more accessible to attorneys, parties, and the public.

IX. Conclusion: The NC Dispute Resolution Commission had a successful year working to make the Mediated Settlement Conference and Family Financial Settlement Programs more effective. The Commission looks forward to fiscal year 2004/05 and the opportunities and challenges it will bring. This coming year, as in past years, the Commission pledges to continue its efforts to strengthen our State's court-connected dispute resolution programs and to facilitate the work of the mediators who serve them.

MEDIATED SETTLEMENT CONFERENCES CASES

July 1, 2003 – June 30, 2004

Districts	Begin Pending¹	Submitted to Mediation	Ordered Removed	Disposed without Session	Resolved through Conference	Not Resolved through Conference	End Pending²
1	111	124	48	42	38	25	82
2	224	109	5	51	13	26	238
3A	180	189	2	83	24	35	225
3B	316	215	2	17	84	58	370
4A	128	98	2	20	26	19	159
4B	36	62	0	31	22	22	23
5	548	425	2	88	69	85	729
6A	36	57	1	15	15	45	17
6B	7	106	10	22	12	15	54
7A ³	27	164	10	9	9	3	160
7B/C	176	399	18	141	107	99	210
8A	25	97	4	34	21	19	44
8B	68	104	11	29	42	31	59
9	217	220	2	49	90	55	241
9A ⁷							
10	541	1,087	45	386	313	264	620
11A	89	259	6	75	73	63	131
11B	313	453	7	288	92	75	304
12	146	396	91	114	134	81	122
13	379	305	2	198	90	55	339
14	841	400	5	262	97	103	774
15A	59	112	2	13	61	33	62
15B	131	187	5	52	59	52	150
16A	40	58	4	23	23	7	41
16B	36	73	0	14	50	12	33
17A	46	89	4	29	37	26	39
17B	86	123	17	35	41	26	90
18	396	836	59	180	362	209	422
19A	91	171	11	70	47	36	98
19B ⁴	58	171	16	46	54	46	67
19C	189	128	1	42	34	38	202
19D ⁴	79	4	0	1	4	4	74
20A	73	120	2	41	28	36	86
20B ⁵	64	0	0	0	16	12	36
21	288	441	11	74	146	100	398
22	836	320	3	32	140	88	893
23	78	164	1	52	44	52	93
24 ⁷							
25A	95	156	11	47	58	53	82
25B	189	213	2	87	62	68	183

Mediated Settlement Conferences Activity, July 1, 2003 – June 30, 2004

(Continued)

Districts	Begin Pending¹	Submitted to Mediation	Ordered Removed	Disposed without Session	Resolved through Conference	Not Resolved through Conference	End Pending²
26 ⁶	403	1,440	19	305	488	510	521
27A	83	228	1	27	62	65	156
27B	129	144	26	23	87	56	81
28	448	234	15	46	116	94	411
29	268	264	6	98	63	71	294
30A	87	79	6	57	10	19	74
30B	57	114	4	39	35	21	72
TOTALS	8,717	11,138	499	3,387	3,498	2,912	9,559

¹Cases pending as of July 1, 2003.

²Cases pending as of June 30, 2004.

³Pending numbers adjusted for July 2003.

⁴Effective November 2003, District 19B split into 19B and 19D. Moore, Montgomery, and Randolph counties reported data for July - December 2003. Montgomery and Randolph counties reported data for January - June 2004. District 19D (Moore County) reported data separately as of effective date.

⁵Data reported for April - June 2004.

⁶Pending numbers adjusted in December 2003.

⁷No data reported.

FAMILY FINANCIAL SETTLEMENT PROCEDURES CASES										
July 1, 2003- June 30, 2004										
Districts	Cases Pending July 1, 2003	Ordered to Mediation	Voluntarily Submitted to Mediation	Submitted to other Settle. Proced.	Ordered Removed from Settle. Proced.	Disposed without Settle. Proced.	Reported Resolved through Settle. Proced.	Partially Resolved through Settle. Proced.	Not Resolved through Settle. Proced.	Cases Pending June 30, 2004
5	95	234	0	0	0	48	62	0	148	71
6A	10	12	0	2	0	2	9	3	8	2
8	29	40	0	0	1	13	17	6	16	16
9	24	24	4	0	1	2	27	0	4	18
11	114	0	0	0	0	0	0	0	0	138
14	40	44	0	29	0	7	32	5	34	35
16A	0	78	0	0	2	26	0	1	4	45
17A	30	48	14	0	0	24	45	1	10	12
19A	0	43	0	0	0	0	0	0	0	43
20	21	121	39	6	1	62	46	0	48	30
23	59	56	1	0	0	8	31	3	17	57
24	40	85	0	2	0	32	45	0	23	27
25	122	230	22	0	39	118	46	10	54	107
26	0	44	0	52	1	6	16	2	18	53
28	30	93	0	0	1	17	23	2	17	63
30	58	65	0	0	2	30	42	0	13	36
TOTALS	672	1,217	80	91	48	395	441	33	414	753
District 11 Pending Case Data reported March-June 2004										
District 16A Data reported August 2003-June 2004										
District 19A Data reported April-June 2004										
District 26 Data reported January-June 2004										
District 12 No Data reported										