

Minutes

NC Dispute Resolution Commission

**Friday, September 9 & Saturday, September 10, 2011
Asheville, NC**

Friday, 1:00 p.m.

Present for the meeting: Chairman Lee and Commission Members Anderson, Bryant, Clare, Conley, Curran, Farah, Gullick, Hay, Hudspeth, Little, McKown, Morgan, Tash and Turner. Ex-Officio Members present: Beason, Cole, Doyle, Laney, Schafer, and Whitley. Guests and Staff present: Mike McDaniel and Leslie Ratliff.

Judge Lee welcomed members and guests. He identified George Doyle who replaces Zeb Barnhart as the Dispute Resolution Section's Chair and liaison to the Commission. Mr. Little introduced his guest, attorney and MSC mediator Mike McDaniel of Raleigh. Judge Lee noted that the meeting was very well attended and thanked Ms. Ratliff and Ms. Robinson for their work. Mr. Hay welcomed everyone to Asheville.

Judge Lee began by noting that Judge Curran's second term on the Commission had come to an end and presented a plaque to her as an expression of the Commission's gratitude. Next he administered the oath of office to Mr. Little and Mr. Farah who had been re-appointed to second terms. Judge Lee thanked them for their service to date and ongoing commitment. Judge Lee noted that terms of other members expired September 30th, but that the Chief Justice had as yet taken no action on those appointments. Mr. Laney noted that the Section had sent a letter to the Chief noting that Ms. Clare, Ms. Bryant and Justice Jackson were all eligible for re-appointment and recommending that they, in fact, be reappointed. Judge Turner and Judge McKown noted that there was some question about their eligibility to continue to serve in that Judge Turner had been elevated to the superior court bench and Judge McKown had retired from the district court bench. Judge Lee does not think the statute is clear, but said they should continue to serve until the Chief Justice takes action.

Judge Lee next called for approval of the minutes and they were approved as submitted. Ms. Ratliff was asked for the office's report. She began by thanking Ms. Robinson for her work in coordinating the retreat and Ms. Laue for keeping the office under control while Ms. Robinson focused on the retreat. She noted that Commission members would soon be receiving a memo regarding State Ethics Act training requirements and that several would need to complete a refresher course. She also reported that the 2011/12 certification renewal period was drawing to a close. She characterized it as a strong year with 1,215 MSC, 290 FFS, 107 Clerk and 45 DCC mediator certifications outstanding as of September 7, 2011. She also summed up budget information for FY 2010/11, which ended on June 30, 2011, and reported that total collections for the year were \$211,535.00 with total expenditures of \$187,434.66. Carry forward for the year was \$24,134.00 and when that number was combined with the carry forward from previous years, it totaled \$113,420.00. Lastly, Ms. Ratliff reported that AOC forms staff had been let go in a recent downsizing and she was concerned about what may happen with the forms approval process in the future. The Commission, she added, currently had some forms in the pipeline in connection with the proposed revisions now before the Court.

Judge Lee reported for the Executive Committee and began by noting that he was extremely concerned that OSMB had confiscated \$12,602.34, or about 10 % of the Commission's accumulated carry forward. He noted that he felt the Commission owed a fiduciary duty to

mediators to protect the fees they paid for certification and certification renewal and to preserve them for Commission use. He added that statutory language was very clear (Session Law 2011-145, Section 15.5) to the effect that the Commission's funds are non-reverting and only to be used at the direction of the Commission. He added that Gregg Stahl had offered to assist the Commission in protecting its carry forward by seeking special non-reverting fund status. Judge Lee sees no reason to do this given that the statute was clear, but was willing to try this approach. He also told the group that he had written a letter to OSMB Director Andy Willis complaining about the seizure, but had not mailed it. He noted that he was concerned about possibly alienating General Assembly members and asked for feedback from the Commission. After some discussion, the Commission agreed that Judge Lee should both send the letter to Mr. Willis and seek assistance from Mr. Stahl. Judge Lee and Mr. Laney reported that the Commission's proposed rule revisions had been approved by the ADR Committee of the State Judicial Council and the State Judicial Council and were now ready to go to the Supreme Court which was scheduled to meet in conference on October 6 and November 9. Mr. Laney added that significant revisions to the Rules for the Court Ordered Arbitration Program would also be going to the Court.

Next, Judge Lee noted that revisions to the Commission's Rules were before the group. He noted that these revisions largely related to ex-officio members voting on matters before Committees. He explained that Deputy AG Grady Balentine had advised Ms. Ratliff that ex-officio members may not be covered under the Defense of State Employee's Act. Though it was regrettable, the Executive Committee felt it best to protect ex-officio members from suit by limiting voting to Commission members who are covered by the Act. The proposed revisions were unanimously approved with minor changes, *i.e.*, removal of the word "periodically" in Rules VIII.C.3.(a) and IX.A.3.(b) and expansion of any 120-day time period noted in the rule to 150.

Judge Lee next called for Ms. Clare to report for the Standards, Discipline and Advisory Opinions Committee. Ms. Clare began by introducing a proposed Advisory Opinion (AO) that addressed how a mediator should respond when approached by a State Bar investigator asking to interview the mediator regarding an attorney's conduct in mediation. The AO, she explained, took the position that mediators should not agree to speak with investigators informally. They could, however, cooperate with the State Bar if deposed or subpoenaed to testify at a hearing. In those situations, she explained, safeguards were in place, *i.e.*, attorneys and a hearing panel present. Judge Turner responded that he thought opportunities would be lost to resolve grievances very early if such conversations were prohibited. Ms. Clare responded that the investigator could speak with others who were also present, including the parties and their attorneys. Mr. Laney asked whether attorneys (and thus attorney-mediators) have any obligation to speak with investigators? Ms. Clare and Mr. Little thought not, but Ms. Clare agreed to contact Alice Mine for clarification. Ms. Bryant asked if the opinion would be different if the investigator were calling regarding the attorney-mediator's own conduct? Discussion followed regarding the wording of N.C.G.S. 7A-38.1(1) and whether the language relating to State Bar hearings and proceedings referred only to grievances filed against attorney-mediators or to those filed against attorneys participating in mediation. Judge Lee asked Mr. Little and Mr. Laney, who argued opposing views, to prepare position papers on the matter for the Commission with the papers due within 60 days. In the meantime, the AO was tabled. Ms. Clare asked how the Commission's office should respond to such inquiries in the near term. Ms. Ratliff was advised to inform callers not to respond to the investigator.

Ms. Clare next drew attention to a proposed inquiry to be directed to the State Bar. She explained that the Commission would be asking the State Bar to comment on the extent that an attorney-mediator working with *pro se* parties can assist them. Specifically, can a mediator reduce the

parties' agreement to a final writing and have them sign it and then assist them in submitting it to the court for the purpose of obtaining a consent order, *i.e.*, is it proper for the attorney-mediator to represent both parties before the court. There followed discussion about whether it was best practice for mediators to draft agreements. Messrs. Little and Beason said that they do not draft agreements, Ms. Bryant pointed out that in family mediations the numbers of unrepresented parties are growing and the reality is that there is a need and demand for such services. She noted that she drafts, but does not have the parties sign the agreement and advises them to have it reviewed by a lawyer. Judge Turner noted that in his district, mediators routinely draft and present consent orders for judges to sign. The Commission agreed the inquiry should go forward. Ms. Clare will send it to Alice Mine. She concluded by thanking Mr. Little for his help with this project.

Next, Ms. Clare presented another AO on mediators serving as notaries. Ms. Clare explained that the SDAO Committee had contacted the Secretary of State's (SOS) office to inquire whether it was appropriate for an attorney-mediator to notarize an agreement reached in mediation. The issue was whether a mediator, who is being paid to mediate a dispute and whose fees may be included as a term in the agreement, is a beneficiary of the underlying transaction. The SOS determined that the mediator's fee was independent of the underlying transaction, *i.e.*, the fee would be due and owing whether an agreement was reached and notarized or not and, as such, they saw no problem in the attorney serving as a notary. In addition, in light of the fact that the NC State Bar has determined that mediation is not the practice of law and given the analysis above, SOS staff further concluded that non-attorney mediators could also notarize mediated agreements. The AO, Ms. Clare explained, reflects the SOS analysis. The AO was unanimously adopted by the Commission. Lastly, Ms. Clare updated the Commission on complaint activity for the quarter and notified those present that additional Opinions on confidentiality and review of materials in preparation for mediation are in the works.

At this point, Judge Lee deviated from the agenda and the group received a special report from Lori Cole updating them on mediation caseload statistics for FY 2010-11. She also reported on significant changes to the Court-Ordered Arbitration Program Rules and presented an update on the work of the Court Programs and Management Services Division. Judge Curran noted that with regard to the Clerk Program statistics, she would like to see foreclosure cases deemed eligible for mediation. Mr. Little asked her if she thought other clerks would support such a rule change and she strongly believed they would. Judge Lee asked Ms. Cole about capturing data on the numbers of cases settling shortly after mediation. Ms. Cole responded that neither her office nor the court had the resources to do this. Judge Lee thanked Ms. Cole for her update.

Next, Mr. Hudspeth reported for the Mediator Certification and Training Committee. He began by directing attention to proposed changes to the Commission's Advertising Policy. The proposed revisions, he reported, were intended to prohibit mediators from posting information about degrees awarded by unaccredited institutions on the Commission's web site. The revisions also suggest that mediators not couple mention of such degrees with notice of their DRC certification. Revisions to the Policy were adopted.

Judge Lee adjourned the meeting at 5:00 so that the SDAO Committee could meet prior to dinner.

Saturday, 8:00 A.M

Mr. Hudspeth continued with his report calling attention to proposed changes in the Requirements for Observer Conduct. He first noted that a new #2 had been inserted asking observers to dress appropriately for mediation. In addition, #3 had been revised to instruct observers to turn off cell phones and similar devices and store them out of sight. The Commission voted to adopt the

changes with the amendment to #2 revised to read, "Dress appropriately. This is a court ordered proceeding." Next, Mr. Hudspeth called attention to proposed revisions to the Policy on Waiver or Reduction of Fees. The proposed changes provide for fees to be waived in situations where an applicant for certification or certification renewal is temporarily or permanently disabled and claims financial hardship. The changes to the Policy were adopted.

Mr. Little next reported for the Program Oversight Committee. He reported that proposed rule changes adopted by the Commission had now passed the ADR Committee and State Judicial Council without changes and would soon be forwarded to the State Supreme Court. He noted that the Commission had approved a last minute change to program rules (by email) that would allow deadlines for completion to be extended upon the judge's own motion, upon stipulation of the parties or upon suggestion of the mediator.

Mr. Laney next reported for the Book Committee. He reported that this project has now entered the editing phase and the book has a tentative February or March release date. He added that the book will be available three ways: by e-book, by print on demand or by key code. Ms. Ratliff asked whether the Commission would make copies available for certified mediators? Mr. Laney and Judge Lee responded that was something that should be considered.

Judge Lee and the members next selected a meeting date for the upcoming FY 2011/12 retreat, September 14-15, 2012. They agreed to again meet in Asheville at the Crowne Plaza. Next, Judge Lee called for liaison reports. Mr. Doyle reported for the Dispute Resolution Section. He noted that the Section's annual meeting is scheduled for February 24, 2012, at the Grandover. As the Section's new chair, he noted that jump starting the Clerk Mediation Program was high on his agenda and he reported that he had tapped Barney Barnhardt, Bill Wolcott and Mr. Little to lead that effort. He described them as busy setting up a pilot program and developing a bench book for Clerks. Lastly, he added that the Section's 20th Anniversary was coming up next year. Mr. Minor was not present for the Mediation Network, but Ms. Bryant reported that centers were having a tough time financially now. Not only were their appropriations cut but, in addition, a court recently imposed a stay on Medicaid appeals resulting in a loss of that income as well. She added that centers have now been authorized by the General Assembly to retain a portion of the dismissal fees paid in district criminal court mediations, but those monies do not compensate for the lost appropriations. Mr. Schafer next gave an extensive update on the Industrial Commission's (IC) Mediation Program. He first reported that the IC had a new Commissioner, Tammy Nance, who is also a certified mediator. He added that new IC mediation program rules had been adopted effective January 2, 2011. Those rules provide that IC mediators must be certified and adhere to the Standards of Professional Conduct for Mediators. Mr. Schaffer also reported that he has been given marching orders to expedite the IC mediation process. In keeping with that charge, program forms were revised, including their Designation Form, which now requires attorneys to not only identify the mediator selected, but also the date the conference is to be held within a 120-day period. His office, he added, is now granting far fewer extensions and most cases are completing the mediation process in six months. Mr. Schafer also noted that legislation was adopted this session which significantly impacted workers' comp law and the IC (HB 709). The new legislation, he suggested, provides for a narrower range of exposure and that settlement ranges would likely become narrower as well. The new legislation also brings the IC and its Commissioners, Department of Commerce positions, under the regulation of the Judicial Standards Commission and makes their rules subject to the Administrative Procedures Act. Judge Curran asked whether expediting the mediation process has affected settlement rates. Mr. Schafer does not believe there has been an affect yet, that rates have been and currently are over 70%. He noted that one unintended consequence of expediting the process is that the work is now being spread among more mediators as parties seek to avoid scheduling bottle necks. Lastly,

Mr. Schafer noted that the IC's annual conference on workers' comp mediation is scheduled for October 19-21. Ms. Whitley reported for the JSSC that she was hearing many concerns about the \$20.00 motion filing fee and that parties have been charged when requesting the court to appoint a mediator. Ms. Clare has also heard of the fee being charged when Designation forms are filed. Mr. Little suggested that he thought the use of the word "motion" on that form was incorrect and asked Ms. Ratliff to modify the form.

The ex-officio reports complete, Judge Lee asked if there was other business. There being none, Judge Lee again thanked everyone for coming and adjourned the retreat.