

# MINUTES

## Dispute Resolution Commission

May 8, 2009

Mecklenburg County Courthouse, Charlotte, NC

Members present: Clare, Curran, Farrah, Hay, Huckel, Hudspeth, Jackson, Lee, Little, Massiello, McKown, Morgan, Morris, Tash, and Turner. Ex-officios: Fuqua, Laney, and Steelman. Guests and staff: Barnhardt, Carlson and, Gullick (Dispute Resolution Section members, but present in their individual capacities); Benade (mediator); Kolodziej (Trial Court Coordinator, District 26); and Ratliff.

Judge Lee called the meeting to order, thanked Ms. Curran for hosting and recognized guests. He next called for approval of the minutes which were approved as submitted. He then asked Ms. Ratliff for the office report. She reported that the office was having difficulty getting equipment and having bills paid given the State's current financial crisis and that she has asked Judge Lee to intervene on a couple of matters. She next reported that a few minor adjustments were being made to the new on-line renewal process and that she is very encouraged by the results of some trial runs using volunteer mediators. She asked mediator members of the Commission to give her feedback when they have completed renewal. Ms. Ratliff noted also that the office has been busy reactivating inactive and lapsed mediators and processing new applications. She stated that she had been worried that renewals might drop given the economy, but that she had been reassured by this activity. She noted that there had also been a lot of activity in connection with the new Criminal District Court Program as provisionally certified mediators transitioned to full certification. She added that there had been questions regarding implementation of Rule 7 of the District Criminal District Court Rules and she thanked Ms. Massiello and other Center staff for their patience. Lastly, she added that a newsletter had gone out.

Judge Lee next reported for the Executive Committee. He began by discussing the Commission's request that the AOC authorize the Commission to pay for Ms. Ratliff's NCBA and Section memberships so that she may be appointed as liaison. He noted it might be difficult to get such an approval at this time given the economy. He asked Ms. Ratliff to contact Whitney Van Haam, Director of Membership at the NCBA, to see whether the Bar would be willing to waive the fee given that the Commission is a State agency. Next, Judge Lee noted that, in order to conserve funds, the Governor and Judge Smith were encouraging meetings by telephone. Since future meetings may need to be conducted in that fashion, he asked the Commission to consider how it wished to handle telephone attendance and voting. He added that three Commission members were attending by telephone today. Judges Jackson and McKown said they saw no problem as long as those attending in that manner heard the full discussion on any issue on which they voted. Mr. Tash asked whether those attending by telephone should have a valid excuse for their physical absence. Judge Lee said that he was willing to consider such requests on a case-by-case basis. Mr. Huckel moved to permit attendance by telephone in the Chair's discretion and voting by telephone, provided the member voting heard the full

discussion on the issue. The motion passed unanimously. Judge Jackson noted that it may be difficult to move meetings around the State if locations do not offer good teleconferencing facilities. Ms. Curran added that she hopes that the voting rule will be applied equally, that is, if a member walks into a meeting late and misses part of the discussion, s/he should not be allowed to vote. Judge Lee agreed that the rule should be applied fairly in both situations. He also noted that the new rule would be effective immediately so that those present today by telephone could vote.

Professor Morris reported for the Standards, Discipline and Advisory Opinions Committee. He yielded the floor to Mr. Little to explain the Committee's recommendation regarding the State Bar's request that the Commission comment on attorney mediator reporting of attorney misconduct. Mr. Little noted that the proposal is in two parts. The first part contains proposed language for submission to the State Bar that recommends a revision to Rule 8.3 exempting mediators from reporting attorney misconduct. Should the Bar be unwilling to revise the Rule, then the second part of the proposal revises Standard III to conform it to Rule 8.3 and permit reporting of attorney misconduct after the mediator has first obtained an informal, oral opinion or advice from the State Bar that the conduct violates Rule 8.3 and is required to be reported. Mr. Little noted that the State Bar has already permitted exceptions to the Rule 8.3 reporting requirement and he talked about the need for mediators to be neutral rather than adopting an investigate or judgmental posture. He asked the Commission to approve part one as the first line of defense and part two as the fall back position.

Judge Turner asked that the specific reference to "superior court" mediator be stricken from the last page of the proposal, *i.e.*, that the rule apply across the board to all certified mediators. Mr. Little agreed that was a typographical error. Ms. Gullick and Mr. Laney expressed their support for the recommendation as presented by Mr. Little. Both noted that lawyers may sometime fudge the truth when they are negotiating, *e.g.*, they may withhold information or characterize a figure as their "bottom line" when it is not. Mediators should not, they argue, be put in the position of investigating such statements. Judge Turner argued in favor of reporting -- If a lawyer is required to reveal that another lawyer has destroyed damning documents, then how is it different when the lawyer is a mediator? Mr. Laney believes that mediation is not the practice of law and that having a different standard is appropriate. Mr. Tash thinks that a reporting requirement could chill the mediation process. Mr. Little reports that Alice Mine of the State Bar has suggested to him that the Bar will be receptive to the change. Judge Lee said that he agreed with the exception, but he does not believe the State Bar will adopt it. Mr. Carlson noted that he also favors an exception. After further discussion, the recommendation as presented by Mr. Little was adopted with two opposing votes. Mr. Laney asks where this matter goes from here and Mr. Little suggested a letter to the State Bar be written as soon as possible. Judge Lee offered to draft it.

At that point, Professor Morris proceeded with the Committee's report by directing attention to the flow chart showing proposed revisions to Commission Rule VIII which enforces the Standards of Professional Conduct for Mediators. He added that the primary intent of the revisions is to add a more informal referral track to operate alongside the

formal disciplinary track. It was suggested that the CJCP referral option be separated out from the option to refer to a Commission member(s) for counseling. Judge Turner asked what happens if the Commission refers a mediator to PALS or FRIENDS and the mediator refuses to cooperate. Mr. Barnhardt said he believes that PALS and FRIENDS will advise the Commission of such. Ms. Ratliff stated that Mel Wright with the CJCP has told her that his Commission's process is confidential and there can be no report back. Mr. Laney asked about referrals to boards regulating other kinds of professionals and it was suggested that option be included. Professor Morris said that he would incorporate the suggestions and plan to have a draft of revised Rule VIII at the next meeting.

Mr. Huckel reported for the Mediator Certification and Training Standards Committee. He first directed attention to a proposed revision to the Commission Policy on Interpreting and Implementing FFS Rule 8.A. Both Judge Turner and Ms. Curran suggested that four years of judicial experience might be a little light. Professor Morris asked what was meant by family cases? Does it include juvenile or child support cases or only equitable distribution cases? It was noted that new district court judges receive training in family law. Mr. Laney noted that he thought the reference to Rule 8.A. was incorrect, that the cite should be to the first unnumbered paragraph of Rule 8.A. The proposed revision was approved with the corrected citation and the insertion of the word, "have" in section 1. Mr. Huckel next explained that a certified divorce financial analyst (CDFA) had asked the Committee to consider recommending to the Commission that the professions enumerated in FFS Rule 8.A.2.(a)-(g) be expanded to include CDFAs. Because she had also been previously approached by certified financial planners (CFP) and denied their applications, Ms. Ratliff also asked the Committee to consider this group since she felt their training was more extensive than that of the CDFAs. Mr. Huckel reported that after reviewing the training, experience and other qualifications of both groups, that the Committee determined not to recommend their inclusion. It was noted that the Committee felt that the qualifications required for both these designations fell far short of the education and training required for the professions already enumerated.

Lastly, Mr. Huckel reported on the proposed Requirements for Observer Conduct. He noted that Ms. Clare had raised this issue with the Commission. Ms. Ratliff was asked how the office proposed to distribute the Requirements if adopted. She responded that she would post them on the Commission's web site, forward them to trainers, and include a copy in all application packets. It was suggested that mediators who were being observed might want to forward a copy to those who had asked to observe. Ms. Curran asked whether a catch-all phrase should be added at the end of the document to give the mediator wider discretion. With that change, the Requirements were adopted unanimously.

Mr. Little reported that the Program Oversight Committee had not met this quarter and had no business to bring before the Commission.

Judge Lee next called for liaison reports. Judge Steelman reported that the Court of Appeals Mediation Program was continuing to work with Professor Morris and his students to gather statistics and evaluate the Program. Mr. Laney reported that caseloads

were down in the federal Appellate Mediation Program. In Jody Minor's absence, Judge Lee asked Ms. Massiello about the Medicaid Mediation Program. She responded that the Centers were very busy. Ms. Ratliff added that Ms. Massiello had been interviewed about that effort in the last edition of *The Intermediary* and the interview had been picked up by the Elder Law Section's newsletter. Mr. Laney noted that Value Options, which represents DHS in many of the Medicaid mediations, had recently admitted to taping mediations conducted over the phone. Professor Morris added that he understood that Value Options had agreed to discontinue this practice. Professor Morris reported that Central University School of Law's Institute for Dispute Resolution is proud to be graduating its first group of law students who will also receive a certificate in dispute resolution. Ms. Fuqua reported for the judicial support staff. First, she introduced Ms. Amy Kolodziej, Trial Court Coordinator, District 26. Ms. Kolodziej, she said, wanted to discuss with the Commission a problem that mediators in her district and across the State had been experiencing. Ms. Fuqua and Ms. Kolodziej explained that parties were telling mediators very early on that their cases were settling and there was no need for mediation. When the mediators insisted on receiving proof before reporting the cases as settled to the court, they meet with resistance from the parties. They added that often these cases are not settled and later are back on the docket. Mr. Little suggested that mediators offer to give parties some more time to finalize their negotiations and ask to receive a copy of the settlement agreement, dismissal or consent judgment when they are through. If s/he does not hear back, the mediator should contact them again and if they still have not settled, go ahead and set a date. Mr. Huckel suggested that court staff should not be shy about asking judges to reprimand attorneys and parties who tell mediators that their case is settled when it is not, and then ask for a trial. Judge Turner agreed and noted that his local rules allow parties to defer appointment of a mediator, if they think they can settle. But, if they can't, then he appoints a mediator and expects them to work hard to resolve the matter. Lastly, Ms. Fuqua announced that she is retiring in August and noted how much she had enjoyed serving on the Commission. Judge Lee thanked her. She said that she had suggested Karan Whitley in District 19A as her replacement.

Judge Lee asked about scheduling the next meeting and those present agreed on September 25, 2009, at the Judicial Center. Given the financial situation, Judge Lee elected to schedule no further meetings. There being no further business, the meeting was adjourned.