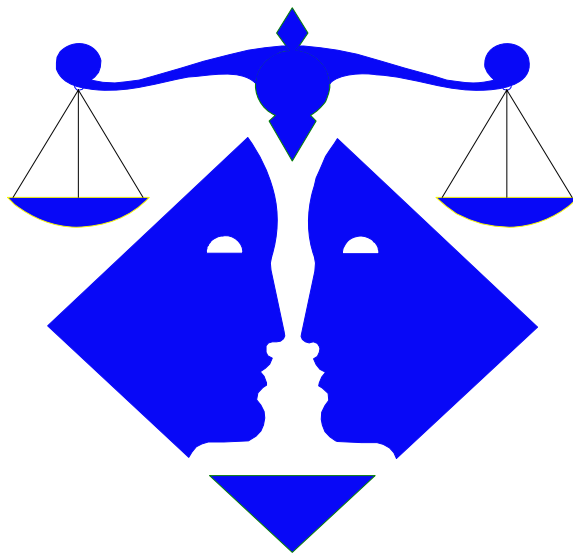


***REPORT OF THE  
NC DISPUTE RESOLUTION COMMISSION***

**FOR FISCAL YEAR 2010/2011**  
(July 1, 2010 – June 30, 2011)



JUDGE W. DAVID LEE, CHAIR

Prepared by:  
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I. **Introduction:** The North Carolina Dispute Resolution Commission was established by N.C. Gen. Stat. § 7A-38.2 effective October 1, 1995. The Commission is charged primarily with administering mediator and mediator training program certification and with regulating the conduct of mediators and training program personnel. The Commission also helps to support the court-based mediated settlement conference programs operating in North Carolina's courts, including: the superior court's Mediated Settlement Conference Program (MSC); the district court's Family Financial Settlement Program (FFS) and District Criminal Court Mediation Program (DCC); and the Clerk Mediation Program (CMP). In addition to certifying and regulating mediators and providing program support, the Commission also recommends policy, rules and rule revisions relating to dispute resolution to the Alternative Dispute Resolution Committee of the State Judicial Council, seeks to promote mediator education and skills development, interfaces with and serves as a resource for other state agencies offering mediation services or seeking to provide such services, and serves as a clearinghouse for dispute resolution information. This annual report, which is the 16th submitted by this body, describes the activities and accomplishments of the Commission for the period July 1, 2010, through June 30, 2011.

II. **Membership:** The Commission is a sixteen-member body. In accordance with N.C. Gen. Stat. § 7A-38.2, its membership consists of: five judges, including two superior and two district court judges; a clerk of superior court; five mediators, including two certified to conduct family financial settlement conferences in district court, two certified to conduct mediated settlement conferences in superior court, and one certified to conduct criminal district court mediations; two practicing attorneys not certified as mediators, one of whom shall be a family law specialist; and three citizens knowledgeable about mediation. Members who were serving as of June 30, 2011, and their appointing authorities are listed below. (Members whose terms expired this fiscal year immediately follow):

**Judge W. David Lee** (Monroe), judge member, re-appointed by the Chief Justice on April 1, 2010, for a term expiring September 30, 2012. Appointed Chair by the Chief Justice on April 1, 2010, for a term expiring September 30, 2012.

**M. Ann Anderson** (Pilot Mountain), knowledgeable citizen member appointed by the Governor on October 26, 2010, for a term expiring September 30, 2013.

**Dawn Bryant** (Raleigh), district criminal court mediator member appointed by the Chief Justice on April 1, 2010, to complete the term of former member Terri Masiello through September 30, 2011.

**Jacqueline R. Clare** (Raleigh), superior court mediator member, appointed by the Chief Justice on October 1, 2008, for a term expiring September 30, 2011.

**Jessie M. Conley** (Statesville), family financial mediator member, re-appointed by the Chief Justice on April 1, 2010, for a term expiring September 30, 2012.

**Martha H. Curran** (Charlotte), Clerk member, re-appointed by the Chief Justice on September 2, 2008, for a term expiring September 30, 2011.

**N. Victor Farah** (Raleigh), practicing attorney not certified as a mediator member, appointed by the State Bar President on July 24, 2008, for a term expiring September 30, 2011.

**Lynn Gullick** (Greensboro), superior court mediator member (certified to conduct mediated settlement conferences in district court) appointed by Chief Justice on October 1, 2010, for a term expiring September 30, 2013.

**Edward C. Hay, Jr.** (Asheville), knowledge citizen member re-appointed by the General Assembly upon recommendation of the Speaker of the House on October 1, 2009, for a term expiring September 30, 2012.

**N. Lawrence Hudspeth** (Jacksonville), family financial mediator member, re-appointed by the Chief Justice on April 1, 2010, for a term expiring September 30, 2012.

**Justice Barbara Jackson** (Raleigh) judge member (Supreme Court), appointed by the Chief Justice on October 1, 2008, for a term expiring September 30, 2011.

**J. Anderson Little** (Chapel Hill), knowledgeable citizen member, appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate on October 1, 2008, for a term expiring September 30, 2011.

**Judge Ann E. McKown** (Durham), district court judge member, re-appointed by the Chief Justice on April 1, 2010, for a term expiring September 30, 2012.

**Judge Michael R. Morgan** (Raleigh), superior court judge member, appointed by the Chief Justice on October 1, 2007, for a term expiring September 30, 2010.

**Gary B. Tash** (Winston-Salem), practicing attorney not certified as a mediator member (family law specialist), appointed by the State Bar President on August 27, 2007, for a term expiring September 30, 2010.

**Judge Joseph E. Turner** (Greensboro) district court judge member, re-appointed by the Chief Justice on April 1, 2010, for a term expiring September 30, 2012.

This year two Commission members, **Wayne Huckel** and **Professor Mark Morris**, completed their terms on the Commission. Mr. Huckel, who completed one term, chaired the Commission's Mediator Certification and Training Committee. Professor Morris, who also completed one term, chaired the Commission's Standards, Discipline and Advisory Opinions Committee. The Commission is grateful to Mr. Huckel and Professor Morris for their leadership and many contributions.

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 full Commission, but participate in committee meetings. Serving as *ex-officio* members through June 30, 2011, were:

**Robert A. Beason**, Member, State Judicial Council's ADR Committee

**Karan B. Whitley**, Court Support Staff Liaison

**Zeb E. "Barney" Barnhardt, Jr.**, Chair, NCBA Dispute Resolution Section

**Alisa Huffman** through February, 2011/**Lori Cole**, NC AOC Liaison

**Frank Laney**, Mediator, US Circuit Court of Appeals for the Fourth Circuit and Chair, ADR Committee of State Judicial Council

**Jody Minor**, Executive Director, Mediation Network of North Carolina

**John Schafer**, Deputy Commissioner, NC Industrial Commission

**Judge Sanford L. Steelman**, Chair Emeritus and Liaison for the Court of Appeals Mediation Program

During FY 2009/10, the Commission was deemed to be a covered agency under the North Carolina State Government Ethics Act. All current members have attended the required training and filed Statements of Economic Interest (SEI's) with the State Ethics Commission. Following review of their SEI's, the State Ethics Commission has found no conflicts of interest on the part of any member of the Commission.

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 per week) and Maureen McCarthy Robinson (25 hours per week). Office staff maintains the Commission's website, which can be viewed at [www.ncdrc.org](http://www.ncdrc.org), and publishes its newsletter, *The Intermediary*. The Commission's office is housed in the North Carolina Judicial Center located at 901 Corporate Center Drive in Raleigh.

IV. **Interface with other agencies or programs:** Dispute resolution programs and services are available in many venues in North Carolina besides the State courts. Though the Commission was established under the Judicial Department and is largely a creature of the courts, it has not hesitated to respond to requests for assistance from agencies and offices housed and working outside the courts. The NC Industrial Commission (mediation of workers' compensation claims); the NC Office of Administrative Hearings; the Federal Eastern, Middle and Western Districts; the NC Office of State Personnel; the NC Department of Insurance (disaster mediation) and the United State's Department of Agriculture's Mediation Program (targeting farmers and lending institutions); and a number of smaller state and federal agencies all operate established mediation programs with assistance, in part, from mediators and trainers certified by the Commission.

It should be noted that during this fiscal year, the Industrial Commission implemented new rules requiring all mediators serving its program to be certified and regulated by the Commission.

V. **Budget:** Commission revenues are deposited in Administrative Office of the Court's Fund 1715. The Commission's budget is comprised of fees collected from mediators and mediation training programs for certifications and renewal of certifications. FY 2010/11 collections for certifications and renewals totaled \$211,535.00 as of June 30, 2011. This fiscal year, as in past fiscal years, the Commission fulfilled its charge to fund its operations from revenues only and without expenditure of any tax dollars.

VI. **Certifications issued:** The total number of outstanding certifications by program as of June 30, 2011, are as follows: 1,299 active MSC certifications, 304 active FFS certifications, 178 active CMP certifications (to conduct guardianship and estate mediations), and 35 active DCC certifications.\* In addition, there were 64 inactive MSC, 17 inactive FFS and 5 inactive CMP certifications.\*\*

\* These numbers reflect total certifications outstanding and not the total number of mediators. The number of mediators is slightly less than the total number of certifications given that 180 mediators hold dual certification, *i.e.*, both MSC and FFS certification (active and inactive) or multiple certifications.

\*\* Inactive mediators may not conduct mediated settlement conferences and their names do not appear in the Commission's mediator database accessible at [www.ncdrc.org](http://www.ncdrc.org). However, they continue to receive information and updates from the Commission and may reactivate their certifications on demand.

VII. **Commission activities in FY 2010/11:** The Commission operates with four committees:

**Executive Committee:** Judge Lee, Chair. This Committee is charged with considering matters relating to legislation, budget, and personnel.

**Program Oversight Committee:** Mr. Little, Chair. This Committee is charged with insuring that mediated settlement conference programs operate effectively and with recommending revisions to the statutes and rules to achieve that end.

**Mediator Certification and Training Committee:** Mr. Hudspeth, Chair. This Committee is assigned responsibility for considering issues that arise in connection with mediator training programs and mediator certification or certification renewal applications and that relate to an applicant's education, training and/or professional experience. This Committee is also responsible for overseeing the Commission's continuing mediator education reporting requirement and with making recommendations on certification fees.

**Standards, Discipline and Advisory Opinions Committee:** Ms. Clare, Chair. This Committee reviews conduct/disciplinary matters, including matters self-reported by mediators at any time during the year and matters disclosed by applicants or otherwise discovered by Commission staff in the context of mediator certification and certification renewal applications. This Committee also investigates and reviews complaints filed by court staff, litigants, attorneys, and others regarding mediator conduct. This Committee is also responsible for recommending revisions to the Standards of Professional Conduct for Mediators and the Commission's Rules enforcing those Standards and with drafting Advisory Opinions.

The committees undertake the work of the Commission and make recommendations to the full body. Committees meet as needed and often two or more times per quarter.

The full Commission met face-to-face three times this fiscal year: September 17-18, 2010, in Carthage; January 28, 2011, in Raleigh; and May 6, 2011 in Raleigh. (Notice of meeting dates and locations is posted on the Commission's web site well in advance of meetings and the public is invited to attend.) During fiscal year 2010/11, the Commission and its four Committees undertook a number of projects designed to improve operations of the Mediated Settlement Conference, Family Financial Settlement, Clerk Mediation, and District Criminal Court Mediation Programs and to facilitate the work of our State's courts and mediators. Highlights of fiscal year 2010/11 (July 1, 2010 - June 30, 2011) are as follows:

- A) **Commission Responds To State Bar Comment Request.** The Commission's Standards, Discipline and Advisory Opinions Committee has worked diligently over nearly a five year period to respond to a comment request from the NC State Bar. The State Bar asked the Commission to address whether mediators who are also attorneys are obligated to report Rule 8.3 violations (incidents of attorney misconduct raising questions of honesty, trustworthiness, or fitness to practice) to the State Bar when they became aware of such violations during mediation. Such a reporting requirement would have been at odds with Standard III of the Standards of Professional Conduct for Mediators which stresses the mediator's obligation, with very narrow exceptions, to preserve the confidentiality of information exchanged during mediation. The Committee wrestled for nearly four years over whether confidentiality should prevail even at the risk that mediators and the program could be charged with enabling attorney misconduct. The discussion had broader ramifications as well for what happens when a mediator's ethical

obligations conflict with the standards of conduct of another profession to which he or she belongs.

The Committee determined at its May, 2009, meeting to recommend to the Commission that it ask the State Bar to revise Rule 8.3 to exempt attorney-mediators from reporting under the Rule. The Commission adopted this recommendation and Judge Lee contacted the State Bar to request the exemption. Recognizing the importance of confidentiality to the mediation process, the State Bar revised Rule 8.3 on October 7, 2010, to incorporate an exemption for mediators. The State Bar, in turn, recommended to the Commission: 1) that the Standards of Professional Conduct for Mediators be revised to require attorney-mediators to report to either the court or the State Bar any statements or conduct on the part of an attorney participant in mediation that would be reportable under Standard III.C.(2); and 2) to incorporate a provision in the Standards that places an obligation on mediators to try and dissuade attorney participants from engaging in professional misconduct and, in the event such conduct does occur, that further obligates mediators to postpone, withdraw from or terminate the mediation in instances where the misconduct jeopardizes or will jeopardize the integrity of the mediation process. The Commission adopted the State Bar's recommendations and proposed revisions to Standard III.C.(2) and Standard VIII.B to the ADR Committee of the State Judicial Council this fiscal year. The proposed changes will be submitted to the State Judicial Council and Supreme Court early in FY 2011/12.

North Carolina is one of the first States to tackle this difficult issue which has significant ramifications for the practice of mediation.

- B) Commission Recommends Program Rule Changes.** In addition to the proposed changes to the Standards noted above, the Commission worked to update and further refine program rules for each of the programs the Commission helps to support. Included among rules changes studied by the Commission this fiscal year were: revisions prohibiting the recording of mediations, either openly or surreptitiously; revisions modifying and simplifying mediator reporting requirements; revisions intended to provide guidance to judges addressing motions to dispense with mediation; and revisions intended to provide guidance to mediators seeking extensions of completion dates. The Commission also proposed changes to its own operating rules which it continues to refine as it has more experience with hearings in certification and complaint matters. These proposed changes will be submitted to the State Judicial Council and the Supreme Court early in FY 2011/12.
- C) Commission Considers Issues Relating to Certification or Renewal of Certification.** This fiscal year the Commission's Mediator Certification and Training Committee considered several applications filed by individuals wishing to be certified, but lacking the four year degree required by MSC Rule 8.B.(2)(c) for mediator certification. Upon reviewing the matter, the Committee recommended and the Commission determined to remain committed to the degree requirement. An applicant lacking a degree has now appealed the denial of his application to the

Superior Court and the matter is pending. The Committee also began to review the Commission's *Advertising Guidelines* and to consider whether it was appropriate for mediators to represent on the Commission's web site that they hold certain advanced or other degrees when those degrees were awarded by institutions that would not be recognized as accredited in North Carolina. In addition, the Committee is exploring whether the Commission should, in an effort to try and protect the public, discourage mediators from representing to the public that they hold such degrees on their letterhead, business cards and in their other advertising materials.

This fiscal year the Mediator Certification and Training Committee also worked to address concerns raised by applicants for Family Financial Settlement (FFS) mediator certification regarding the cost of completing training on NC family law (many applicants are non-attorneys or are attorneys who do not necessarily practice family law). The Committee secured the cooperation of the North Carolina Bar Association in posting a link where applicants could view the NCBA's basic family law course for a nominal fee. The Commission very much appreciated the NCBA's assistance and cooperation in this matter.

The Committee also considered concerns raised by both applicants for superior court as well as FFS mediator certification to the effect that it has become extremely difficult to obtain observations of mediations. The Committee, with the Commission's support, has now taken steps to encourage mediators to cooperate with applicants in an effort to facilitate observations and will continue to look for ways to encourage cooperation between certified mediators and certification applicants.

This year the Commission also adopted a policy relating to payment of certification fees and that permits Commission staff to waive fees for active duty military or for those who demonstrate financial hardship and seek temporary relief.

- D) Commission and Dispute Resolution Section Study Clerk Mediation Program.** Recognizing that the Clerk Mediation Program has been underutilized, the NCBA's Dispute Resolution Section established an *ad hoc* committee to take a look at the program's enabling legislation, rules and forms to see whether adjustments needed to be made. The Commission has become a co-sponsor of the Committee which is now in the process of developing a handbook for Clerks on mediation and is considering establishing a pilot program in a limited number of counties. In pilot counties, the Program could be implemented and more thoroughly scrutinized and evaluated with an eye toward making it a more useful tool for Clerks and their staff. The *ad hoc* Committee is chaired by certified mediator William F. "Bill" Wolcott, III, of Asheville and Commission member Andy Little serves as a member. One of the issues that the Committee may tentatively consider is whether foreclosure should be included among the matters eligible for Clerk referral to mediation.
- E) Commission Supports Update of "Green Book".** Beginning in 2001-2002 former Commission member Carmon J. Stuart began to think about a book. He

sensed that the dispute resolution landscape had and was continuing to change rapidly in North Carolina. No one was making a record of this evolution and he feared that history could be lost. Mr. Stuart was instrumental in persuading the NCBA's Dispute Resolution Section and the Commission to establish a committee to explore writing the history of dispute resolution in our State. Mr. Stuart's vision prevailed and in 2003, *Alternative Dispute Resolution in North Carolina: A New Civil Procedure* was published. The volume was affectionately known as the "Green Book" for the color of its cover. Much has changed since the book was published in 2003 and this year, the Section and Commission reactivated the Committee under the leadership of ex-officio Commission member, Frank C. Laney, for the purpose of exploring whether an update should be published. The Commission agreed to partially fund the effort as did the Section, and this fiscal year work began on a new, updated version. The new book, which is scheduled for publication next fiscal year, will be available both electronically and in a print on demand version. As with the previous publication, the chapters are being written and updated by volunteers many of whom are certified mediators.

- F) Commission Addresses Disciplinary/Character Matters and Adopts Advisory Opinions.** The Commission's Standards, Discipline and Advisory Opinions Committee continued its work of responding to complaints regarding mediator conduct and reviewing ethical matters involving mediators and applicants for certification and certification renewal. In addition, the Standards, Discipline and Advisory Opinions Committee drafted and the Commission adopted three advisory opinions (AO) this fiscal year: ##10-17, 11-18 and 11-19. AO #10-17 established that a mediator is not precluded from serving as an arbitrator in a case which s/he previously mediated and distinguished the role of arbitrator from that of a fiduciary (a previously adopted AO established that a mediator may not solicit or accept the role of fiduciary in a case that s/he mediated, *e.g.*, a mediator who mediates a dispute over who should serve as the administrator of an estate, may not agree to accept that position). AO #11-18, published after a mediator was disciplined privately for failing to fulfill his case management duties, including failing to file or to timely file his Reports of Mediator with the court, stressed the importance of the case management role played by mediators. AO #11-19 established that mediators in party selected cases may charge an advance deposit for their services, but should not postpone a session or deny an indigent party the opportunity to mediate because s/he fails to pay the deposit. In addition to publishing these three Opinions, several others were in process at the conclusion of the fiscal year.

**VIII. Plans for Fiscal Year 2011/12.** In the coming fiscal year, the Commission will focus on the following projects among others:

- Continue to work with the NCBA's Dispute Resolution Section to explore ways to invigorate the Clerk Mediation Program and make it a more useful tool for the Clerks and citizens of North Carolina;
- Continue to work with the NCBA's Dispute Resolution Section to insure publication of an updated version of *Alternative Dispute Resolution In North Carolina: A New Civil Procedure*, affectionately know as the "Green Book";
- Revisit Commission Rules to further refine the role of *ex-officio* members;

- Explore development and publication of a *Judges' Mediation Bench Book*;
- Cooperate with the NCBA's Dispute Resolution Section to explore whether the Commission can play a larger role in helping obtain speakers for CLE programs;
- Continue to insure that only qualified individuals of good character become certified and to address complaints regarding mediator conduct; and
- Continue to publish Advisory Opinions clarifying the ethical responsibilities of mediators.

IX. **Conclusion:** The NC Dispute Resolution Commission had a successful year working to help the Mediated Settlement Conference, Family Financial Settlement, Clerk, and District Criminal Court Mediation Programs operate more effectively and to improve mediator performance. This was a particularly important year in that it marked the 20<sup>th</sup> Anniversary of the establishment of the superior court's Mediated Settlement Conference Program.

Mediation has now become institutionalized in our courts and plays an integral role in helping with case management. Without mediation, our courts could not efficiently handle the volume of cases filed each year. It is a process that does not rely on the taxpayers for funding, but is a party-pay program, with mediators voluntarily assisting indigent parties.

The Dispute Resolution Commission pledges to continue to work to make the mediation process responsive to the changing needs of our State's court system and its citizens, through innovation and thoughtful re-evaluation of the mediation process and the role and work of mediators.