

MINUTES

NC Dispute Resolution Commission

Friday, February 11, 2005

10:00 a.m.

Nelson Mullins Riley & Scarborough Law Offices
Raleigh, NC

Commission members present: Steelman, Bernholz, Conley, Gumbiner, Hudspeth, Isenhower, Lee, Seigle, and Taylor. Ex-officio members present: Beason, Laney, Little, Schafer, and Wrenn. Staff present: Ratliff.

Judge Steelman called the meeting to order. He thanked Nelson Mullins for hosting the meeting and called for approval of the minutes for the December 3rd meeting. It was noted by Judge Lee that the minutes did not reflect that Judge Steelman was sworn in as Commission's Chair. The minutes were approved with that addition. Next, Judge Steelman administered the oath of office to Judge Taylor and Mr. Isenhower.

Ms. Ratliff presented the report on the activities of the Commission's office. She thanked Ms. Seigle for allowing Commission staff member Sharon Laue to attend a 3-day mediation training at Carolina Dispute Settlement Services. Next, Ms. Ratliff reported that she was advised by AOC web technology staff that the project to post mediator profiles on www.ncdrc.org had been reactivated. The project is scheduled to be completed in June, 2005. She added that AOC staff also advised her that the DRC home page alone was receiving some 2,600 "hits" per month, up from six months ago. Ms. Ratliff reported that this was considered substantial traffic. Next, she reported that a newsletter was mailed in January. It contained an article on the revised Standards of Conduct by Mr. Little. She added that Professor Kate Mewhinny of Wake Forest Law School had submitted an article on adult guardianship mediation for the upcoming edition. She also noted that she had received four new applications from two out-of-state trainers, one from Texas and one from Colorado. She added that she had sought to explain to the Colorado trainer, who had contacted her pre-filing, that the market was very tight. Next, Ms. Ratliff reported that things had been calmer this quarter in terms of disciplinary issues. She noted that the Commission's office was beginning to gear up for the spring renewal period. Renewal packets, she added, will go out in mid-May this year as opposed to the first part of April when they have historically been mailed. She explained that the change was intended to accommodate mediators who wanted to report last minute CME efforts and also to reflect the Commission's history with invoices and payment. That history, she suggested, did not support the need for an early spring mailing. Lastly, she reported that she planned to re-design the MSC and FFS brochures as tri-folds.

Judge Steelman next called for Committee Reports and began by reporting for the **Executive Committee**. He first directed the group's attention to pages 2 and 4 of the Commission's Rules and noted that these relatively minor changes were needed to reconcile the current rules with new rules VIII and IX adopted at the December meeting. Ms. Bernholz moved to adopt the additional changes, Ms. Seigle seconded, and the motion passed unanimously. Next, Judge Steelman reported that AOC staff had expressed concerns about the Commission's proposed revisions to N. C. Gen. Stat. § 7A-38.2(a). The concern expressed was whether it

was the intent of the amendments to alter the relationship between the DRC and AOC, particularly as to reversion of excess funds generated by the DRC, and in personnel matters. Judge Steelman suggested that he could either send the section back to Committee or he could write a letter to the AOC Director reassuring him that there is no intention on the Commission's part to alter in any manner the relationship between the Commission and AOC. The members determined that the latter approach would be the most effective.

Next Judge Lee reported for the **Program Oversight Committee**. He noted that a couple of matters were pending before his Committee. First, some complaints had been registered regarding the new time frames for finalizing agreements and reporting the results of conferences (revised MSC and FFS Rules 4 and 6). He reported that he had spoken with mediator Lewis Sauls and with Deputy Attorney General Richard Moore regarding their concerns that the fourteen-day time frame for filing consent judgments and voluntary dismissals was too tight. Mr. Moore, who handles condemnation cases, suggested exempting the State from the fourteen-day requirement. Judge Lee noted that he felt that a longer time period might be in order, but he had reservations about a blanket exemption. Mr. Little noted that he and others had been concerned that the revised rules placed time constraints for finalizing settlements on attorneys. He suggested the rules should focus on what mediators do and not attorneys. Ms. Wrenn noted that she and other judicial assistants like being given a date when dismissals or consent judgments will be filed, even if that date is outside the deadline set for completion of the conference. Judge Steelman observed that he favors having a time frame for filing dispositive documents because otherwise matters drag on. Judge Taylor noted that she thinks the key is flexibility, that sometimes attorneys need more time to finalize matters. Judge Lee suggested that perhaps sixty days might be a more realistic term than fourteen days. He noted that he would appreciate any comments Commission members wished to share. Judge Taylor suggested that perhaps he should poll the judicial assistants.

Judge Lee also noted that his Committee would consider whether to look into claims that local mediator appointment policies were exclusionary. He asked Ms. Ratliff about any calls the office had received. Ms. Ratliff reported that there had been a spate of calls some months back, mostly coming from non-attorney mediators.

Mr. Laney reported for the **Mediator Certification and Training Committee**. (Judge Steelman reported that the Committee's Chair, Mr. Criner, was absent due to illness and hospitalization.) Mr. Laney noted this Committee had a number of matters to report on today and he began with proposed language to be posted on the Commission's web site to alert readers that the Commission does not routinely verify biographical information provided by mediators and that the parties should satisfy themselves as to a mediator's qualifications. Judge Taylor moved for adoption and Mr. Hudspeth seconded. The motion passed unanimously. Next, Mr. Laney called the members' attention to proposed language to be inserted in application and renewal materials that would alert mediators to the fact that some districts have local rules setting additional requirements for inclusion on lists to receive court appointments. Mr. Laney called on Ms. Ratliff to elaborate on the need for this language and she noted that some mediators felt the Commission's application and renewal materials were misleading in that they gave the impression that mediators were being listed in districts where they were not, in fact, eligible to serve. Judge Taylor moved to adopt the proposed language, Ms. Conley seconded, and it passed unanimously. Next, Mr. Laney called members' attention

to proposed new advertising sections to be added to the MSC and FFS Guidelines for Trainers. After a short discussion, Judge Lee moved for adoption, Ms. Wrenn seconded, and the new sections were approved unanimously.

Next, Mr. Laney called the members' attention to concerns that had been raised regarding the "preferred city" designation that Ms. Ratliff had incorporated in the city search option. Ms. Ratliff explained that when the list of certified mediators had been posted, she had arranged for the public to search the list by name of mediator, by judicial district, and by city of mediator residence. The city option was intended to assist members of the public who were not familiar with judicial districts. Later, a mediator living in Black Mountain complained that since he did nearly all his work in Asheville, he should be included as a resident of that city as well for purposes of the search function. Later, Ms. Ratliff noted that concerns were raised by members of the Commission who mediated full time in a number of cities and felt that they should be able to designate all those cities for purposes of the list. There followed some considerable discussion. Ms. Ratliff noted that a map was posted with the list which showed which counties were encompassed in individual judicial districts. However, that map, she noted, was not very readable if the user had older computer equipment. Following further discussion, Mr. Hudspeth moved that the city search field be deleted from the list and that the list be searchable only by name of mediator and by judicial district, Ms. Conley seconded, and the motion passed unanimously.

Mr. Laney next brought forward proposed revisions to the Commission's inactive status policy. Mr. Laney began by noting that the Commission had four statuses: active, inactive, revoked, and lapsed. The Committee had been struggling, he noted, to more clearly define the difference between lapsed and inactive. Unlike the current policy, he reported that the Committee felt that a mediator should be able to elect to be inactive relative to one certification while remaining active in others. Mr. Laney added that while addressing this issue, members of the Committee had considered whether certification should be mandatory for those mediating in the courts. The Committee, at least preliminarily, was favorably disposed toward mandatory certification. The Committee, he reported, also favored mandatory CME, but found it problematic to require CME when a mediator could avoid compliance by simply not certifying. Judge Taylor asked what the CME requirement would be. Mr. Laney noted that the Committee did not get that far. Currently, he responded, mediators are asked to voluntarily complete six hours every two years. Mr. Little noted that he had concerns about mandatory CME, fearing that mediators would drop off the lists. He noted also that it is difficult to craft a rule, that he thinks the best education is actually mediating cases. Ms. Seigle suggested that more would stay certified and complete CME if non-certified folks were unable to siphon off business. Mr. Laney asked for guidance from the Commission and the Commission agreed that the Committee should further consider: whether certification should be mandatory to serve the courts, whether CME should be mandatory, and what inactive and lapsed statuses should look like depending on responses to the former. Ms. Wrenn noted that some judges had asked non-certified mediators to work in their districts and that such a policy change could bring some local rules into question. Ms. Conley added that she thought such a rule change might result in some excellent mediators no longer serving. Others noted that they had concerns about the skill level of some of the non-certified folks who were sometimes also not trained. Mr. Little added that there is also the large question of whether referral of cases to the MSC Program should be mandatory as with

the FFS Program. He thinks that perhaps it is time to revisit this issue also. Lastly, the Commission reviewed the Committee's proposed lapsed status policy and suggested a few revisions in order to make its provisions more concrete.

Ms. Bernholz reported for the **Standards and Discipline Committee**. She began by asking Ms. Ratliff to give a status report on the three matters before the Committee this quarter. Ms. Ratliff reported that two of the matters were now resolved and the third placed on hold pending action taken by another disciplinary body. One complaint, she explained, was dismissed with a letter to the mediator cautioning him to distribute evaluation forms at the conclusion of mediation. A second complaint was resolved with a letter of warning to the mediator cautioning him that scheduling was the mediator's responsibility.

Next, Ms. Bernholz called the members' attention to proposed Advisory Opinion #08-05, which seeks to clarify that it is the mediator's responsibility, and not that of the parties, to schedule the conference. After a short discussion, Mr. Gumbiner moved for adoption of the Opinion, Judge Taylor seconded, and it was unanimously approved. Next, Ms. Bernholz called attention to a proposed change to the Mediator Evaluation Form (AOC-DRC-9). The revisions, she noted, reflected recent changes to the Standards of Conduct which permit mediators to give opinions at the parties' request and as a last resort. Judge Taylor moved for adoption of the revised form, Ms. Conley seconded, and the motion passed unanimously.

Next, Ms. Bernholz introduced a draft protocol for the handling of complaints by the Commission's office. She explained that she was not a fan of bureaucracy, but thought a protocol was necessary to standardize procedures and to insure institutional memory. There followed some considerable discussion of the draft. Mr. Little suggested that with regard to #1, the draft should clarify that the Commission may use an anonymous tip as the basis of a complaint if the tip can be independently verified. With regard to #12, Mr. Isenhower asked what would constitute a quorum for purposes of a Committee vote to recommend that sanctions be imposed? Ms. Bernholz agreed that matter should be addressed. It was also suggested that letters of warning provided for in #12 (b)(ii) could not remain confidential consistent with proposed § 7A-38.2 (f). Ms. Bernholz responded that the Committee needed to clarify the distinction between the letters of warning in #12 and Rule VIII.B.10.(a) and (b). Lastly, Ms. Bernholz agreed that the Committee would make a recommendation to the Commission regarding the retention and treatment of complaints where no sanctions resulted, especially in situations where additional complaints are later filed. The discussion having concluded, Ms. Bernholz noted her Committee would take the comments under consideration.

The reports of the standing Committees having concluded, Judge Steelman asked Mr. Little for the report of the **Ad Hoc Committee** to design a program for mediation of matters filed before Clerks. Mr. Little began by noting that drafting had been difficult because they were not able to track the MSC and FFS legislation too closely because Clerks operated differently than the courts. As an example, Mr. Little noted how difficult it had been to draft the attendance provision. It was necessary, he explained, to provide for others beyond the parties to attend, including interested persons and such others as the Clerk deemed necessary. Judge Taylor asked what happens when those ordered to attend fail to appear? Mr. Little responded that the statute provides for the Clerk to sanction any person ordered to attend who fails to appear without good cause. Mr. Gumbiner asked what happens when someone is ordered to

appear and feels that s/he has no relevant information to share. Mr. Gumbiner also wondered whether the Clerk can order someone who is not a named party to appear? There followed some considerable discussion and Mr. Little suggested that the individual should file a Motion to Quash with the Clerk. Judge Taylor asked what happens when a doctor, surveyor, or other professional is required to appear – how does that person get his/her fee paid? Mr. Little thinks that the Clerk would just review the matter and award fees in the same way that attorney's fees are awarded. At this point, Mr. Little began to review the proposed statute section by section as adopted by the *Ad Hoc* Committee. With regard to section (h), Mr. Little noted that some agreements reached in mediation may be finalized by the parties as a matter of law. Others, including guardianship and estate matters, must be approved by the Clerk.

Next, Mr. Little briefly brought members' attention to the proposed Rules for the Clerk Program which he indicated were not yet in final form as was the statute. He focused particularly on draft rules 8 and 9. He noted that tentatively the thinking was that anyone already certified as an MSC or FFS mediator would be eligible to receive court appointments in matters ordered to mediation by the Clerk, except that to receive court appointments in estate or guardianship matters, a mediator would need to complete an additional eight hours of training in either estate law and procedure or guardianship law and procedure.

At this point, the members returned to the earlier discussion initiated by Mr. Gumbiner regarding what a person who is ordered to attend but who feels s/he has nothing to share should do. Mr. Little wondered whether it needed to be written in rules or a statute that a person could be excused for a valid reason. Judge Lee noted that he thought a procedure could be written in and noted 4.A.(1) which provides for modification of the requirement to physically attend. Judge Steelman suggested that he thought the issue could be addressed with a Motion to Quash. Mr. Little suggested that it might clarify things to set forth a procedure in the rules. Ms. Wrenn asked about indigent parties. Mr. Little responded that Rule 7.E. addresses indigency and that the Clerk would hear any such motions. The discussion about the statute having concluded, Mr. Little asked the Commission to adopt it and to recommend it to the General Assembly for adoption. Judge Lee moved for adoption, Ms. Conley seconded, and the motion was unanimously approved.

Next, Judge Steelman and Mr. Little raised the issue of Mr. Little's attendance at the NCBA Dispute Resolution Section's Annual Meeting to be held this April in Los Angeles. Mr. Little, they explained, had been invited to serve on a panel where the ADR book, the Commission's efforts, and the dispute resolution work of North Carolina's courts would be discussed. A copy of a resolution authorizing Mr. Little's attendance was distributed and it was pointed out that the Resolution also provided for the Commission to assist Mr. Little with his travel and lodging expenses. Mr. Little noted that Judge Ralph Walker, the AOC's Director, and John Schafer would also be serving on the panel and that he felt it was appropriate to suggest that resolutions also be prepared authorizing their attendance on behalf of the Commission and assisting them with travel expenses. Mr. Schafer declined the offer noting that he had already applied elsewhere for assistance. A motion was made approving the attendance of Judge Walker and Mr. Little and providing for the Commission to assist with their expenses. The motion was unanimously approved. Judge Steelman indicated that

he would contact the AOC about the matter since the AOC would need to approve the expenditure.

Next, Judge Steelman called for **liaison reports**. Mr. Laney reported for the Dispute Resolution Section noting that the Section's Annual Meeting will be held on March 18 in Greensboro. He also noted that the NCBA's Board of Governors has already voted to approve the statute for the Clerk Program. Lastly, Mr. Laney updated everyone on the Section's efforts to provide for mediation of disputes involving escrowed funds. Mr. Schafer next reported for the Industrial Commission noting that over 9,000 cases were ordered to mediation last year and for the ninth year in a row settlements were over 70 percent. Lastly, he noted that the IC would be holding its annual conference for mediators in October. Ms. Seigle reported for the Network that they were moving forward with efforts to agree on a formula and to secure Center funding in the legislature and she noted that the Network was still searching for an Executive Director. Ms. Wrenn reported that the Judicial Support Staff Conference would be held in April in Charlotte.

Next, Judge Steelman turned the members' attention to upcoming meeting dates: May 13 in Greensboro, tentatively at the UNC-G campus; August 19 in Raleigh at Nelson Mullins, if available; and November 4. Judge Taylor asked if the Commission would hold a retreat this year as it has done in past years? Judge Steelman said that he would consider this suggestion for the November 4 meeting. There being no further business, the meeting was adjourned.