

MINUTES

DISPUTE RESOLUTION COMMISSION

February 20, 1998

Raleigh, NC

Commission members present were: Judges Walker and Eagles, Sauls, Bradley, Ray, White, Beason, Hastings and Stuart. Also present were ex-officio members: Bernholz, Schafer, and Laney. Ratliff and Corey-Laue of the Commission's office were also present.

Judge Walker began the meeting by thanking everyone for attending. Next, he asked for input about the Commission's spring retreat. Ms. Ratliff explained that the office was having difficulty finding a hotel with a reasonable room rate on the beach from early May on. She asked whether the Commission might want to move up the date of the meeting or change the location. After some discussion, the Commission decided to move the meeting to May 29 and 30 and to return to Boone unless further efforts turned up a hotel on the beach or in New Bern with a reasonable rate.

Judge Walker next asked for Ms. Ratliff's office report. She introduced Sharon Corey-Laue, the new administrative assistant replacing Ms. Girardot. Ms. Ratliff noted the office is beginning to gear up for the coming recertification period. She noted the CME surveys had been mailed and that preliminary results had been compiled though surveys were still being returned. She thanked Ms. Corey-Laue for her hard work in compiling survey results. She noted the office had been very busy scheduling meetings, processing applications and responding to an increasing volume of telephone calls. The office continues to wait for its new software and hardware to arrive. Lastly, Ms. Ratliff noted that the office is continuing to work with the Department of Public Instruction which will soon be surveying certified mediators to learn about their experiences, if any, with special education law and issues.

Next, Judge Walker asked Ms. Bernholz to report from the NCBA's Dispute Resolution Section. She noted that Professor George Walker and others were hard at work on Standards of Conduct for Arbitrators. She assumes the Standards will eventually come before the Commission for its consideration. Ms. Bernholz also noted that the Section's Council had asked the Family Law Section to take on the question of whether parties to a divorce may enter into a binding agreement after their case has been filed. There is apparently some case law which suggests such agreements are void.

Next, Judge Walker asked John Schafer for a report from the Industrial Commission (IC). Mr. Schafer outlined some proposed revisions to the IC Mediation Rules. He noted that the changes are designed to expedite the mediation process and eliminate paperwork. He noted also that a menu would be made available to parties with counsel. He also reported that the IC would, if the changes were adopted, begin cracking down on postponements. Judge Eagles and

Mr. Sauls noted postponements have become a problem in the MSC Program. Judge Walker suggested Mr. Saul's Committee track this matter over the coming months and see what final language the IC adopted. He also suggested Mr. Sauls' Committee take a look at the \$100.00 one time, per case administrative fee. It has been in place at that rate for some time and Judge Walker suggested it may be time to increase it.

Mr. Bradley next reported for the Mediation Network. He noted that, according to a report compiled by the AOC, Centers mediated over 11,000 disputes during the 1997 calendar year and interacted with over 36,000 individuals. Mr. Bradley reported that he has been talking with legislators and it is his sense there is much support for dispute resolution in the General Assembly. Lastly, Mr. Bradley noted the Network has received a grant from the Z. Smith Reynolds Foundation to work in the restorative justice arena and will initiate a victim/offender pilot in Judge Marlene Hyatt's district. Also, a grant from the NCBA's Bar Foundation will enable Centers to provide more training for their own personnel. Mr. Stuart asked Mr. Bradley whether any of the legislators had brought up the issue of user pay versus state funded programs. Mr. Bradley responded that that issue had not come up.

There being nothing further from the liaison groups, Judge Walker asked for Committee reports. Mr. Beason reported for the **Committee on Mediator Conduct and Ethical Standards**. He noted that preliminary CME survey results had been distributed and he gave a brief summary of those results. His committee will, over the next few months, consider the survey results carefully and make a recommendation. Judge Walker asked Mr. Beason's committee to be sure and keep in mind the impact on the Commission budget of those who choose not to recertify in light of a new requirement they must meet. Mr. Schafer noted the IC has a six hour workers compensation law education requirement every two years. Mr. Schafer is concerned about how any additional CME requirement established by the Commission might impact the IC and their pool of mediators.

Turning his attention to the ethics advisory opinion issue, Mr. Beason noted that Mr. Stuart had come up with a draft establishing guidelines for issuing such opinions and Mr. Laney had added some language to it. He noted the Committee is still working on this project. Mr. Beason noted Mr. Stuart's draft proposed issuing opinions only in response to requests from certified mediators. Judge Walker suggested that might be too narrow an approach, that he could envision requests for opinions and assistance coming from attorneys and parties.

Next, Mr. Beason noted some recent requests for assistance and advise directed to the Commission in writing. One of the letters involved a mediator concerned that he was about to be subpoenaed to testify concerning attendance at a mediation. (Ms. Ratliff reported a subpoena had, in fact, never been issued and the matter had since been dismissed by the judge.) An attorney involved in the case, Mr. Clay Collier, had also written the Commission asking whether he needed to have a representative of a governmental entity present at a mediation in addition to a representative of Risk Management Services. Mr. Beason noted the spirit of Rule 4 was not being violated in the circumstances Mr. Collier described, but that the better practice was probably to have a representative of the governmental entity present as well. Mr. Beason said that he would call Mr. Collier and discuss this matter with him.

Judge Walker next reported for the **Committee on Budget, Finance and Long-Range Planning**. Judge Walker began by updating those present on the proposed menu which went to the Supreme Court in the fall. He noted the AOC had expressed concerns about the arbitration component of the menu. Specifically, AOC staff were concerned about the likelihood of confusion between the component and the existing court-ordered arbitration program. He noted that a meeting had been held with AOC staff to discuss their concerns and that it was essentially their view that the arbitration offered in the menu should be an extension of the court-ordered arbitration program, including State funding of the arbitration mechanism. At the end of the meeting, Judge Walker reported that he suggested a committee be formed with two AOC staff and two Commission members to work out differences and to get the menu moving. Walker noted he regretted the delay, but believed that the AOC's concerns needed to be fully addressed. Judge Eagles reported she has heard much support for a menu from the field.

In Mr. Little's absence, Judge Walker asked Mr. Stuart to give a brief report on the work of the **Ad Hoc Group to Design a Family Financial Mediation Program**. Mr. Stuart reported that the ad hoc group is hard at work. He noted there is great difficulty in designing a draft which meets the unique concerns raised by all participants.

Judge Eagles next reported for the **Committee on Rules, Training and Certification Standards**. She noted her group had been working on revising Rule 8 as it pertained to certification of non-lawyers and looking at the six hour training program required of non-attorneys and attorneys not licensed to practice in North Carolina. Judge Eagles and Mr. Bradley summed up the Committee's proposed revisions for Rule 8 noting that the non-attorney mediation experience requirement would be reduced from five to three years (36 mediations total would be required over the three year period) and some equivalents to the college degree requirement inserted. Judge Walker expressed his concern that certification not appear inaccessible to non-attorneys and he noted he thinks the experience requirement is still too extensive because of limited opportunities to mediate. Judge Walker suggested that perhaps the Commission could sponsor a workshop which non-attorneys could attend and receive credit toward certification. Mr. Stuart asked how the Commission can provide incentives for attorneys to choose non-attorney mediators? Mr. Hastings noted that the college degree equivalents were added because there were those who could not meet the degree requirement. Mr. Schafer suggested substituting observations for experience mediating. Judge Eagles expressed her concern that the requirement establish a meaningful floor and that unqualified individuals not be certified. Mr. Hastings asked how wide do we want to open the door? Judge Walker agreed with Mr. Schafer that observations can be very valuable and could substitute for experience mediating. Judge Walker believes the 36 case mediation requirement should be reduced in favor of more observations and co-mediations. Judge Eagles noted her committee would continue to work on its draft. Judge Walker thanked Judge Eagles and her group for their effort and noted that this was a difficult assignment.

Next, Judge Eagles spoke about her Committee's work on the orientation plan for the menu. She noted that Thorns Craven and Lynn Gullick had volunteered to spearhead this effort.

Mr. Craven and Ms. Gullick agreed to help recruit mediators to conduct local or regional programs provided free to participants. Judges would be asked to encourage attendance.

Mr. Sauls reported for the **Committee on Trainer/Mediator Certification Fees and Fee Charged by Mediators**. He noted that his group recommends that the certification/recertification fee for fiscal year 1998/99 again be set at \$120.00. This recommendation was unanimously adopted by vote of the Commission. Mr. Stuart asked whether, in light of Mr. Bradley's earlier comment about legislative support, this might be a good time to go to the General Assembly and ask that the filing fee be increased to cover the Commission's expenses? Mr. Sauls responded that he thought the time frame was too tight to permit such an effort. Mr. Sauls also commented on the subpoena matter raised earlier by Mr. Beason and asked whether if both parties waive confidentiality, does the mediator have a right to refuse to testify? Mr. Stuart asked whether a mediator has standing to move to quash a subpoena? Mr. Beason noted that more and more attorneys are arriving for mediation without their clients. Mr. Schafer noted the IC has issued at least twenty sanctions this year involving attendance.

There being not further business, Judge Walker asked Ms. Ratliff to notify everyone when a location for the May meeting was confirmed. He also noted this meeting was fully attended and, again, thanked everyone for coming.

MINUTES

DISPUTE RESOLUTION COMMISSION

April 22, 1998

Telephone Conference Call

Commission members present were: Judges Walker and Eagles, Sauls, Ray, Beason, and Stuart. Also present were ex-officio members Little and Laney. Ms. Ratliff of the Commission's office was present.

(This conference call was scheduled to permit the Dispute Resolution Commission to vote on the recommendations of its *ad hoc* group assembled for the purpose of designing a district court program for settlement of family financial issues. The group was chaired by Mr. Little and Messrs. Stuart and Sauls served as the Commission's representatives to the group.)

Judge Walker began the meeting by thanking Messrs. Little, Stuart, and Sauls for their hard work in bringing this new program along. He noted their assignment had proved to be a difficult one and that the Commission was most appreciate of their efforts. Mr. Stuart and Mr. Sauls joined in praising Mr. Little for the work he had done in chairing the group and bringing it to consensus. Mr. Stuart observed that Mr. Little had had to meld a number of divergent points of view and that his task had been one requiring great patience and facilitative skill.

Judge Walker noted that copies of proposed revisions to the statute and proposed Supreme Court Rules had been distributed to everyone. Mr. Little reported that these proposed revisions and Rules constituted the recommendation of the *ad hoc* group for the program's design. Judge Walker suggested that Commission members direct their questions to Messrs. Little, Stuart and Sauls.

Judge Walker noted that the size of the Commission would be significantly increased if the revisions are adopted by the General Assembly. Mr. Little pointed out that terms of new members terms would be meshed with terms of current members so that terms of current members would not be impacted. He added that he and Mr. Stuart were still fine-tuning the language of the appointments section and would have it finalized soon. Judge Eagles asked whether the Rules can be implemented until the revisions are adopted. If not, she asked whether it was possible to get the revisions before the short session. Mr. Little says that he believes it can be done. Mr. Little went on to note that Judge Walker planned to call on legislators next week to ask for their support of the revisions. He added that the AOC has already selected pilot districts and that the AOC thought the proposed legislation could be added to the appropriations bill.

Mr. Ray asked what the time frame might be? Mr. Little noted the AOC would report to two subcommittees of the House and Senate Judiciary Committees on May 1, 1998, and that matters should move forward quickly from there. Mr. Stuart noted that he does not expect there will be any opposition. Judge Eagles asked why the membership of the Commission need to be expanded so dramatically. Mr. Little noted that the AOC believed there should be more judicial representation on the Commission and that district court needed as much representation as superior court.

In working to design this program, Mr. Little observed that he was struck by the difference between district and superior court culture. Superior court judges had never favored making the MSC Program mandatory, believing judges should ultimately have discretion over whether or not to refer specific cases or case types for mediation. District court judges, Mr. Little observed, took a different point of view and wanted "shall" language making the program mandatory.

There followed discussion about the pilot districts. Five districts have apparently been chosen by the AOC and the Chief District Court Judges notified. Mr. Little noted that the AOC appeared to be geared up to begin implementation.

Mr. Stuart moved that the recommendations of the ad hoc group be adopted. Mr. Sauls seconded. The motion passed by unanimous vote of all Commission members present.

Mr. Beason asked for some clarification of Rule 8.B. How will the course be structured, who will offer it. Judge Eagles noted her committee is currently considering the six hour course required by Rule 8 of non-attorneys and out-of-state lawyers and may end up recommending that out-of-state lawyers be exempted from the requirement.

The recommendation being adopted and there being no further business Judge Walker again thanked Messrs. Little, Stuart and Sauls for their work, thanked Commission members for attending and then adjourned the meeting.

MINUTES

DISPUTE RESOLUTION COMMISSION

May 29-30, 1998

Boone, NC

Friday, May 29th
2:00 p.m. - 5:30 p.m.

Commission members present were: Walker, Eagles, Sauls, Bradley, Hastings, Ray, and Stuart. Ex-officio members present were: Peeples, Schafer, Miller-Moore, Little, Laney, and Gates and guests: Professors Tom Metzloff and Catherine Harris, Miriam Saxon, Elaine Cigler, Nina Starr-Cohen and Melissa Johnson. Also present was Ms. Ratliff.

Judge Walker began by welcoming everyone to Boone and thanking them for attending. He introduced new ex-officio member, Jim Gates, and welcomed him. Mr. Gates is the new chair of the Dispute Resolution Section. Next, the February and April minutes were approved as submitted.

Ms. Ratliff gave her report. She indicated the Commission's office was in the middle of the recertification period. To date, she reported the Commission had collected \$62,000. She noted that final data was now available on the continuing mediator education survey and those results distributed. The Commission's website, she reported, had also been updated and expanded considerably. She also reported contacting judicial districts to encourage staff to submit their fiscal year end caseload data. She noted the Commission's office would soon be returning to Hammond-Park. Lastly, Ms. Ratliff asked the Commission to approve up to \$700.00 for the purchase of a laser printer for Sharon Corey-Laue. Ms. Ratliff explained that Ms. Laue's deskjet printer is slow and impedes workflow in the office given high volume printing of lists, invoices, and other materials. The Commission approved the purchase.

Medical Malpractice Mediation Research

Next, Judge Walker asked Dean Ralph Peeples and Professors Metzloff and Harris to report on their research on mediation of medical malpractice cases. Dean Peeples reported on the study methodology. He noted that 15-20% of cases actually tried in North Carolina are medical malpractice cases. He also talked about the history of dispute resolution in medical malpractice cases, including the use of screening panels and mentioned the influence of the National Data Bank (which collects data regarding settlements and judgments in medical malpractice cases) as an impediment to settlement. Dean Peeples reported that he and his colleagues had attended 41 malpractice mediations. He noted that most cases had been mediated in one session with a mean length of 3.7 hours and a median length of 3.3 hours. He noted there had been very few requests for exemptions from mediation. Lastly, he observed delay is beginning to creep into the process with cases filed in 1995 taking longer to reach mediation than those filed in 1991.

Professor Metzloff discussed conclusions. He reported that mediation was helping to move cases forward. Of the 202 cases studied, 50 (24.8%) reached agreement in

mediation. In 152 cases (75.2%) impasse was declared. He went on to report that of the cases impasse, 35 went on to settle (as a result of the mediation) and two were dropped (as a consequence of what occurred in mediation). He noted the trial rate is very high in malpractice cases due, in his opinion, to the National Data Bank. Professor Metzloff suggested he would like to see mediation referrals occurring earlier. The presentation concluded, Judge Walker expressed his appreciation and noted the questions asked the presenters were very good and reflected a lot of interest in this area.

Frank Laney next noted that the ABA is appointing a Committee to formulate model state laws and rules for dispute resolution. Ms. Ratliff was asked to write the Committee and provide copies of our statute and rules. Mr. Little noted that a copy of proposed revisions to N.C. Gen. Stat. §7A-38.4 was included in the materials distributed by Ms. Ratliff. He expressed surprise that the bill had been introduced independently rather than as a part of the budget package.

Committee Reports

Judge Walker reported for the *Committee on Budget, Finance, and Long-Range Planning*. He indicated his committee had not met this period. He noted there had been no movement on the proposed menu before the Court and that it may be necessary to sever the menu from proposed changes to Rules 1 and 14-16. He stated the Commission's budgets for the current and upcoming fiscal years would be discussed at the next meeting after the recertification period concluded and final expenses were tabulated.

Judge Eagles reported for the *Committee on Rules, Training, and Certification Standards*. She distributed copies of her Committee's recommendation for revisions to Mediated Settlement Conference Rule 8. The proposed revisions (which are attached to these minutes) rewrite certification criteria for non-attorneys and would permit lawyers licensed in states other than North Carolina to substitute independent study for the current 6-hour course requirement. She noted the five year practice requirement would remain in tact for North Carolina lawyers. Judge Walker said he was very pleased with the work of this Committee and this new approach to the certification of non-attorneys. Judge Eagles thanked Mr. Little for his contributions to the effort. Judge Eagles noted that her Committee had been very concerned about ensuring that all applicants had substantial experience to ensure the program's credibility and effectiveness. Mr. Stuart moved that the attached, proposed revisions to Rule 8 be adopted and submitted to the Court. Mr. Sauls seconded and the motion was adopted unanimously.

Ms. Ratliff asked whether Rule 8 revisions should be submitted to the Court immediately. It was asked whether the Standards of Conduct were also still pending before the Court. Ms. Ratliff said they were. Judge Walker suggested, given the AOC's objections to the arbitration component of the menu, that the best course of action may be to withdraw the menu and submit in its place a packet with revisions to Rules 1, 8, and 14-16 only. At the same time, the Standards would be re-submitted separately.

Saturday, May 30th
8:45 a.m. - 12:45 p.m.

Court Ordered Arbitration Program

Miriam Saxon began the Saturday meeting with a discussion of the Court-Ordered Arbitration Program. She explained how the program operates and distributed a map showing availability. She also talked briefly about the Program's successes and the evaluation that was completed during the pilot phase. She noted that in several districts the *de novo* rate has been creeping up the past few years and that the AOC is concerned. Ms. Saxon noted that \$779,249 is allocated in the continuation budget for this program. Of that amount, \$349,000 is earmarked for arbitrator fees. Judge Walker thanked Ms. Saxon for her presentation.

Custody and Visitation Mediation Program

Following Ms. Saxon were Drs. Elaine Cigler and Nina Starr-Cohen who talked about the Custody and Visitation Mediation Program. Dr. Cigler began by reviewing the Program's history and discussing why the original rules were written as they were. She also explained how the Program operates and spoke of her experiences as a mediator. Dr. Cigler was followed by Dr. Starr-Cohen who discussed the role the program plays in educating divorcing parents, where the program is in terms of expansion, and the study of the program that is currently underway. At the conclusion of their presentation, Judge Walker thanked Drs. Cigler and Starr-Cohen.

Committee Reports (cont'd.)

Mr. Sauls reported for the ***Committee on Trainer/Mediator Certification Fees and Fees Charged by Mediators***. Mr. Sauls referred to the Anne Duvoisin letter directed to the Commission and describing negative experiences she has had with cancellations. He suggested it may be time for his Committee to consider revising Rule 7.B. to address cancellations. He noted his Committee will also be looking at whether it is time to increase the fee for services as well as the one time, per case administrative fee provided for in Rule 7.B. Judge Walker asked that Mr. Sauls' committee report on these matters by the November meeting.

Mr. Beason was not able to attend the meeting due to his moving schedule. Ms. Ratliff gave the report for the ***Committee on Mediator Conduct and Ethical Standards***. She distributed copies of the Advisory Opinion Policy formulated by the Committee. Thereafter, discussion followed. Mr. Bradley and others suggested there be clearer lines drawn between formal advisory opinions and informal advice. Mr. Laney suggested a sentence could be inserted in subsection D. making subsection E unnecessary. A motion was made to tentatively approve the policy as amended with the matter to be put back on the agenda at the August meeting with amended copies distributed to members and ex-officio members. (The amended version is attached to these minutes.) Ms. Ratliff reported that the Committee is beginning to examine the data resulting from the continuing mediator education survey mailed in January.

Committee reports having concluded, there followed some other discussion. Mr. Little expressed concerns that there appeared to be some variance between the version of the revised enabling legislation for the new family financial program which he understood was to be submitted to the General Assembly and the copy which had actually been submitted. There followed some discussion and Mr. Little suggested it might still be possible to make additional changes. He indicated it would be important to determine who made the initial changes. There also followed some discussion about the proposed menu. Mr. Little offered to try and continue to work with the AOC to iron out concerns about the menu. Judge Walker authorized him to continue the effort.

New Business

Judge Walker next called for new business. Mr. Little said that he was concerned about the proposed legislation increasing the jurisdiction of district court to \$25,000 and along with it the jurisdiction of the Court Ordered Arbitration Program. He noted the cost to taxpayers could be significant if cases now being referred to mediation are diverted to arbitration. Judge Walker expressed some concern this issue might be outside the purview of the Commission. There followed discussion and Commission members concurred that Judge Walker should contact sponsors of the legislation and advise them that while the Commission does not have an opinion on the jurisdiction of district court, it is concerned about the cost to taxpayers if cases now being resolved in mediation are referred for arbitration. A copy of the letter is to be directed to Jim Gates as chair of the Dispute Resolution Section in the event that body wishes to comment also.

Ms. Miller-Moore mentioned a meeting of the South Carolina Council on Dispute Resolution to consider issues involved in expansion of their mediation/arbitration program. She noted they will be looking specifically at how to set up some sort of state level administration. She added that she and Ms. Ratliff will be attending.

There being no further business, Judge Walker again thanked everyone for coming and adjourned the meeting.

MINUTES

DISPUTE RESOLUTION COMMISSION

August 28, 1998

10:00 a.m.

First Union Building, Raleigh

Commission members attending: Judges Walker and Eagles, Stuart, Bradley, Ray, White, and Beason. Ex-officio members: Laney, Little, Schafer, and Gates. Commission staff: Ratliff and Corey-Lau. Guest: Professor George Walker of Wake Forest Law School.

At 10:10, Judge Walker called the meeting to order. He congratulated Mr. Ray for braving the aftermath of Hurricane Bonnie to come to Raleigh and noted Mr. Sauls was absent due to the storm. Judge Walker asked for approval of the minutes which were approved as submitted. Ms. Ratliff gave the office report. She noted the Commission's newsletter, *The Intermediary*, was soon to be combined with the NCBA Dispute Resolution Section's newsletter and mailed to the combined mailing lists as well as Senior Resident Superior Court Judges, Clerks and Trial Court Administrators. Mr. Bradley noted that in the future, the newsletter should also be mailed to Chief District Court Judges given the new family financial program. Ms. Ratliff also noted that she and Ms. Corey-Lau were learning HTML so that they could maintain the DRC's web page. She also indicated the DRC's annual report would be mailed shortly. End of the year fiscal data was distributed and she identified the handouts passed out to Commission members, including information about a new "fast track" mediation program established in District 10. Judge Walker noted this new program again pointed up the issue of local rule varying from the MSC Rules. Judge Walker charged Judge Eagle's committee with looking at local rules with an eye toward determining whether the DRC should encourage conformity or whether it should recommend to the Supreme Court that it adopt language mandating conformity. Mr. Little noted that there were a number of local rules concerns: 1) judges using "short lists"; 2) mediators being required to send copies of the agreement with their Reports; 3) arbitration being named as the default procedure.

Next, Judge Walker introduced the speaker, Professor George Walker who presented the proposed Canons of Ethics for Arbitrators as adopted by the NCBA's Board of Governors. Professor Walker began by speaking about the Canons generally. He described them as "be good" standards, i.e., they exhort arbitrators to be fair and good. He noted that, at present, compliance with them is voluntary, i.e., they would apply with consent of the parties only. Thereafter, he briefly walked those present through the individual Canons.

Judge Walker asked Professor Walker to explain what role he thought the DRC could or should play relative to the Canons. Professor Walker noted that he would like to see any suggestions the DRC had for improving the Canons. He also noted that arbitration is becoming increasingly prevalent around the State -- the district court program, the proposed new Family Arbitration Program, private arbitration. Professor Walker noted that he does not believe the Supreme Court can impose the Canons on parties contracting privately for arbitration. However, he does believe they could be imposed on district court arbitrators and on arbitrators serving the

Industrial Commission. Professor Walker went on to note that if the Court were to adopt them, the Commission would, he suggested, likely be the enforcing body. Professor Walker suggested it would also be appropriate for the DRC to recommend the adoption of the Canons to the Supreme Court. Judge Walker asked Commission members whether they wished to vote today or to consider the Canons further in November. Judge Walker asked whether the AOC had commented on the Canons. Professor Walker indicated that he did not know whether the AOC had seen the Canons. Mr. Bradley suggested it might be prudent for the Commission to get some input from the AOC. Ms. Ratliff asked whether Chief District Court Judges had seen the Canons since they are the ones currently "regulating" arbitrators. Professor Walker noted there is a Chief District Court Judge on the Board of Governors. Judge Walker said he believes the Canons are a step in the right direction. He thought the Commission probably would be willing to recommend the Canons to the Court, but the AOC needed to review and comment on them first. Professor Walker asked whether the letter should come from Larry Sitton. Judge Walker suggested Mr. Gates might want to make the request of Mr. Sitton. Professor Walker asked whether a letter should also go to the Industrial Commission. Mr. Schafer responded that there is no specific reference to arbitration in the IC Rules, but that he would bring up the matter at the next staff meeting. Judge Walker thanked Professor Walker for attending and suggested this matter could be put on the agenda for the November meeting, providing the AOC is notified.

Next, Judge Walker noted that the DRC's office had requested that Ms. Corey-Laue's hours be increased from 20 to 25 and the personnel committee had reviewed the request and supported it. After some brief discussion, the motion passed unanimously.

Next, Judge Walker asked for Committee reports. Judge Eagles reported for the **Rules, Training and Certification Standards Committee**. Judge Eagles noted that her law clerk, Steve Williams, had gone through and noted revisions to the MSC Rules since their inception. As such, there was now a running log of all revisions and when they occurred. The DRC's office was asked to continue Mr. Williams' work in the future. Judge Walker asked Mr. Little to give the group a brief update on what was happening with the MSC Rules. Mr. Little noted the AOC had sent a letter in July indicating that it would not support that portion of the proposed rules creating a dispute resolution menu. A decision was made to drop the menu from the revisions. As such, what will be submitted to the Court are largely proposed revisions to Rule 1 (new plan for administration in districts using scheduling conferences or orders) and Rule 8 (certification requirements for non-attorneys). Mr. Laney asked whether the new packet should be reviewed by the AOC again. Judge Walker indicated the AOC will be copied when the packet goes over to the Court. At that point, Judge Eagles asked why the proposed Rule 1 revisions had left out language in Rule 1.A.(6) authorizing judges to order other settlement procedures at the request of the parties. Mr. Little responded that he thought the omission was an oversight. It was agreed that the 1.A.(6) language would be reinserted. Ms. Ratliff was asked to forward the rule revisions and the Standards of Professional Conduct for Mediators to the Supreme Court with a copy to the AOC.

Judge Walker reported for the **Budget, Finance and Long Range Planning Committee** that the AOC has suggested to the Supreme Court that it reactivate its Dispute Resolution Committee formerly chaired by Justice Frye. Judge Walker noted that he had discussed this matter with several Commission members and that he had told the Chief that the Commission

endorses the concept of an umbrella organization, but that there should be more definition of the Committee's role and responsibilities. Judge Walker would like to see the NCBA and the Dispute Resolution Section have some input in this matter. Judge Walker noted that it is not clear whether the DRC would continue to report to the Court or whether proposed MSC rule changes would go to the Committee first.

Due to the absence of Mr. Sauls, there was no report from the **Fees Committee** although it was noted the Committee was continuing to consider whether to recommend an increase in the court-appointed fee for mediators as well as a cancellation penalty.

Mr. Beason reported for the **Committee on Mediator Conduct and Ethical Standards**. He noted his Committee was awaiting comments on the continuing mediator education issue. Ms. Ratliff reported that comments were being sought on the web page and would be solicited in the upcoming issue of *The Intermediary*. Ms. Ratliff also distributed a revised version of the Advisory Opinions Policy which had been tentatively approved at the Commission's last meeting and was scheduled for final vote at this meeting. Mr. Stuart suggested revising the first subtitle from "Policies and Principles" to "Policies and Procedures". With this revision, the Policy was adopted by the Commission. Judge Walker mentioned a conversation he had had with a mediator who opposed a CME requirement and indicated he might abandon his certification if one was adopted. Judge Walker suggested that if a CME requirement is to be adopted, then the larger question becomes one of whether certification should be required of all who mediate. Otherwise, mediators could circumvent the requirement by simply dropping their certification and continuing to mediate upon party selection. Judge Walker also noted that he was concerned that comments will not be forthcoming until the Commission actually has a CME proposal, so that mediators have something more concrete on which to comment. He charged the committee with developing a specific proposal. Mr. Laney voiced some concerns about CME relative to the law students who are taking the "40 hour" course at UNC or other applicants where there is a delay from the time they take training until they seek certification. Mr. White reported some conversations he had had with mediators about CME. He noted they have no problem with certification and no problem with CME for some initial period, but not thereafter. They believe the market will take care of those who are incompetent. Professor Walker suggested that perhaps those mediators who complete "x" number of hours mediating per year, could be exempted from the CME requirement. Judge Walker noted that made some practical sense, but the State Bar made so such exemption. Mr. Beason suggested that perhaps mediators could be exempted from CME if they complete "x" number of mediations or hours conducting mediations per year and then de-brief "x" number of times per year for those observing them in connection with certification or CME. This would at least require those mediators to reflect on their performance. Judge Eagles noted she did not think it was possible to require everyone who mediated to certify. She believes this might go to impairment of contract. Mr. Beason thinks that may be true for purposes of cases where parties are mediating voluntarily, but where a court order is involved, he thinks you could require certification.

At this time, Judge Walker called on Mr. Little for an update on the Family Financial Settlement Program. Mr. Little noted there were some inconsistencies between the version of the Rules submitted in the AOC report to the General Assembly and the version adopted by the Commission in April. He noted there were also some variations between the Senate and House

versions of the proposed revisions to §7A-38.4. In the House version, three of the fourteen Commission members must be non-lawyers. In both versions, \$50,000 is allocated to the Commission. In neither version is there a \$30,000 appropriation for an evaluation. Mr. Little noted that two issues have surfaced since adoption of the Rules: 1) attorneys who possess significant domestic experience and have MSC training but are not board certified, do not believe they should have to take family training (Lambeth letter). 2) as it may be very difficult to find certified family mediators to observe, it may be necessary to count voluntary mediations. Mr. Little noted that he would like to have the ad hoc group continue to remain active. Judge Walker responded that until the legislation is adopted and those with family expertise are added to the Commission, that it would be appropriate to continue the ad hoc group.

The following meeting dates were approved for the coming year: Nov. 20, 1998; Feb. 19, 1999; May 21; Aug. 27 and Nov. 19. Judge Walker next asked about any new business. It was noted the proposed legislation to increase the jurisdiction of district court and the court ordered arbitration program had been tabled. Mr. Schafer reported the IC had adopted new rules and their settlement rate was at 72.5%. Mr. Laney reported that the Fourth Circuit's mediation program was disposing of twice as many cases as a judge and costing half as much. Judge Walker asked Messrs. Little and Beason about interest in mediation training. They responded that it is holding. Mr. Stuart asked whether the market was saturated. Mr. Beason noted lawyers are always looking for good mediators. Mr. Little noted a big side benefit is that lawyers are being trained to negotiate better and many are hammering out agreements prior to mediating.

Mr. Beason reported on a new joint program between the PAC and Dispute Settlement Centers. They will be training law students to mediate small claims cases. Judge Walker noted that the NCBA will be celebrating its centennial next year. Judge Walker and Mr. Gates will be co-chairing a dispute resolution committee that will be contributing to the centennial effort. They will be working to have October, 1999, declared Dispute Resolution Month. There being no further business, Judge Walker adjourned the meeting.

MINUTES

Dispute Resolution Commission

November 20, 1998

First Union Building, Raleigh, NC

Commission members present: Judges Walker and Eagles, Stuart, Beason, Sauls, and Ray. Ex-officio members present: Schafer, Peebles, Gates, Laney, and Little. Also present were Ratliff and Laue, staff, and guests Prof. George Walker and Robin Stinson.

Minutes were approved as submitted. Judge Walker next asked Ms. Ratliff for her report. She noted first that the Commission's third annual report had been completed and copies distributed to appointing authorities, judges, NCBA officials, and others. She reported receiving good feed back from mediators on the first joint edition of the newsletter. A second edition, she announced, is due to be published in December. She noted that judging by phone contact, there continues to be considerable interest in both the new pilot program and the proposed revisions to the MSC Rules. Mr. Stuart asked Ms. Ratliff about ethics complaints. She noted that, to date, everything had been resolved in-house.

Next, Judge Walker asked Professor Walker to report on the Canons of Ethics for Arbitrators. Judge Walker reminded everyone that Professor Walker had appeared at the last meeting and asked the Commission to endorse the Canons. It was decided the Commission would take no action until the AOC had reviewed the Canons. Professor Walker reported that the Canons had been forwarded to the AOC along with a request for comment, but there had been no reply. He now asked the Commission to: 1) endorse the Canons and 2) recommend them for adoption to the NC Supreme Court. He added that the Chief Justice had suggested to NCBA officials that the Commission would be the logical enforcement body. Judge Eagles observed that she believes the NCBA should be the body to recommend the Canons to the Court. Further, because the Commission has no statutory or other authority with respect to arbitration she believes the Commission cannot "endorse" the Canons, but only suggest they are a "good idea". After additional discussion, Mr. Stuart moved that the Commission write Larry Sitton, NCBA President, and advise him the Commission approves of the Canons and finds them consistent with existing dispute resolution statutes and rules. However, the Commission believes the NCBA is the appropriate body to recommend the Canons to the Court. The motion was approved. Judge Walker thanked Professor Walker for his work in developing the Canons and, then, called for Committee reports:

Mr. Beason reported for the *Committee on Mediator Conduct and Ethical Standards*. He submitted draft language for a continuing education requirement. He noted that the proposal is not onerous, six hours every two years in a workshop or seminar and attendance at one observation during that same period. Mr. Stuart asked what will happen when a mediator does not comply? It was suggested that failure to comply could result in the Commission's failure to recertify. Thereafter additional questions followed:

What cases would be eligible for observation? Mr. Schafer hoped the Commission would make Industrial Commission cases eligible. Would non-attorney continuing education hours be acceptable? Would the Commission's office need to verify attendance? Judge Walker believes there could be presumptive approval of Dispute Resolution Section, SPIDR, and Network conferences and that mediators would likely be placed on their honor in reporting. Mr. Ray asked about programs presented by the Academy of Trial Lawyers. Mr. Beason suggested there could be credit for attendance at law updates. Judge Walker affirmed that the Commission must be willing to be flexible. He suggested that what mediators probably need most is role playing and opportunities to refine techniques and network with other mediators. Judge Walker asked about portability of programs. Will they be available locally across the State? Ms. Ratliff was asked to circulate the draft language and to invite comment on it, but to be sure to indicate that it was only draft language of the Ethics Committee and not a proposal adopted by the full Commission. This matter is to be back on the February agenda.

Mr. Sauls reported for the **Fees Committee**. He distributed proposed draft language revising Rule 7. The proposal increases the hourly fee for mediator services to \$125 and also would increase the one time, per case administrative fee to \$125. Mr. Sauls noted it was the first such increase in 7 years. He called attention to a new section "c" requested by superior court judges and providing for payment of the administrative fee to a court appointed mediator when another mediator is subsequently requested by the parties. Another new section "e" provides for a penalty to be assessed when a party or parties seek to postpone mediation near the date of a scheduled conference. The mediator would request the sanction in his/her Report of Mediator. Judge Eagles observed that she is concerned section "e" appears to allow for unilateral postponement. Judge Walker asked whether a continuance requested during a mediation would invoke the penalty? Messrs. Sauls and Ray said "no". It was questioned whether the penalty should be waived in the face of "good cause". Mr. Sauls responded that though there may be some need for discretion, but good cause notwithstanding, the mediator is still left holding the bag and the proceeding is delayed. Judge Eagles also noted the Rules do not provide for the court to impose sanctions for failure to pay a mediator's fee. Mr. Sauls suggested that matter may need to be addressed. Judge Eagles requested more time to think about the proposal. Judge Walker asked the matter be put on the February agenda after some of the changes suggested by the Commission were considered further. He noted that he sensed no objection to the amounts of the increases or the penalty fees suggested, only objections to some of the wording. Judge Eagles questioned whether the Commission is sending proposals to the Supreme Court too frequently. Judge Walker agreed and suggested that perhaps matters should be held and forwarded semi-annually only. He noted that he would meet with the new junior justice to discuss this issue. Judge Walker asked Ms. Ratliff to mention in *The Intermediary* the changes the Commission is considering to Rule 7.

Next, Judge Walker asked Ms. Stinson and Professor Walker to make their presentation to the Commission on the proposed Family Arbitration Act. Ms. Stinson noted that district court judges are overwhelmed with criminal cases and that, as such, there has

been much delay in equitable distribution cases. The Act is designed to speed up litigation by offering an alternative to trial. She noted the Act would allow for binding arbitration of family disputes with the agreement of the parties even when such disputes were already in litigation. She indicated there were protections built into the Act, the court could review the award if it was alleged the arbitrator had grossly abused his/her discretion and the court would have ongoing jurisdiction over custody and support matters. Ms. Stinson reported that the proposed legislation is to be submitted to the General Assembly in the NCBA's next package. Now, the NCBA is requesting the Commission's endorsement. Judge Eagles noted the proposed Act appears not inconsistent with other rules, but she is uncomfortable going beyond that. Judge Walker suggested responding to the NCBA that there is nothing in the Act inconsistent with the new Family Financial Settlement Program which in fact authorizes binding and non-binding arbitration (Rule 1.A.). The Commission views this Act as providing another option for settlement of disputes. Mr. Stuart moved for adoption of Judge Walker's statement above and the motion carried.

Judge Eagles reported for the Committee on *Rules, Training and Certification Standards*. She reported her group was continuing to work on responding to the Collier letter. At this point, she does not think Judge Collier's concerns warrant any revision to the MSC Rules. Rather, her committee believes the solution to some of the issues he raises may lie in enforcement of the current rules. A response to the Chief from Judge Walker with a copy to Judge Collier will, she reported, be ready in February. Her committee continues to collect information on local rules which vary from the MSC Rules. To date, she reports that the variation which gives her most cause for concern is a requirement in some districts that mediators attach agreements to their Reports. Judge Eagles suggests that perhaps her Committee may want to contact local judges and ask them to explain why they are deviating from the MSC Rules. Mr. Laney asks what mediators are doing when told to forward agreements? Mr. Sauls suggested they are complying. Lastly, Judge Eagles reported that her committee has adopted guidelines for interpreting the proposed revisions to Rule 8.

Judge Walker reported the *Committee on Budget, Finance, and Long-Range Planning* did not meet this quarter. Given that the recertification effort was so successful this year, he suggested his Committee would be looking into whether the certification fee could be reduced next year.

Judge Walker next asked Mr. Little to report on the work of the *ad hoc* group which met that morning to consider revisions to the proposed family financial rules adopted by the Commission in April. Mr. Little first reported that revisions to the Family Financial Settlement legislation had passed. Those changes included expanding the program to offer a dispute resolution menu, expanding the number of Commission members to 14 (the term will now be three years), and obtaining funding to support the Commission's operations during the pilot period. Mr. Little noted the *ad hoc* group had today recommended some revisions to the proposed Family Financial Settlement Rules including, increasing the hourly rate and administrative fee to \$125, provided such was

approved for purposes of the MSC Rules. Judge Eagles moved that the hourly rate and administrative fee for superior court mediators be increased to \$125 for purposes of a recommendation to the Supreme Court on the Family Financial Rules. Her motion carried. Mr. Little next reported that the *ad hoc* group also proposed revising Rule 8 to grandfather in MSC mediators who were certified by December 31, 1998, have family law or mediation experience, and are recommended by a district court judge. After December 31, 1998, applicants for certification must take a family course. The *ad hoc* group also proposed revisions to the observation requirement in that same rule. The proposed rules adopted in April required five observations. The *ad hoc* group now recommends the requirement be reduced to three observations and would permit an applicant to substitute the conduct of five family mediations of 50 hours spent conducting family mediations for the observations. Judge Eagles moved the Commission adopt the changes to the proposed rules recommended by the *ad hoc* group. The motion carried. Next, the Commission adopted a \$120.00 certification and annual certification renewal fee for family financial mediators, that amount to be pro-rated the first year. The fee will become effective the date the Court approves the Rules. A motion was made to adopt a \$200.00 fee for certification of trainers and renewal of training certification. The motion carried. Ms. Ratliff was asked to send the AOC a letter advising it of the fee recommended by the Commission.

Next, Judge Walker asked Ms. Ratliff and Ms. Laue to provide information about the spring retreat. Ms. Laue spoke about the difficulty of finding an affordable location at the beach in May. She also indicated that the Broyhill Hill was renovating and would be increasing its rates. Ms. Ratliff mentioned that the Commission had considered Asheboro and meeting facilities at the NC Zoo. However, rooms were not available due to NASCAR and the U.S. Open tennis meet. The remaining alternative, Ms. Laue suggested was the Pisgah View Ranch in Candler. Ms. Ratliff and Ms. Laue were asked to poll the membership over the next few weeks.

Lastly, Judge Walker called for other business. Mr. Laney noted that new federal legislation had been adopted to require all federal trial courts to provide dispute resolution alternatives with mediation as the default procedure. Judge Walker spoke briefly about the NCBA's Centennial effort. He noted the NCBA was seeking to have October, 1999, declared Mediation Month. Moreover, there would be a speakers' bureau, booths in malls, brochures, neutrals available on a *pro bono* basis to help resolve disputes, and possibly a public television special on dispute resolution. Mr. Laney reported on a inquiry from the AOC to the Dispute Resolution Section regarding whether Rule 3 of the district court Arbitration Rules should be revised to allow corporations to appear *pro se*. The Section advised against it given that North Carolina law does not permit corporations to practice law. He reported also that he had spoken with Miriam Saxon about the Canons and she reported, that this time, the AOC had no objections to them. Mr. Gates noted the Section's annual meeting would be in Wrightsville Beach April 16-17. There being no further business, Judge Walker thanked everyone for coming and adjourned the meeting.