

MINUTES
NC Dispute Resolution Commission
February 19, 1999
Guilford County Courthouse
Greensboro, NC
10:00 a.m.

Members present: Walker, Eagles, Aycock, Morgan, White, Hastings, Bradley, Ray, Little, Cunningham, and Beason. Ex-officio members present: Miller-Moore, Schafer, and Laney. Staff present: Ratliff and Kolb. Jean Marie Craddock of Kernersville appeared to comment on CME. The absences of Judge DeRamus and Lewis Saul were excused.

Judge Walker opened the meeting by introducing five new members appointed pursuant to revised G.S. 7A-38.2: Senior Resident Judge Judson D. DeRamus, Jr., of District 21 (as noted above Judge DeRamus was absent); Chief District Judge E. Burt Aycock, Jr., of District 3A; District Judge Michael R. Morgan of District 10; J. Anderson Little, a mediator from Chapel Hill; and George G. Cunningham, a mediator/attorney practicing in Wilkesboro. Judge Walker administered an oath to the four new members present and also to Messrs. White and Hastings who had not previously received the oath and welcomed them to the work of the Commission.

Next, the minutes were approved as submitted and Ms. Ratliff gave her office report. She introduced Lona Kolb, new staff assistant hired to work with the Family Financial Settlement Program. She also noted that since the last meeting the Supreme Court had adopted Rules to implement the Family Financial Settlement Program, revisions to the MSC Rules, and Standards of Professional Conduct for Superior Court mediators. Ms. Ratliff distributed copies of the new brochure for the family program and reported that program forms were under construction. She also reported on the May retreat and noted the office was gearing up for its annual recertification period. Judge Walker next described some of the dispute resolution activities planned in conjunction with the NCBA's Centennial Celebration.

Judge Walker next called for Committee reports. He reported for the **Committee on Budget, Finance and Long-Range Planning**. He noted the Committee had recommended to the Fees Committee that no certification fees be assessed family financial mediators during the remainder of this fiscal year and the following year and that superior court fees remain static. He also reported that a letter had been sent to Larry Sitton expressing the Commission's support of the proposed Family Arbitration Act and Arbitrator Standards of Conduct. In light of the additional Commission members appointed, Judge Walker also noted that this Committee recommended the Commission adopt language re-defining a quorum as 8 members for purposes of its IOP's ^{rules}. Mr. Bradley asked what would happen if there were vacancies. Judge Walker responded that the quorum provision would not be relaxed. Judge Eagles moved for adoption. The proposed revision was approved. Judge Eagles suggested that perhaps the Commission's Rules or the IOP's should be revised to set forth the Commission's charge/responsibilities/duties. She noted the Commission has no express authority to recommend rule changes even though it has been its practice to do so. Mr. Little suggested that any such language should be permissive rather than exclusive. Judge Walker noted this Committee also recommended revising IOP 4 to allow

members' attendance at meetings to be excused by notifying the Commission's office rather than the Chair as currently required. Judge Eagles moved for adoption and this revision passed.

Judge Eagles reported for the **Rules, Training and Certification Standards Committee**. She is in the process of completing a letter to the Chief Justice responding to Judge Robert Collier's letter. She very briefly summarized her letter as saying that the Commission appreciates Judge Collier's concerns, but does not believe that there is any more effective language the Commission could adopt that would address good faith. Further, she indicated her letter would say that the Commission will continue to monitor the situation and consider suggestions of mediators and others for addressing the concerns raised by Judge Collier. Judge Eagles reported that her Committee continues to look at the issue of local rules at variance with the MSC Rules. She listed some of the areas in which local rules appeared to conflict with the MSC Rules: 1) requiring mediators to forward a copy of the agreement to the court; 2) providing for appointment of non-certified mediators; 3) allowing for non-monetary sanctions for failure to attend; 4) requiring good faith negotiation; and 5) providing for a menu approach. She suggested one approach to harmonizing local and MSC Rules might be to do outreach to SRSCJs explaining why the MSC Rules are written as they are. She suggested further that the Commission establish a Bench/Bar Committee to monitor rule implementation and to encourage more dialog and consistency. Lastly, she noted her Committee had been working with John Schafer to draft a new Rule 4.E. to address an overlapping rule issue regarding attendance of third party tort-feasors at Industrial Commission mediations. Mr. Schafer reported that this matter would be on the May agenda.

(The Commission held this meeting in Greensboro to facilitate comment on the proposed CME requirement. At this point Jean Marie Craddock, Esq., arrived and requested an opportunity to address the Commission.) Ms. Craddock objected to the CME requirement. She noted that she believed the Commission was trying to over-generalize about the needs of mediators and to force everyone into a box. Moreover, she noted it would be too time consuming to comply with the requirement and, particularly, the observation portion.

Mr. Beason reported for the **Committee on Mediator Conduct and Ethical Standards**. He began with a discussion of draft 3 of a proposed CME Requirement (see attached). Mr. Laney asked whether non-attorneys could be given credit for attending law updates? Judge Eagles noted that she was starting to rethink her position on CME. She noted that many of those who objected to the requirement were experienced mediators and she was concerned about their lack of support for the measure. Mr. Schafer noted that he was doubtful as well. Mr. Ray observed that letters were coming only from those with concerns; not from those who were positive. Ms. Miller-Moore noted that the letters are from the more active mediators. It is those who are less active about which the Commission is more concerned. These folks, she noted, are not registering concerns about the proposed requirement. Judge Morgan noted that a requirement would be a good public relations tool relative to consumers. Mr. Beason noted that he has some ambivalence about this effort as well. If the requirement is watered down anymore, he is not sure it will have any real impact anyway. He added, though, that the letters opposing the requirement are few in number compared to the positive responses to the CME survey. Judge Eagles noted that she thought the group needed to think more about what it wanted to accomplish, what is the goal behind a CME requirement? She said she has heard grumbling that

the proposed CME requirement is elitist in that the Commission will be, in effect, shutting out those who want to mediate on a limited basis. She suggested the Commission needed to have a specific goal in mind and tailor the requirement to meet the goal. Mr. Little noted that he, too, was ambivalent. He added that he thinks the requirement may still be premature. He suggested there is an "evangelical" factor to be considered, i.e., the more people certified, the more people invested in the process and program. To throw up obstacles to certification or re-certification might lead to attrition. He continued by noting that the program might be better served by concentrating on a voluntary, advanced certification requirement rather than an involuntary one. Judge Morgan noted that perhaps certain groups could be exempted, but that he supports the concept of continuing education in general. Mr. Ray asked whether new members had a copy of the CME survey. Ms. Ratliff was asked to forward materials to them. Ms. Miller-Moore said she also wanted to look at an advanced certification requirement. Mr. Laney and Mr. Beason want to as well. Judge Walker asked whether anything should be stricken from the existing proposal. Mr. Little noted that he supports an "or" between paragraphs one and two and not an "and". Judge Walker referred the matter back to committee for consideration of alternatives to the existing proposal, including the possibility of a voluntary, advanced mediator designation. He asked Ms. Ratliff to contact other states to see if they had any advanced certification requirement. Judge Walker suggested that perhaps a "super-certification" might be a way to ease into mandatory certification.

Mr. Beason added that his committee is also considering whether the superior court Standards as written can be applied to family financial mediators. He noted that the AFM and Florida Rules stress issues noted, but not necessarily emphasized, in the superior court rules, e.g., the AFM and Florida require the mediator to disclose that confidentiality does not protect specific types of admissions, e.g., child abuse or elder abuse. (Mr. Beason's committee is concerned that such a disclosure is tantamount to encouraging allegations). Further, the NC Rules do not stress any duty on the mediator's part toward non-participating third parties, such as children, who can be significantly impacted by the agreement. They will continue to study this issue.

In Mr. Sauls' absence, Mr. White reported for the **Fees Committee**. Mr. White walked Commission members through proposed revisions to Rule 7 (see attached). Mr. Little expressed concern about the "not proceed" language in subsection E. Does it include situations where there is a settlement. Judge Aycock asked about summary judgments. Mr. Little asked about situations where the mediator can re-book. Mr. White explained that the "not proceed" language meant not proceed under any circumstances. Mr. Little stated that he thought the 3/7 day language in E. was arbitrary. Judge Eagles responded that any time frame is going to arbitrary to some extent. She noted that though it may be arbitrary, it is not unreasonable. Mr. Little noted that because E. states that the party requesting the postponement is to pay, that it puts the mediator in the position of having to decide who is responsible for the postponement. Mr. Little thinks it would be better if the fee were split. There was some discussion of this point. Mr. Schafer noted that proposed G. does not provide for sanctions when a party fails to pay a postponement fee. Mr. Cunningham moved that G. be amended to provide for sanctions to be imposed for non-payment of a postponement fee. The motion was approved. Thereafter, the proposed Rule 7 changes with amendment to G. were adopted.

Mr. White reported further that his Committee recommends that certification fees for family financial mediators be waived for the balance of this fiscal year and the following fiscal year because money had been appropriated to operate the program and fees were not collected during the MSC pilot. Moreover, the Committee recommends leaving the superior court certification fee at \$120 for the 1999/2000 fiscal year. Mr. White moved for adoption of both recommendations. Judge Walker noted that he had initially favored lowering the fee, but remains concerned about the uncertainty of collections. The motion carried with both recommendations adopted. Judge Walker said that he would speak to Justice Wainwright regarding frequency of DRC rule revision submission.

Judge Walker reported for the **Personnel Committee**. He noted that Ms. Kolb was hired at a starting salary of \$12,500 for half-time. He also noted that Ms. Laue's position was being upgraded to a Secretary II. (Ms. Kolb was hired as a Secretary II.) Judge Walker asked that the Commission ratify both actions which it did by vote. At this point, Ms. Ratliff was asked to leave the room. When she returned Judge Walker noted that the Commission had voted to increase her salary as set forth in the attached salary memo. The salary increase for Ms. Ratliff was based on the fact that her last salary adjustment was June 1997, and the fact that she has rendered exemplary service to the Commission.

Judge Walker asked Mr. Little for an update on the new **Family Financial Program**. Mr. Little noted that local districts were gearing up to implement. He raised the issue of what Rule 8.E. required of applicants for certification, i.e., how does one demonstrate familiarity with the statutes, rules, etc. Judge Aycock noted that on its face he does not believe the Rule requires additional training. Judge Eagles believes an affidavit should be sufficient. Judge Walker raised some concerns about AFM practitioner applicants, that they may not previously have worked within the context of a court-ordered program and need some exposure to the Rules. After much discussion of the meaning of Rule 8.E. and how it might apply to the different applicant categories, the Commission voted that: 1) those grandfathered in as superior court mediators would need only certify that they have read and studied the Rules, and 2) other category applicants, e.g., AFM practitioner applicants and those who completed 40 hour training prior to adoption of the Rules, must complete at least a 2-hour course on the Rules and an exam. (Since he is a trainer, Mr. Little abstained from this vote.)

Judge Walker asked for suggestions from new members regarding committee structure and an indication of where they would like to serve. Also, he asked experienced members whether they might wish to serve on other or additional committees at this point in their service. He then appointed a new committee, the **Family Financial Settlement Committee**. Judges Aycock and Morgan and Mr. Cunningham agreed to serve and Judge Walker appointed Mr. Little as chair. Judge Eagles agreed to serve as an ex-officio member. There followed some discussion about whether the Rule 7 revisions regarding postponements and sanctions should be recommended for the Family Financial Program. It was decided no action would be taken for now.

Judge Walker called for further business. There being none he thanked everyone for coming and adjourned the meeting.

MINUTES

DISPUTE RESOLUTION COMMISSION

May 21-22, 1999

Pisgah View Ranch, Candler, NC

Members Present: Walker, Eagles, Stuart, Morgan, Sauls, Bradley, White, Cunningham, Hastings, DeRamus and Aycock, Ex-officios present: Leslie Ratliff, Executive Secretary, Schaffer and Miller-Moore. Also present were guests: Sarah Corley, Barry Master, Barbara Davis, Ingrid Friesen, Paul Godfrey, Robert Riddle, and Leslie Ratliff.

Judge Walker welcomed everyone to Candler and the Commission's third annual retreat. He introduced Judge DeRamus to the Commission and administered an oath. Next, the minutes for the February 19th meeting were approved as submitted. Ms Ratliff reported that the office was in the middle of its recertification period for fiscal year 1999/2000. She also reported that there were now 818 certified MSC mediators. She also noted that she was now working with the AOC to begin to automate collection of MSC caseload data. She also reported that the web site had been enhanced and that the newsletter had gone out in April with another planned for June. Ms. Ratliff complimented Jackie Clare on the work she had done with the newsletter and noted how cooperative and effective an editor Ms. Clare had been during this experimental period as the two publications merged. Ms Ratliff also noted the office had now certified 36 family financial mediators and two family trainers. All pilot sites were now operating, she added. Lastly, Ms. Ratliff reported that the office was looking into obtaining a 1-800 number. Next Judge Walker recognized Barry Master who presented an update on the work of The Mediation Center in Asheville. Next, Ms. Ratliff introduced and thanked Asheville attorney and mediator, Barbara Davis, whom the Commission had asked to organize a family financial role play and panel discussion for presentation to Commission members. Ms. Davis introduced the additional participants: Sarah Corley, Ingrid Friesen, Paul Godfrey, Barry Master and Robert Riddle. There followed a mock mediation involving a divorcing doctor and her spouse followed by a panel discussion highlighting differences between the conduct of superior court and district court conferences and program rules. Questions followed and the participants were commended for their hard work in putting together the role play and handout materials.

Committee reports followed. Judge Walker reported for the **Budget, Finance, and Long-Range Planning Committee**. He noted that Ms. Ratliff and staff had completed an audit of office check receipting and accounting procedures to ensure that they complied with AOC and State Budget Office regulations. Judge Walker continued by noting that some terms of Commission members were drawing to a close. He reminded members of revised NC Gen. Stat. §7A-38.2 which provides for various organizations to have an opportunity to comment. He indicated that letters would be sent to these organizations as well as to appointing authorities. He asked those who terms were expiring whether they were interested in continuing to serve. Messrs. Sauls, Ray, and Hastings responded positively. Mr. Stuart indicated he plans to complete his service with the end of his term. Next, Judge Walker introduced the idea of establishing an Executive Committee. He noted that the number and geographic diversity of Commission members has expanded as have the responsibilities of the Commission. There may be, he suggested, times

When immediate action is required of the Commission or its office. Such a Committee could, he stated, act with regard to emergency matters, or matters which must be addressed but where there is no need to involve the entire Commission. He suggested the Commission consider establishing an Executive Committee, and if established, the Committee itself could develop guidelines under which it would operate and report. At that point, Mr. Stuart introduced a Resolution establishing an Executive Committee and moved for its adoption. Mr. Cunningham seconded and the motion passed. Judge Walker asked for volunteers to serve on the Executive Committee and after some discussion the following appointments were made: Judge Walker, Chair; Judge Eagles; Judge Morgan; and Mr. Little. Initial appointments are for one year with members to serve through September 30, 2000. The Committee is to develop a structure for its operations and consider what the appropriate number for its membership should be.

Judge Eagle reported for the **Rules, Training, and Certification Standards Committee**. She began by discussing a revision to Rule 4 proposed by John Schafer. Proposed, new Rule 4.E. would authorize the combining of mediated settlement conferences in instances where a party has both a workers' comp and a superior court claim. The new rule would permit a SRSCJ to order parties to participate in an Industrial Commission mediation. Mr. Cunningham asked whether corresponding language should be inserted in the Family Financial Rules. Judge DeRamus was concerned that the language proposed was vague and it was not clear to him from reading 4.E. what kinds of situations it was designed to address. Judge Eagles suggested that this matter be held till the next meeting to give her committee an opportunity to explore the concerns Judge DeRamus and Mr. Cunningham had raised. Next Judge Eagles spoke about the Few and Laing cases.(recent Court of Appeals cases) Both these cases involved situations where a mediator conducted a successful mediation but then failed to get the agreement in writing. Judge Eagles introduced a memo that she suggested be sent to all superior court mediators advising them of these cases and reminding them that the rules require that agreements be reduced to writing before the participants leave the conference. Judge Eagles also noted that there is currently pending legislation which would provide that if there is no writing, there is no agreement. Judge DeRamus added that she believes the letter Judge Eagles proposes should indicate that the parties agreement must contemplate that either a consent judgment or voluntary dismissal be filed, that it is not an agreement to write that the matter will be submitted to arbitration. Mr. Sauls noted that he is concerned about all the many non-certified mediators who will not get the letter. Judge Walker noted that he does not want to threaten mediators with sanctions for failing to comply and he believes it is up to SRSCJs to see that non-certified mediators comply with the Rules. Judge Eagles moved that her letter be sent in the Commission's name. The motion carried. Next, Judge Eagles brought up the need to encourage more dialogue with SRSCJs. She said that she would like to arrange a meeting between SRSCJ and Commission members. At this time, Judge Walker appointed Judge DeRamus as a member of Judge Eagles' Committee. Lastly, Judge Eagles mentioned that she had responded to Judge Collier and the Chief Justice regarding their correspondence to the Commission. She added that she had reminded the Chief Justice of the Commission's efforts to establish a dispute resolution menu which would have addressed some of Judge Collier's concerns.

In Mr. Beason's absence, Messrs. Ray and Bradley reported for the **Committee on Mediator Conduct and Ethical Standards**. Mr. Bradley walked the group through a pro and con analysis on establishing a CME requirement. Mr. Ray noted that the Commission had recently received

many more comments on the subject. He noted that in light of these comments, the Committee may want to take a step backward and continue to look more closely at the big picture. He added that the Commission certainly does not want to lose a lot of folks in adopting such a requirement. Currently, he and Mr. Bradley noted the Committee is looking at a menu approach to reporting such as the Academy of Family Mediators has adopted and also at the possibility of stand alone evaluations of mediators completed by litigants and lawyers. Judge Eagles asked about resource issues. Does the Commission have enough staff to process everything? Judge Walker noted this matter has been under consideration for two years and he asked whether the Commission needed to provide the Committee more direction. At this point, several Commission members, including Judges DeRamus and Eagles and Messrs. Cunningham and Schafer expressed concerns and doubt about the need for a CME requirement, especially in light of the opinions expressed in the correspondence. After some discussion, Judge DeRamus moved that the whole matter be tabled, not including the evaluation component. Mr. Bradley responded that the Committee would like to continue to study this issue and he does not believe it would appropriate to narrow the Committee's options at this point. Judge Walker observed that if the motion carries, it is not a sign of disrespect for the Committee's work. Judge Morgan noted that he does not want to send a message that the Commission is not in favor of continuing education. Mr. Ray noted that this Committee has worked very hard on this issue and he does not want to see it dropped at this point. At that point, Judge DeRamus withdrew his motion. Judge Eagles suggested that the Commission should make an effort to let mediators know what was happening. She and Judge Walker suggested that perhaps an announcement could be made that there would be no requirement in place prior to the end of fiscal year 1999/2000 but that voluntary CME is encouraged. Ms. Ratliff was asked to post notice on the web site and in the newsletter. Judge Walker suggested that the Committee continue to try and come up with a final recommendation on this matter.

Next, Mr. Bradley stated that Committee on Mediator Conduct and Ethical Standards recommended that the Commission make the existing Standards of Professional Conduct applicable to family financial mediators. Judge Eagles so moved and Judge Aycock seconded. The motion was adopted. Ms. Ratliff was asked to put the recommendation before the Supreme Court. Lastly, Mr. Bradley discussed a bill proposed under the auspices of the Mediation Network that would remedy some of the confidentiality concerns raised by the Few and Laing cases and preclude mediator testimony. He noted that the legislation was tacked onto the Center bill for the purpose of expediency only. Judge DeRamus observed that he has some concerns about the language in the bill. He believes a judge should be able to compel a mediator to testify as to whether the parties signed the agreement in question and as to whether it was signed in the mediator's presence. He believes such an exception should be included in the proposed statute. At this point, Judge DeRamus proposed an amendment to the bill providing that a mediator may be compelled to testify that an agreement was reached by the parties as evidenced by their signatures, and, if oral agreements are to be enforceable, the mediator may testify as to his or her understanding of the terms of the agreement. The motion failed. (The Chair did not vote). Mr. Schafer said that he would speak with Mr. Little about Judge DeRamus' concern.

At this point, Judge Walker yielded the floor to Judge Eagles who had a resolution to introduce. The Resolution was addressed to the Chief Justice from the Commission and encouraged him to re-appoint Judge Walker as the Commission's Chair in light of his wise guidance and exemplary

service to date. (Judge Walker asked that the record show that he did not encourage or request the drafting of the Resolution and that he did not preside over the discussion or vote upon the Resolution). Judge Eagles' resolution carried unanimously and members and ex-officio members expressed their hope that Judge Walker would continue his leadership. Ms. Ratliff was asked to forward the Resolution to the Chief Justice with a copy to Judge Eagles. Judge Walker expressed his gratitude for the strong showing of support, but said that any credit for the Commission's accomplishments belonged to all the members and ex-officio members as well as the mediators and judiciary. He noted how hard everyone had worked to make mediation programs successful in this State and he expressed his belief that the accomplishments of the Commission had exceeded his expectations.

Judge Walker next asked whether there was any further business. There being none he reminded everyone that the next meeting was set for August 27 in Raleigh at the Academy of Trial Lawyers , 1312 Annapolis Drive, and he thanked everyone for traveling to Candler and said he hoped they had enjoyed their stay.

MINUTES
NC Dispute Resolution Commission
August 27, 1999
NC Academy of Trial Lawyers, Raleigh, NC
10:00 a.m.

Members present: Walker, Eagles, DeRamus, Little, Sauls, Ray, Beason, Stuart, Bradley, Morgan, Aycock, Cunningham, and White. Ex-officio members present: Laney and Schafer. Staff present: Ratliff and Laue. Also present: Barbara Ann Davis. Mr. Hastings and Ms. Miller-Moore were excused.

Judge Walker introduced Ms. Davis and explained that she was a new appointee to the Commission whose term would begin effective October 1, 1999. Judge Walker next asked for approval of the minutes. Mr. Ray noted that his attendance at the May meeting was not reflected in the minutes. The minutes were adopted with that correction. Ms. Ratliff next gave her report. She noted the recertification period for 1999/2000 has closed. Ninety-six percent of mediators renewed their certification for the new fiscal year. She also reported that the Supreme Court had adopted the proposed MSC Rule 7 revisions as well as the proposal to apply the Standards of Professional Conduct to family financial mediators. She noted that the effective date for both the Rule 7 revisions and the Standards was October 1, 1999. Ms. Ratliff distributed copies of the DRC's Annual Report for FY 1998/99 and noted the attached district-by-district MSC caseload statistics. Lastly she noted she has begun to work on the upcoming edition of *The Intermediary* with the new Section editor, Deborah Nowachek.

Next, Judge Walker asked for reports from liaisons. Mr. Bradley reported for the MNNC on the upcoming 7th Southeastern Mediation Conference scheduled for September 16-18 in Charlotte. He also reported that the Centers are doing well and that several had received grants from the Governor's Crime Commission or other agencies. He noted that the Centers are moving beyond court-based work. Mr. Schafer reported for the Industrial Commission and the **NCBA Dispute Resolution Section**. He noted that the Section has finalized Guidelines for Mediators and the Practice of Law, designed to help non-attorneys steer clear of the practice of law. He noted also that the Supreme Court has adopted Canons of Ethics for Arbitrators, the first statewide code of conduct for arbitrators in the country. He also noted that thanks to Debi Miller-Moore, AAA President, Bill Slate, appeared at the Bar Convention and spoke on the future of dispute resolution. Mr. Schafer believes his remarks were well received. Mr. Schafer also reminded everyone that Governor Hunt has declared October as Dispute Resolution Month. Lastly, he noted that Carmon Stuart will be chairing a committee which will look at the history of dispute resolution in North Carolina. Reporting now for the **Industrial Commission**, he noted they had had a busy year. Settlement rates have remained stable and that the mediation program is having a significant impact on disposition rates, he observed. In FY 1993/94, for example, he reported that the average disposition time was approximately 1 year; for FY 1998/99 the average disposition time was 4 months. This time saving is occurring, he added, at a time when filings are increasingly. Mr. Laney reported for the 4th Circuit that Justice Martin will be leaving as director of the mediation program. He noted also that participants are being surveyed about their experiences with mediation and that, over all, surveys are returning with positive comments. Judge Walker announced that the **Court of Appeals** is considering establishing its own

mediation program and has been gathering material from other states. He noted there are 29 other States with such programs.

Judge Walker commented that he is pleased with the renewal rate and believes it speaks well for the Commission and the MSC Program. Mr. Little added that he continues to be amazed by the number of lawyers taking training who do not intend to actually mediate. He believes this says much about the Bar's interest in negotiation. Mr. Beason echoed the same sentiment. Judge Walker next reported for the **Committee on Budget, Finance and Long-Range Planning**. He reminded members that at the May meeting the Commission had approved establishment of an Executive Committee. He noted that his Committee was continuing to work on developing a framework for that Committee's operations.

Mr. Beason reported for the **Committee on Mediator Conduct and Ethical Standards**. Mr. Beason noted that he plans to attend the SPIDR meeting in Baltimore and to learn more about that organization's master mediator designation. He noted also that there had been a request for an Advisory Opinion. He distributed a copy of the request and proposed opinion. Mr. Little stated that he believes the request focuses on a real problem which is occurring increasingly and needs to be addressed. Judge Walker suggested that he believes the Commission needs to remain neutral and not cast insurance providers in a negative light. There was some further discussion of the opinion and Messrs. Ray and Bradley were asked to consider it further over the lunch break.

Judge Eagles reported for the **Committee on Rules, Training, and Certification Standards**. Judge Eagles called attention to proposed Rule 4.E., the combined causes rule and distributed a proposed comment to it. She reported that the comment addressed the vagueness concerns expressed at the May meeting. She called for the Commission to adopt the rule and comment, but she noted that the recommendation would not go to the Supreme Court immediately as her committee may be proposing additional comments. Mr. Little asked that the comment be revised to replace the term "mediation conference" wherever it appeared with "mediated settlement conference". Judge Eagles moved for adoption of the Rule and the comment with Mr. Little's changes. They were adopted. Judge Eagles noted that her committee is also looking at drafting a comment to Rule 4.C. stressing that oral agreements will no longer be enforceable in light of revisions to 7A-38.1. Judge Eagles also noted that she and Judge DeRamus will be meeting with SRSCJs at the February Judges Conference to talk about the MSC Program. That meeting, she added, will be at the Mid-Pines Resort the 3rd or 4th week in February. Judge Eagles also reported that her committee was reviewing a training proposal from a trainer which raised specialization issues. She noted that though there are some concerns with the application, but that it is her understanding the Commission wishes to promote specialized training. She added that she has set up a subcommittee to compare the applicant's agenda and handout materials to materials submitted by programs which have been approved. Lastly, Judge Eagles also called attention to the establishment of the State Judicial Council and the opportunity that may bring to reintroduce the concept of a dispute resolution menu in superior court.

Mr. Sauls reported for the **Committee on Fees**. He began by noting that Mr. Cunningham has requested that the Commission establish a lower combined fee for mediators seeking to be certified or to renew certification to conduct both superior court and family financial mediations.

He noted that Mr. Cunningham is concerned that some mediators will be forced to choose between one certification or the other if they must pay two full fees. Mr. Sauls noted that the Committee supports such an approach and will consider the possibility further. It was noted that the Commission had earlier agreed not to assess a certification fee for family financial mediators through the end of FY 1999/2000. Next, Mr. Sauls reported that the Committee had considered a letter from a mediator requesting that the Commission consider revising MSC Rule 7.D. to make it clearer how the mediator's fee is to be divided among the parties. The mediator described a situation involving one plaintiff and two defendants represented by separate attorneys who were squabbling over the division of fees. Mr. Sauls noted that it was the recommendation of this Committee that the Rule remain as it is, since they believed it was already clear. Next, Mr. Sauls described a letter from another mediator asking for some clarification on the application of revised MSC Rule 7. Mr. Sauls reported that his committee could not really address most of the issues raised by the mediator because it would be up to the trier of fact to determine them or the answers to her questions could be found in the Rules of Civil Procedure. The Committee on Fees did, however, move that the Commission adopt the position that new Rule 7 apply only to cases ordered to mediation after October 1, 1999. The motion carried. Lastly, Mr. Sauls shared a letter from a mediator suggesting that new MSC Rule 7 be further amended to place some responsibility on lawyers for collection of mediator fees. Mr. Sauls indicated the Committee strongly disagreed with this suggestion. Ms. Ratliff was asked to write the mediators who had contacted the Commission to advise them of the action taken.

Next, Judge Walker asked that Commission members turn their attention to meeting dates for the Year 2000. He suggested some possible dates and locations and asked Ms. Ratliff to send a survey to Commission members and ex-officio members asking for their date and location preferences.

Mr. Little next reported for the **Family Financial Settlement Committee**. Mr. Little reported that he has set up a Committee to monitor the progress of the Family Financial Settlement Program and to recommend revisions to the Rules. He anticipates at least four meetings for the remainder of this fiscal year.

At this point, Messrs. Ray and Bradley were ready to report on the proposed ethics advisory opinion recommended by the **Committee on Mediator Conduct and Ethical Standards**. They recommended that in the last paragraph of the opinion, the third sentence, the term "mediation conference" be replaced with "mediated settlement conference". A motion was made to adopt the opinion with this change and it was done. Ms. Ratliff will maintain a log of opinions in the Commission's office. At this point, it was also suggested that Ms. Ratliff contact the NCBA to inquire about their Executive Committee and any by-laws or rules governing its operations.

Judge Walker asked whether there was any other business. There being none, Judge Walker thanked everyone for coming and adjourned the meeting.

Revised

MINUTES

DISPUTE RESOLUTION COMMISSION

November 18, 1999

10:00 a.m.

Law Offices of Kennedy, Covington, LaBelle, and Hickman
Charlotte, NC

Members present: Judge Ralph A. Walker; Scott Bradley; Joseph L. Ray; Judge Michael R. Morgan; Barbara Ann Davis; C. Randall Isenhower; Judge E. Burt, Aycock, Jr.; George A. Cunningham; J. Merritt White, III; and Robert A. Beason. Also present were ex-officio members: Debi Miller-Moore, Carmon J. Stuart, Frank C. Laney and John Schafer. Judge Jane V. Harper was present as the guest speaker and Ms. Lynn Chewing attended as a representative of the Judicial Assistants. Judge Eagles, Mr. Little, Mr. Sauls, and Judge DeRamus advised the Commission's office that they were unable to attend.

Judge Walker welcomed everyone and thanked them for attending. He noted that a new Commission member, J. Randall Isenhower, was present and he introduced him and Ms. Chewing. He also noted that the November meeting had been moved to Charlotte to facilitate participation of Commission members in the Mediation Network of North Carolina's Mediation Conference and he thanked everyone for rearranging their schedules. He also noted Kennedy Convington's generosity in hosting the Commission. The minutes were approved as submitted. Judge Walker began the Committee Reports by giving an update on the new **Executive Committee**. He reported this group was still working to develop a resolution to establish the scope of the Executive Committee's duties. Judge Walker also spoke briefly on the charge and membership of the new Task Force appointed by Chief Justice Frye to consider the establishment of a dispute resolution umbrella.

Barbara Ann Davis reported for the superior court **Rules, Training and Certification Standards Committee**. Ms. Davis first proposed adding comment language to MSC Rule 4.C. which would address the recent revision to N. C. Gen. Stat. §7A-38.1(l) requiring settlements to be reduced to writing to be enforceable. She moved for adoption of the comment (attached) and it was adopted unanimously. It was suggested that Ms. Ratliff hold off on submitting the comment to the Court given that Mr. Sauls committee was also considering some proposed comments. Ms. Davis next moved for the Committee's adoption of the proposed Year 2000 Prelitigation Mediation Rules. Judge DeRamus and Mr. Ray moved to amend Year 2000 Rule 3.E. to provide that, "Rule 4 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference to the extent it is consistent with prelitigation disputes." Moreover, they suggested that the full text of MSC Rule 4 be added as a second paragraph to Year 2000 Rule 3.E. less the last sentence of Rule 4. Lastly they suggested that the comment to MSC Rule 4 just adopted be added also as a comment to Year 2000 Rule 3.E. Next, Judge DeRamus suggested that language be added to Rule 2.C. and 2.D. providing that parties shall deliver copies of forms filed with the Clerk to the SRSCJ simultaneously. Lastly, Mr. Schafer suggested adding a new subsection (5) at the end of Year

2000 Rule 4 to indicate that the mediator is to file a certification at the end of the conference. The amendments suggested by Judge DeRamus and Mr. Ray were adopted and Ms. Ratliff intended to make the changes and submit the proposed Rules to the Supreme Court immediately. Ms. Davis also distributed copies of Year 2000 forms prepared by the Commission and adopted by the AOC Forms Committee. Lastly, Ms. Davis reported for the information of the Commission, that it had determined to deny UNCG's application for certification of its 40-hour MSC training program since the application could not be deemed complete. In addition, Ms. Davis reported that there were additional concerns about the application in that UNCG's approach did not provide for the 40-hour training to be devoted to the basics exclusively.

At this time Ms. Ratliff arrived and Judge Walker asked for the report for the Commission's office. Ms. Ratliff reported that the office had suffered some set backs this quarter. First, she noted that Lona Kolb had resigned from her position as Secretary II after seven months. She noted that the office had experienced a lot of turn over. She added that she was interviewing now and would approach the Executive Committee about salary. Ms. Ratliff also noted that she was experiencing problems on the technology front. The computer programmer that was hired used ACCESS software to make the superior court mediator list "searchable" and to enable the office to print tailored lists for individual districts, but the programmer could not get the superior court list up on the web site. Unfortunately, ACCESS cannot communicate with UNIX, the language in which the AOC's computer infrastructure is maintained. Currently, ISD staff is working to find an intermediate language which can communicate with both ACCESS and UNIX. Ms. Ratliff also reported that it appears the AOC has stopped moving forward with its effort to automate collection of MSC caseload data. On the positive side, Ms. Ratliff noted that the tailored superior court mediator lists should be ready to go in January. She expressed her thanks to case management coordinators: Michelle Bailey, Marie Rice and Betty Fuqua who helped with this project. She also noted that judges and other court personnel have been notified about the new Year 200 Program. Lastly, Ms. Ratliff reported the results of the survey of Commission members on meeting dates and locations for Year 2000.

Judge Walker next asked Judge Jane V. Harper, district judge in District 26, to give the Commission an update on that district's Family Financial Settlement Program. She reported that 100 percent of eligible cases are being referred. Most parties opt for mediation of their case, though some select the judicial settlement option and even more rarely the expedited trial. Judge Harper relayed that she has heard no negative comments about the program and that district judges try very few family cases now. It is her impression that attorneys like the program. She reported that Marshall Karro mediates 90 percent of their cases with David Hamilton mediating many of the remainder. She reports that Mr. Karro is spending 75 percent of his time mediating. She noted that most parties go through custody mediation before undertaking family financial mediation. The prevailing view in the district is that litigants are much better off addressing custody/visitation issues without attorneys present since there is less posturing. Judge Harper noted that financial cases other than ed cases are being mediated within their program such as, actions seeking back child support. Judge Haper notes that she understands District 22 includes custody/visitation issues within the purview of its family financial program. Judge Harper said that she had spoken with David Hamilton in preparation for her remarks and she relayed that he had observed that the more property involved, the easier it is to settle a case. In smaller cases

there is just not enough to go around. Judge Harper also noted that Mr. Karro will be presenting some rudimentary training on mediation to the family law judges in District 26. Judge Walker asked Judge Harper whether they had observed any need to revise their Rules. Judge Harper responded, "no". She observed that she thinks pro se litigants are more likely to select the judicial settlement conference option. Judge Harper concluded by saying that she is very, very positive about this program. She attributes much of its success to the fact that the District made a very real effort to include the Bar in its planning and Rule drafting, but did not include an opt out provision in its Rules.

Next, committee reports resumed with Mr. Beason reporting for the **Ethics and Standards Committee**. Mr. Beason reported that the Ethics Committee was recommending no action on the CLE issue for the time being. Mr. Beason also reported that the Committee is concerned about the Uniform Mediation Act being developed by the ABA and the National Conference of Commissioners on Uniform State Laws and, in particular, provisions of the Act which relate to confidentiality. He noted that the Act will eventually be presented to the States so he suggested the Commission may want to consider the Act and its ramifications. He suggested he may have a fuller report at the next meeting.

In Mr. Sauls absence, Ms. Ratliff reported for the **Fees Committee**. She noted that the Commission's office has received calls and letters on revised Rule 7. She reported further that the Committee is going to be considering some proposed comments to Rule 7.

In Mr. Little's absence there was no formal report for the Family Financial Committee. Mr. Cunningham who was present at the October meeting of the Ad Hoc group made a few comments and others joined in. It was noted that some family law practitioners had become proponents of the Custody and Visitation Program after having sat in on some mediations as they completed observations for their family financial mediator certification. Mr. Cunningham reported that there were some complaints that applicants for certification were having difficulty scheduling observations. He reported that the Ad Hoc group believed, for the most part, that opportunities to observe were available if the applicants persevered. Ms. Ratliff noted that she had received several calls from applicants indicating that it was very difficult to schedule observations. She specifically mentioned a letter she had recently received from Barry Master in Asheville indicating that the custody mediators there could not find family financial mediations to observe. Judge Walker noted that he had asked Mr. Little to bring the Commission's smaller Family Financial Committee together to look at some of these issues. Mr. Cunningham volunteered to help the custody mediators in Asheville if they were willing to drive to Wilkesboro. It was also reported that District 12 had been added as a family financial district.

Next, Judge Walker asked for liaison reports. Judge Walker began by noting that Carmon Stuart, now an ex-officio member of the Commission, is very active in spearheading an effort to develop a history of dispute resolution in North Carolina. Mr. Schafer, reporting for the NCBA's **Dispute Resolution Section**, added that he thinks Mr. Stuart has suggested a great idea and that a lot of folks in the Section are very energized by it. "It is an opportunity to record how we have gotten to where we are now", Mr. Schafer added. He also observed that the Dispute Resolution Section has requested funding from the Bar Foundation to underwrite the project. The Section, he noted, has itself contributed \$2,000.

Mr. Schafer also indicated that Mr. Little will coordinate a brainstorming session on dispute resolution set for March 4. Mr. Schafer pronounced Dispute Resolution Month a great success and noted that UNC television will air a program on dispute resolution in January. Judge Walker reported that Jim Gates had told him that there had been over 100 events in October. Lastly, Mr. Schafer noted that the Dispute Resolution Section is going to set up an ED Family Law Committee. The next Council meeting, he announced, will be held December 3.

Mr. Schafer then began his report as liaison for the NC Industrial Commission. He noted that Chairman J. Howard Bunn had retired and planned to become a certified mediator. He also reported that there had been over 600 attendees at the IC's Education Conference in January. There being no other liaison reports, Judge Walker asked whether there was any other business. There being none, he again, welcomed Randy Isenhower and Lynn Chewing and invited Ms. Chewing or a representative of her organization to again attend. Lastly, he reminded everyone that the next Commission meeting would be February 25 in Raleigh and adjourned the meeting.