

MINUTES

NC Dispute Resolution Commission

February 25, 2000

Bar Center, Cary

Members present: Judge Ralph A. Walker; J. Anderson Little; Joseph L. Ray; W. Lewis Sauls; Robert A. Beason; Judge Judson D. DeRamus, Jr; J. Merritt White, III; C. Randall Isenhower; George G. Cunningham; Scott Bradley; Judge Catherine C. Eagles; and Judge Michael R. Morgan. Ex-officio members present: Debi Miller-Moore, Frank Laney, Ella S. Wrenn. Commission staff: Leslie Ratliff and Sharon Corey-Laue. Excused were members and ex-officio members: Judge E. Burt Aycock, Jr.; Barbara Ann Davis; John Schafer, and Carmon Stuart.

Judge Walker welcomed everyone and introduced Ms. Wrenn who serves as Trial Court Coordinator in Superior Court District 9. Next, Judge Walker administered the oath to Randall Isenhower. Judge Walker then asked for revisions to the November minutes. Ms. Ratliff noted that she had not recorded Mr. Schafer's attendance. Mr. Laney noted that he had not been listed as attending as did Judge DeRamus. The minutes were adopted with these revisions.

Judge Walker noted that the terms of five Commission members would expire later this year. He added that a list of Commission members and their terms was in the packet distributed that morning. He asked that everyone review the list and determine whether their term and appointing authority were correctly listed. Lastly, he suggested that those Commission members whose terms were expiring should let him know if they were not interested in re-appointment. The Commission would, he noted, need to draft letters to appointing authorities and the groups listed in 7A-38.2 as invited to suggest names for appointment. Judge Walker also pointed out that a draft of duties/responsibilities of the Commission and its office had also been distributed. He asked members to let Ms. Ratliff know if they had any additions or corrections to the draft.

Next, Judge Walker asked for Ms. Ratliff's report. Ms. Ratliff reported that Yvette Hohenberger had been hired to fill the position vacated by Lona Kolb. She also reported that mediator lists customized by district had begun to go out in January and that, so far, feedback from judicial assistants had been positive. She also noted that lists of certified MSC and Family Financial mediators are now up on the Commission's web site, but that there were some significant programming problems to be fixed. Ms. Ratliff also reported that she had been asked and had completed some projects for Dispute Resolution Task Force members. Lastly, she reported that District 12 (Cumberland County) had been added to the family financial pilot. She asked for comments on the superior court brochure which is to be sent for re-printing and she reminded members to make reservations for the May retreat.

Judge Walker next called for Committee reports and he reported for the new **Executive Committee** which he chairs. He submitted for vote a Resolution delegating authority to the Executive Committee. Mr. Cunningham moved for adoption, Mr. White seconded, and the

Resolution was adopted unanimously. Next, Judge Walker reported that the Committee had developed a travel reimbursement policy given that there appeared to be some lack of clarity in the State policy. Judge Eagles noted that the proposed Commission policy was designed to make it clear that members could travel by air provided that the expenses involved in air travel did not exceed the expenses that would have been incurred if travel had been by car. She added that advance approval must be obtained from the Commission for air travel. Mr. Cunningham suggested deleting the "less cost" language in reference to air travel and inserting "comparable cost" language. With that revision, the policy was adopted unanimously. (Ms. Ratliff was asked not to send anything to the Court at this time, however.) Judge Walker also noted, that an issue had been raised with this Committee about the sharing of applicant information among border states (SC, TN, and VA). He suggested and Judge Eagles agreed that this matter should be discussed within the Rules Committee.

Next, as a part of his Committee report, Judge Walker described how Mr. Stuart is spearheading an effort to write the history of dispute resolution in North Carolina. He noted that raising funds for the project is an issue. He added that the NCBA had turned down a funding request. Judge Walker asked the members whether the Commission would be willing to authorize the Executive Committee to contact the AOC to discuss the possibility of the DRC fronting or simply absorbing some of the costs associated with the project. Mr. Laney spoke in favor of the request and noted that the DRC has a very legitimate interest in preserving the history and in educating mediators as well as judges and legislators. The information, he suggests, would also be helpful to other state agencies/offices interested in launching their own dispute resolution efforts. Mr. Cunningham asked about IOLTA funding. Mr. Laney indicated that those organizing the effort had missed the IOLTA funding cycle, but would apply in October, 2000. Judge Morgan inquired about the estimated cost of the venture. Judge Walker said that the figures were something in the \$15,000 to \$25,000 range. Mr. Laney suggested that SJI and other like organizations might be tapped as well. Judge Walker noted that the Dispute Resolution Section was going to contribute some funds. Mr. Isenhower asked whether there would be any recurring expense. Judge Walker said, "no". Mr. Little asked why the Bar Foundation had declined to contribute. Judge Walker explained that the Foundation had made some substantial contributions to the Hurricane Floyd relief effort. Mr. Laney added that there were also some concerns about the absence of a wide market for the book.

Continuing to discuss funding for the project, Judge Eagles cautioned that the Commission's appropriation could be affected in the upcoming legislative session given the hurricane. Mr. Cunningham suggested that perhaps the Commission could seek voluntary contributions in its recertification materials or at some other point in lieu of or in combination with some other funding commitment. Mr. Ray said that he has no objection to the Executive Committee looking into the matter and so moved, Mr. Bradley seconded and the motion passed unanimously. Judge Walker suggested that perhaps the Commission could purchase copies and make them available to legislators. Mr. Bradley suggested an exploratory call should be made to the Joe Kilpatrick at the Z. Smith Reynolds Foundation since this organization had funded many of the programs initially. Judge Walker will report back at the May meeting.

Judge Eagles reported for the **Rules, Training and Certification Standards Committee**. She began by describing the Commission's meeting with the Senior Resident Superior Court Judges

at Mid-Pines. She reported that she was pleased by the turn out for the two-hour meeting. The judges' comments, she continued, were very positive and she believes they would welcome additional such contact in a couple of years. She added there was much discussion about local rules and appointment of mediators. She noted some concerns were expressed about the court-appointments list not being as up-to-date as it could be. Judge Eagles added that most of the judges indicated that they are sending nearly all their eligible cases to mediation, with a few districts exempting medical malpractice cases and cases involving local government. She noted that several judges had asked for model appointment policies. Judge Eagles also noted that her committee would be working on revising the re-certification materials and on revising the initial application form both to address the judges' concerns and to address other concerns that have surfaced recently. She also noted that Ms. Ratliff would be writing the Michie company to address some discrepancies in their version of the Rules relative to the Court's version and that her Committee will continue to look at eligibility of inactive Bar members to be re-certified. She explained relative to the inactive members, that her Committee does not want to keep out attorneys who have voluntarily elected to refrain from practice and moved to inactive status, e.g., retired attorneys and those mediating full-time. However, they are concerned about those who may have become inactive involuntarily. She closed by noting that her members had agreed to meet by telephone in two weeks. Judge Walker noted that the re-certification effort starts July 1 and that there may be a time problem in trying to revise certification materials at this late date.

Mr. Little suggested that Judge Eagles' Committee use caution in drafting model appointment policies. He noted that problems had occurred in the past when the appointments were simply left to the judges' discretion, i.e., some female mediators had suggested that gender was an issue and that females were not being appointed. Mr. Little suggested that rotating down the list was the best way to ensure a "fair" process with everyone having an equal opportunity to participate. Judge Eagles noted that she does not believe this is a great problem in that in most districts parties are selecting rather than waiting for the court to appoint. She also noted that there are some geographic issues, e.g., Judge Barber will appoint only mediators who live in District 15B or a contiguous district. Judge Eagles noted that the first order of business is to "fix" the list and then go on from there. Ms. Wrenn noted that in her district, she contacts the mediator first to make sure s/he is available before making the appointment.

Mr. Little next followed up on the issue of local rules and asked what should be done about inconsistent rules. Judge Eagles responded that her Committee had looked at this matter a while ago and found inconsistencies in only a few areas, e.g., local rules requiring a good faith effort in mediation and non-monetary sanctions for failure to attend. Judge Eagles added that the judges were reminded that local rules should be consistent. Mr. Beason noted that there was also the issue of judges requiring mediators to attach copies of the agreement to their Report and that he had recently received a fax from a mediator informing him that Judge Winner in Asheville apparently left the meeting with the notion that such attachments were required by the statute/rules. Judge Eagles noted that in most instances she believes that parties do not care whether their agreement is confidential. In instances where confidentiality is an issue, she asked why the mediators can't call Judge Winner and explain the situation. Mr. Beason explained that he would be making such calls all the time. Moreover, Mr. Sauls added that he believes that such a requirement has a chilling effect on the mediation process, that is parties sometimes will not settle if they believe that their agreement will be made public. Judge Eagles said that she will

te the judges and correct any misconceptions they might have that the statute or rules mandated attachment of the agreement. She will circulate a draft memo and will hope for some comment from the mediator members of the Commission. She also said that she would put the issue of local rules back on her Committee's agenda. Judge DeRamus said that he will contact Judge Barber about his tentative appointment requirement. Judge Eagles concluded by saying that though there may be a need for some fine-tuning, that the judges are very positive about the program and believe it is working.

Mr. Beason reported for the **Committee on Mediator Conduct and Ethical Standards**. Mr. Beason began by asking Mr. Bradley to talk briefly about the Uniform Mediation Act. Mr. Bradley noted that this effort had been underway for more than two years. He suggested that it may be intended for states that do not yet have much legislation on the books. He noted that the Act had been amended recently to take out some of the concerns that had bothered mediators, including some confidentiality language that had bothered Mr. Beason. Mr. Beason added that he was concerned that the drafters were rushing things too much in an effort to conclude their work by July and he suggested that the Commission should draft a letter asking them to proceed more deliberately. Judge Walker asked Ms. Miller-Moore her opinion and she responded that the AAA had also been concerned about the Act's confidentiality provisions. Judge Walker asked Mr. Beason and Mr. Bradley to keep the Commission informed. He also agreed to sign a letter drafted by Messrs. Bradley and Beason asking the UMA drafters to slow down their efforts and to act with more deliberation. Mr. Beason also reported that the Advisory Opinion Committee had received a second request for an opinion and was considering its response. He noted that the Committee would proceed slowly since it was a difficult issue, i.e., when a mediator should permit attendance by telephone. Judge Walker added that Richard Boyette had written to suggest that the Commission should be very careful in addressing this issue.

Mr. Little added that prior to 1995, the Rules had provided that only a Senior Resident Superior Court Judge could excuse physical attendance at the conference. Perhaps, he suggested, it might be time to revisit the Rules and take the mediator out. Mr. Little went on to suggest that the insurance industry is not making a concerted effort to have adjusters present and the meditation is often undermined when the person on stand-by cannot be found. Judge Eagles added that she has heard similar complaints. Mr. Isenhower suggested that as a plaintiff's attorney he believes that cases are much more likely to settle if everyone is physically present. Judge Walker suggested the Committee proceed cautiously and deliberately in addressing this request. Judge Eagles added that the defense attorneys and adjusters will be meeting in the fall. She suggested that perhaps Mr. Beason should call and see if the Commission can get some time on the agenda. Lastly, Mr. Beason reported that his Committee is continuing to consider CME. At this point, he is leaning toward master level certification rather than requiring CME in general.

Mr. Sauls reported for the **Fees Committee**. Mr. Sauls reported that his Committee recommends leaving the certification fee for superior court mediators at \$120 for fiscal year 2000/01. They also recommended imposing no fee on family financial mediators for the remainder of the pilot. Upon vote, the Commission adopted these recommendations. In addition, Mr. Sauls directed attention to a number of proposed comments to Rule 7. Judge Eagles registered an objection to the Comment 7.E. "trial conflict" language. She observed that in Guildford County, attorneys know about such potential conflicts for weeks. Moreover, she

noted that the "shall" language had specifically been inserted in that Rule to give it teeth and she was concerned about providing an "out" through the comment. Mr. Sauls withdrew the Comment to Rule 7.E. for the time being. Upon vote, the Commission members adopted Comments to Rules 7.B; 7.F. (this Comment is to be cross referenced with Rule 5); and 7. G.

Mr. Little reported for the **Family Financial Committee**. The Ad Hoc and Family Financial Committees are scheduled to meet on March 24. District 7's program, he reported is still not operating, but the pilot was reported doing well elsewhere. He observed there was a tendency on the part of judges to still appoint only lawyer mediators. Judge Walker asked Mr. Cunningham about District 23 and he responded that the program was doing very well.

Judge Walker next reported for the Ad Hoc Task Force chaired by former Chief Justice Exum. The Task Force met in Mid-December. Dean Peebles had produced a report on the dispute resolution programs operating in North Carolina and the list was long. Judge Walker noted that at their next meeting on March 31, they were scheduled to brainstorm recommendations for a governance structure.

Lastly, Judge Walker asked for ex-officio reports. Mr. Laney, reporting for the Fourth Circuit noted that Justice Martin had retired and that Judge William Howell of South Carolina would replace him. His office will be in Buford, South Carolina. Mr. Bradley reported that the Network is exploring establishing a center in Beaufort. The reports concluded, Judge Walker adjourned the meeting.

NC Dispute Resolution Commission Minutes

Pine Knoll Shores, NC
May 5-6, 2000, Meeting

May 5

2:00 to 5:30 p.m.

Members present: Walker, Eagles, Little, Bradley, Beason, Cunningham, Sauls, Aycock, Isenhower, Morgan, DeRamus, and Davis. Ex-officio members present: Stuart and Laney. Guests present: Robert Kistner, Marshall Gallop, Michael Jones, and Todd Lonker. Also present staff: Ratliff and Hohenberger. Judge Walker welcomed everyone to the Commission's spring retreat. Ms. Ratliff announced excused absences for Mr. Ray, Ms. Miller-Moore, Mr. Schaffer and Dean Peoples. Judge Walker asked for corrections to the February minutes. Mr. Bradley noted that the new Dispute Settlement Center mentioned in the February minutes is located in and will serve Beaufort County and not just the city of Beaufort.

Judge Walker next asked Ms. Ratliff for her report. She began by introducing the Commission's newest staff member, Yvette Hohenberger. Next, Ms. Ratliff reminded everyone that it was time for the annual certification renewal period, the office's busiest time of the year. She thanked Ms. Corey-Laue and Ms. Hohenberger for their hard work to date in preparing for re-certification. She noted that the committees have been very active this quarter. Ms. Ratliff reported that she participated in the judicial assistants' annual meeting in Kill Devil Hills and will go to Charleston to meet with mediators, attorneys, and court personnel. She reported that she is still having computer problems with the web site, i.e., the office has still been unable to post a searchable list. Lastly, she observed that the office is now involved in the investigation of a formal complaint, the first filed with the Commission.

Ms. Ratliff next introduced panel members assembled to talk about the Mediated Settlement Conference Program and how it is working from the perspective of insurance companies and defense attorneys. The members were: Todd Lonker of Allstate; Robert Kistner of Nationwide; Marshall Gallop, a defense attorney from Rocky Mount; and Michael Jones, a defense attorney from Goldsboro. Mr. Lonker began the discussion by conveying Allstate's greetings and its support for the MSC Program. He indicated it is Allstate's practice to make an offer prior to the mediation and then increase it only if the value of the case changes. If, for example, a bill for an MRI is submitted during mediation and Allstate had made its offer prior to the bill's submission, then it might increase the offer. Mr. Lonker suggested revising the Rules to require that bills for medical treatment be submitted 60 days prior to mediation. He also suggested that a better effort needed to be made to get lien holders to participate in the mediation. Lastly, Mr. Lonker observed that Allstate has been criticized for not increasing offers in mediation, but if nothing changes, they will not offer more.

Mr. Little said that he has observed that plaintiff's attorneys are doing a better job of submitting medicals. Judge DeRamus asked Mr. Lonker whether Allstate ever views

mediation as an opportunity to present its case. Mr. Lonker said, "yes". Ms. Davis asked whether it would be Allstate's preference not to go to mediation. Mr. Lonker responded that they sometimes feel forced to participate and he believes that plaintiff's attorneys sometimes seek to punish Allstate, knowing full well what their position is and that the mediation will be futile. He added that Allstate is willing to try cases because verdicts are very often less than the settlement offers. Lastly, Mr. Lonker observed that he looks forward to mediation in cases where there are a lot of "real" issues.

Mr. Robert Kistner spoke for Nationwide Insurance which is the largest property and casualty insurer in North Carolina. He added that Nationwide is very supportive of the MSC Program and keeps track of its success in mediation. He handed out some statistics and indicated that Nationwide settles half its cases in mediation. He has heard concerns about adjusters not being available on standby. Nationwide adjusters, he emphasized, attend all mediations. Their adjusters, he notes, prefer to go because they believe mediation, "brings claims to life." Sometimes, he adds, Nationwide adjusters change their evaluations as a result of mediation and increase an offer. In rare instances, he admits, adjusters are not available, but he would not endorse a return to the old rule requiring physical attendance. Such a requirement would be particularly burden on smaller companies with a nominal presence in North Carolina. Mr. Kistner also noted that the Rules are a little vague on what authority adjusters must possess. Also, he said he would like to see hard data showing that adjusters are not making themselves available by phone.

Marshall Gallop noted that he speaks as a mediator with a defense attorney background. He observed that cases where a carrier has not authorized any increase in the offer, are among the most frustrating for mediators. He added that this is not an easy issue. Lots of bad cases are being filed (so, this is not just a defense problem) and a lawsuit for personal injury is worth what the jury will award (and some juries aren't awarding much, if anything.) He observed that there is nothing wrong with not increasing an offer -- it is just a bad fit with the mediation model. He agrees with Richard Boyette, an attorney mediator, in that if the parties and the client agree that someone does not need to be there, they know more than the mediator. He believes the proposed advisory opinion is trying to mix attendance policy and ethics. Mr. Gallop added that it would not do any good to have a deadline to submit medicals -- good attorneys will get their work done, other won't.

Mike Jones noted that he is speaking as a mediator and not as a defense attorney. Mr. Jones expressed a great deal of frustration over some of his mediation experiences which he refers to as "DOA" mediations. (These are mediations where the plaintiff knows that the offer is not going to be increased and everyone is mad that they have to be there.) Mr. Jones requires attendance in accordance with Commission policy. He says he is sometimes criticized by attorneys who tell him that they can find a mediator who won't make them attend. Mr. Jones reports that defense attorneys will not ask the judge for a Motion to Dispense because they believe it angers the judge. This results, he believes, in the mediator being put on the spot.

Judge Eagles asked Mr. Lonker how the defense attorneys used by Allstate felt about Allstate's approach. She also asked about the use of "Colossus", a computerized evaluation of claims system. Mr. Lonker responded that Colossus helps standardize offers across the State. Adjusters are, with good reason, allowed to overstep Colossus.

Mr. Sauls indicated that he believes that many plaintiff's attorneys do not cooperate more with Allstate because they believe Allstate does not participate meaningfully. Judge Eagles noted that judges do not often grant motions to dispense because they see cases settle after everyone has told them mediation will be futile. Mr. Jones observed that perhaps when the defense claims there is no liability and they are offering nothing, that perhaps the motion should be granted. Mr. Little observed that he thinks the real problem is case identification. The Rules do not provide any mechanism for identifying the exceptional cases, i.e., those which are inappropriate for mediation. Mr. Little added that he now thinks it was a mistake to have amended the Rules to allow the mediator to waive attendance. Since this change, he has seen a great increase in the number of such requests.

Mr. Sauls noted that Nationwide does a good job of getting adjusters to mediations and sometimes even has medical personnel present. Judge Walker asked Messrs. Lonker and Kistner whether they were using other forms of dispute resolution. They responded, "no". Judge Eagles asked about pre-litigation mediation. Mr. Kistner responded that Nationwide is mediating some cases pre-litigation using superior court mediators. Judge Eagles observed that people do not like to be told that a computer has decided something and that perhaps Allstate should find another way of explaining their decisions. Judge Walker thanked the panel members for coming and promised that the Commission would carefully consider all their suggestions.

May 6, 2000

9:00 a.m. to 12:45 p.m.

Judge Walker asked Mr. Stuart to report on the book project sponsored by the Dispute Resolution Section. Mr. Stuart told the group that Jackie Clare would serve as editor and would be the only paid individual associated with the project. Funds are needed to pay her and to cover the costs associated with printing and binding. Mr. Stuart reminded everyone that the Commission had previously authorized Judge Walker to speak with AOC Director Tom Ross to determine whether any unspent revenues or appropriations belonging to the Commission could be contributed to the project. Judge Ross, he reported, had told him and Judge Walker that he viewed the book as a conceptually appropriate expenditure of state funds since the book would be instructive for court personnel and mediators. Judge Ross indicated he would consider the matter further.

Next, Mr. Stuart read a proposed resolution providing for the Commission to contribute up to \$25,000 in unspent revenues or appropriations to the project, provided that AOC approved the transfer. He added that the Section's Book Committee would account to the Commission for expenditure of the contribution. Mr. Little moved for adoption. Ms. Davis asked whether money was available. Ms. Ratliff responded that she believed that there were sufficient unspent monies in the Family Financial Settlement account. She

added that these monies were from the pilot appropriation and that the AOC had taken many expenses of the pilot, including rent and supplies, out of the MSC account. This, she concluded, explained why there was such a surplus in the Family Financial account. Judge Aycock suggested that any accounting should go to both the Section and the Commission. The Resolution was adopted unanimously.

Judge Walker next reported for the **Executive Committee**. He reported that the Committee had approved, subject to the Commission's ratification, salary adjustments for Ms. Ratliff (4%) and Ms. Corey/Laue (5%), effective February 1, 2000. Judge Walker reported that the Committee had approved the salary adjustment without objection by Commission members to this action of the Executive Committee.

Judge Eagles reported for the **Rules, Training and Certification Standards Committee**. She began by discussing the Committee's recommendation for a revision to MSC Rule 8.B.1.a.(i) and (ii) which would permit inactive attorneys to be certified as mediators provided that they were not inactive due to disciplinary action or threat of such action. She defined inactive as not required to pay fees to the Bar or to complete CLE. She added that the proposed revision would not impact DRC revenues. The recommendation was adopted unanimously. Next, Judge Eagles announced that the renewal materials that went out this year asked mediators to affirmatively state the district in which they wished to be available to receive court appointments. She noted also that the Application for Certification was revised to add a new Section VII on character. Judge Eagles added that Rule VII of the Commission's Rules specifically requires a certified mediator to inform the Commission of any complaint filed against him or her by any professional body regulating the individual's conduct. She noted that she has some concerns about asking a mediator about "all" complaints, e.g., can meritless complaints be exempted? She added that there are some additional issues, for example, 1) what do we do with the information once we receive it and 2) does the Commission wait for the State Bar or other regulatory body to finish an investigation before it gets involved relative to certification. She asked for input. Mr. Little indicated that he did not believe the Application went far enough. Specifically, in Section VII.1.(c), he asked that mediators be required to disclose all states in which they have practiced whether there were complaints or not. Everyone agreed that the application and renewal materials need to focus more on character. Judge Eagles indicated that she would put the matter on the agenda for the next meeting.

Judge Eagles also reported that the matter of local rules inconsistent with Supreme Court Rules has come up again. Mr. Little will, she said, lead the effort to re-visit this issue. Judge Eagles reported that she sent a memo to Senior Resident Superior Court Judges clarifying that the better practice is not to attach agreements to Reports of Mediator. Ms. Davis says that she has seen no follow-up memo from Judge Winner. Lastly, Judge Eagles reported that an application for MSC trainer certification filed by UNCG-Greensboro and Sam Margolis had been denied because the applicants did not submit all their materials. She indicated that beyond that concern, there was a feeling that the application amounted to specialized training and as such did not comply with the requirement that mediators have 40 hours basic training.

Mr. Beason reported for the **Mediator Conduct and Ethical Standards Committee**. He began by saying that the time frame to comment on the Uniform Mediation Act has been extended. Judge Walker indicated that he had spoken with Professor Rhoda Billings and that she had voiced some concerns about the UMA and reported that it is back on the agenda of the Uniform Laws Committee at its July meeting. Mr. Beason also reported that his committee would consider a master mediator designation, having rejected the notion of a CME requirement for purposes of certification renewal. Next, Mr. Beason referred members to draft #3 of the Advisory Opinion before them and asked for comment. Mr. Little suggested that the word "Ethics" be stricken from the Opinion's title. Judge Walker mentioned Marshall Gallop's concern that this opinion was mixing ethics issues with attendance issues. He also mentioned a case in which a client disputed that he gave an attorney authority to settle and in which the mediator ended up testifying. Judge Walker wants to get mediators out of the loop once the case settles. Mr. Beason observed that he believes it is very important for participants to be physically present, but he does not want to take away all flexibility. Mr. Sauls thinks it would be good to remind the insurance industry that they need to get adjusters to the conferences, i.e., that physical attendance is preferable to telephonic/standby attendance. Mr. Little agreed and observed that he believes that language needs to be added to make it clear that even when the parties agree and consent, the mediator still should exercise his/her judgment and not agree to absences cavalierly. Also, he is concerned about the last paragraph and its use of the term "good cause". He does not believe that is what the rules say. Judge Morgan says that authority to settle issues should not be injected into this opinion. Judge Walker asked what a "travel hardship" is. He believes that making such determinations will only mean more work for mediators. Mr. Little observed that in the past only SRSCJs could modify or waive the attendance requirement. The insurance industry claimed there were difficulties in reaching the judges, so the rules were revised. He now wonders whether they thought about broadening the language to include any judge. He thinks this might have been a more effective approach to the problem. Judge DeRamus added that he thinks too many people are now involved. It should be either the SRSCJ or the mediator. There followed additional discussion on how far the opinion should go. Judge Aycock asked whether it would help if the parties were required to file their request in writing and a specified number of days in advance. The mediators did not believe that would help the situation. Judge Walker asked Ms. Ratliff to make revisions and put the matter back on the agenda.

Mr. Sauls reported for the **Fees Committee**. He began by reading a proposed DRC Comment to MSC Rule 7.E. He spoke about concerns that have arisen in connection with the "shall" language in the postponement rule. He suggested that many mediators are not and perhaps should not be, assessing a fee in instances where the postponement was occasioned by circumstances outside the requesting party's control. Judge Eagles said that she is concerned about the trial conflict language in the proposed Comment. She observed that in Greensboro, attorneys know well in advance when they will need to be in court. Mr. Sauls says that is not always the case in more rural districts. Ms. Ratliff was asked to revise the language to speak in terms of "unexpected and unavoidable" trial

conflicts. Mr. Sauls also reported that his Committee was considering assessing a reduced certification fee for mediators who seek a dual certification.

Mr. Little reported for the Commission's **Family Financial Settlement and Family Financial Ad Hoc Committees**. He reported that the pilot judges who are attending the AD Hoc meetings are very positive about the Program.

He added that District 12 (Cumberland County) has been added to the Program and that District 27A (Gaston County) is now mediating family financial cases though not as a part of the pilot. Judge Eagles noted that she had heard that the AOC had received no funding for a study of the pilot. Mr. Little added that he believed the Ad Hoc Committee could submit a report. He said that matter would be discussed at the Ad Hoc Committee's next meeting on June 16, 2000. Mr. Little also explained that there were continuing to be problems with the observations, parties are not giving their permission for observers to attend. Mr. Laney suggested that when court appointments are involved, perhaps parties should not be able to refuse observers. Judge DeRamus noted that the superior court observation rule does not require permission of the parties. Judge Eagles suggested that divorce cases are different. Many issues arise which are not necessarily addressed by the court and that forcing observers on the parties might chill the process. Mr. Little noted that there may be alternate ways of meeting the observation requirement.

Mr. Laney reported for the Dispute Resolution Section. He noted that the Section had sponsored a successful CLE Program focused on mediator technique. Next year, the Section's Annual Meeting will be at the Broyhill Inn in Boone. He added that Jackie Clare and Ann Duvoisin are working on another CLE program.

Lastly, Ms. Ratliff asked for Commission approval to purchase three 19" monitors to assist in publishing the newsletter and website. The cost has been estimated at just under \$1,500. She indicated money was available in fund 1715. The Commission approved the purchase. There being no further business, Judge Walker thanked everyone for coming and adjourned the meeting.

MINUTES
NC Dispute Resolution Commission
August 25, 2000
NCBA Bar Center in Cary

Members and Ex-Officio Members Present: Walker, Bradley, Davis, Beason, Ray, Cunningham, Sauls, Aycock, DeRamus, Eagles, Little, Gumbiner, Stuart, Peeples, Schafer, and Laney. Present also were staff and guests: Celeste Broughton, James Gates, Rene Ellis, Leslie Ratliff and Sharon Laue. Excused from attending were: Morgan, White, Isenhower, and Wrenn.

Judge Walker first took up the matter of the Broughton complaint filed with the Commission regarding the conduct of a certified mediator. He is appointing a panel of three Commission members to determine whether the complaint warrants a hearing. He announced the panel members: Mr. Ray, Chair; Mr. Cunningham; and Ms. Davis. Judge Walker noted further that the mediator and Ms. Broughton would be given until September 15 to submit any additional written materials to the Commission's office. He added that the Commission will expect a report from the panel at its November meeting. Ms. Broughton asked to see a copy of the mediator's response. Judge Walker noted that only a summary of the response had been shared with her given that the mediator had confidentiality concerns since there were two additional plaintiffs involved in the mediation. After discussion, the Commission determined that the mediator should be given an opportunity to revise his response with the understanding that it will be shared with Ms. Broughton and that Ms. Broughton will be given an opportunity to reply to the response. In that sense, Judge Walker noted, the panel will conduct a *de novo* review.

Judge Walker next called for approval of the minutes from the May meeting. Mr. Bradley asked that the phrase, "and not just the city of Beaufort", be stricken from the first paragraph. Next, Judge Walker asked for Ms. Ratliff's report.

Ms. Ratliff reported that the Commission has wrapped up the re-certification period for fiscal year 2000/2001. She thanked Ms. Laue and Ms. Hohenberger for their help. She noted that there was more attrition than in the past relative to the MSC Program -- 66 mediators did not renew. She reported that revised Mediator Information Directories had been mailed to court staff. Ms. Ratliff next reported on the budget noting that the Commission had spent \$2,200 of its appropriation this year. She noted two reasons for the increased expenditures: the number of Commission members had increased by five and the AOC had charged expenditures for the pilot program to the MSC fund. Next, Ms. Ratliff called attention to the Commission's Annual Report for 1999/2000 and the caseload data for the MSC Program. She also noted that the Supreme Court had adopted, effective September 1, 2000, the MSC and Family Financial Rule revisions recommended by the Commission. The Court did not adopt the airline travel policy submitted by the Commission. Ms. Ratliff added that the new rules have been mailed to court staff and mediators and are on the web. Lastly, Ms. Ratliff reported that she will be participating in a number of CLE programs over the next few weeks.

Next, Judge Walker recognized Rene Ellis who came to speak to the Commission as a Regional Director for SPIDR. She spoke briefly about some of the issues with which SPIDR is involved. She encouraged members of the Commission to join SPIDR and to consider doing more to foster

NC's reputation on the national scene. Ms. Ellis also noted that SPIDR and CRENET are merging. Lastly, Ms. Ellis suggested that the Commission appoint a liaison to stay in touch with the SPIDR Board. Mr. Beason agreed to serve in this capacity and to monitor the UMA. Judge Walker thanked Ms. Ellis for coming and wished her success in her endeavors with SPIDR.

Next, Judge Walker asked for Committee Reports. He began by reporting for the **Executive Committee**. He noted first that terms for Executive Committee members were expiring. The members agreed to serve an additional year. Judge Walker then noted that the Commission must elect a representative to serve on the State Judicial Council's Dispute Resolution Committee. Mr. Beason was appointed. Next, Judge Walker asked whether anyone had any suggestions for rule revisions as an outgrowth of the Commission's May meeting with defense attorneys and carrier representatives. No one responded. Members were asked to keep the matter in mind.

Mr. Sauls reported for the **Fees Committee** saying that he, in essence, he had no report. He did note that his committee was continuing to look into the issue of a reduced fee for dual certification. Mr. Little asked whether he wanted a recommendation from the Family Financial Committee and Mr. Sauls replied affirmatively. Mr. Little reported for the **Family Financial Committee**. He noted that at its next meeting the Ad Hoc Committee will discuss whether to recommend continuation and statewide expansion of the pilot. He noted that in his cursory poll at the last meeting, the group had unanimously supported statewide expansion.

Judge Eagles reported for the **Rules, Training and Certification Standards Committee**. She began by noting that the superior court application had been revised to add a section on character. She added that the re-certification materials have also been revised to inquire about disciplinary actions or censured conduct occurring since certification. Judge Eagles reported that Ms. Ratliff will process applications which report censured conduct on a case-by-case basis in consultation as necessary with her and Judge Walker. Judge Eagles also noted that her Committee had adopted guidelines interpreting MSC Rules 8 and 9 for purposes of trainer applicants. She noted that the Guidelines stress that the training should be a full 40 hours focusing largely on the curriculum in Rule 9. Lastly, Judge Eagles reported that her Committee will look at issues of reciprocity and attendance/participation. Judge DeRamus asked whether the Standards and Ethics Committee might be the better one to consider renewal issues hinging on character? There followed some discussion of reciprocity. It was mentioned that Florida will not grant reciprocity to NC mediators. Ms. Ratliff was asked to contact border states and Florida to learn what their policies are relative to certification of out-of-state mediators. Judge Eagles also announced that Mr. Little will look into local rule variations. Ms. Ratliff inquired whether she could proceed to certify the Virginia applicants pending the Commission's review of reciprocity and Judge Eagles responded affirmatively. Judges Aycock and DeRamus expressed reservations about whether the Commission had any business concerning itself with what Florida or any other state does? Judge Walker replied that reciprocity implies a two-way street. Mr. Ray indicated that he did not think it was fair when our mediators are shut out. Mr. Ray noted that the field has become very competitive and he does not want out-of-state mediators taking work away from NC mediators.

Following lunch, Mr. Stuart gave an update on behalf of the NCBA Dispute Resolution Section's Book Committee. Judge Walker complimented the Book Committee members for their hard

work. Next, Bob Beason reported for the **Committee on Mediator Conduct and Ethical Standards**. He reported that his Committee is currently considering an advanced mediator designation. Mr. Beason noted that his Committee is also developing an evaluation form which mediators could give to attorneys and parties. Judge Walker expressed concern that advanced mediator applications or an evaluation form will require office staff to make subjective decisions about conduct or about training, mentoring, or other qualifications. Mr. Ray is concerned that attorneys may try to use the survey to register complaints. Mr. Little noted that a lot of advanced training does not focus on mediation per se. Judge Aycock is concerned about the perception of elitism on the part of Commission members. Mr. Schafer would like to see Industrial Commission or workers comp training programs eligible for purposes of any advanced mediator designation. Mr. Cunningham noted that the State Bar requires specialty renewals every five years. He does not think an advanced mediator designation would need to be renewed more often. Judge Eagles noted the Commission will need to be prepared to consider trainer applications such as the recent specialty applications from UNCG. Judge Walker suggested that a panel could be established to consider applications for the advanced designation.

Next, Mr. Beason described a situation that had come to the Committee's attention. A mediator conducted a family mediation during which she learned in confidence that the husband intended to kill the wife and her boyfriend. The statutes and Standards place no duty on the mediator to warn the endangered individuals. Mr. Beason reported the Committee considered this a serious deficiency and intends to revise the Standards to cover such situations. Mr. Beason suggested that until some language can be hammered out, an announcement run in the newsletter advising mediators they should be mindful of participants' safety. The Commission agreed. Mr. Little asked why the Committee is considering "serious" bodily harm rather than bodily harm only. Judge DeRamus asked about property damage, such as arson. Next, Bob asked the Commission to adopt proposed Advisory Opinion 02-00. Judge Walker queried whether the opinion will make life easier for mediators? Mr. Little observed that requests to modify or excuse attendance are so common now as to be an everyday occurrence. Mr. Little moved to adopt and Mr. Ray seconded. The Opinion was adopted unanimously.

Next, there was some additional discussion of the pilot program. Mr. Little observed that settlement rates are tremendously high and that pilot site judges and AOC are very pleased. Mr. Little suggested that the program could go statewide as early as 2001. Judge Walker observed that he is certain the success this Program is enjoying reflects the good work of Mr. Little and the Ad Hoc Committee. At this point, Mr. Cunningham asked to be excused for personal reasons from service on the panel to review the Broughton complaint. He was replaced by Mr. Bradley. Next, Judge Walker called for **Liaison Reports**. Mr. Schafer reported that Buck Lattimore is the new Chairman of the Industrial Commission. The IC mediation program's settlement rate for the past fiscal year was in excess of 73% with 8,703 cases ordered to mediation. 70% of the mediators are selected. Mr. Laney indicated that he had no report for the Fourth District. Mr. Gumbiner reporting for the Section called attention to an upcoming September 22 CLE. Judge Walker thanked Judge Aycock for his service to the Commission and invited him to return.

Lastly, the Commission agreed on dates for the coming calendar year: February 16, May 18-19, August 24, and November 16. There being no further business the meeting was adjourned.

MINUTES

NC Dispute Resolution Commission

November 17, 2000

Guilford County Governmental Center, Grand Jury Room

Members present: Walker, Eagles, De Ramus, Davis, Morgan, Ray, Sauls, Little, Isenhower, White, Cunningham, Bradley, Beason and Davis. Ex-officio and staff present: Peeples, Gumbiner, Stuart, and Ratliff. Guests present: Robin Jones (substituting for Ella Wrenn), Judge Ben Tennille, and Professor John Redmond.

Judge Walker began by thanking everyone for coming and noting that the full membership was present. He first asked for approval of the August minutes. They were approved as submitted. Next, Judge Walker introduced Judge Danny E. Davis a district court judge from Asheville, the newest member of the Commission. Judge Davis replaces Judge Aycock. Judge Davis told the group a little about himself and noted that he would be serving on the Commission's Family Financial Settlement Committee. Next, Judge Walker administered the oath to Judge Davis and to Barbara Davis who had not been sworn to date.

Ms. Ratliff was asked to give the office report. She noted that the 19" monitors had been delivered. She also reported that she had been able to make no progress in getting the list of certified mediators up on the web or in getting a forum underway. She noted that her requests for assistance were apparently lost in the course of the restructuring at the AOC. She noted that she had participated in some seminars and had met with some court officials from Mexico. Lastly, she noted that she was collaborating with Lewis on a chapter for the book project and that the DRC's office might be moving in an effort to consolidate court staff in one location.

Next, Bob Beason began the committee reports by updating those attending on the work of the **Committee on Mediator Conduct and Ethical Standards**. Bob noted that proposed amendments to Standard III (Confidentiality) of the Standards of Professional Conduct for Mediators had been distributed to the group prior to the meeting. There followed some considerable discussion about the proposed revisions and particularly about 1) the use of the word "felony" in Section C.(3) and 2) the last sentence in Section C which provided that, "A mediator is obligated to resolve doubts regarding the duty to report in favor of maintaining confidentiality." Several members thought it was bad public policy to, in effect, promote confidentiality over public safety. Several revisions to Sections (2), (3) and the last sentence were discussed and Judge Walker moved for adoption with those changes. The motion passed, but the vote was not unanimous. Mr. Little expressed concern about the lack of unanimity. He asked for those who voted "no" to be polled to see if their votes would change if the last sentence were deleted. B. Davis, De Ramus, Little, D. Davis, Cunningham and Eagles indicated they were uncomfortable with the last sentence and favored its removal. Beason, Sauls, and Morgan expressed their support for the sentence as written. Next, Judge Walker moved to amend the previously adopted motion by deleting the last sentence from Section C. The motion passed, but the vote was still not unanimous. Mr. Little wondered whether we ought to publish the proposed

revisions for comment. Judge DeRamus asked whether mediators would feel they could warn now. Mr. Little suggested they would be unlikely to do so for fear they might be sanctioned but the Commission. Ms. Ratliff was asked to bring the Standard III revisions before the Court immediately. Mr. Beason's committee was asked to monitor the situation further to see if the revisions were helping the situation.

Next, Mr. Beason reported on the proposed mediator evaluation form. Judge Walker commented that he had some concerns about the whole notion of advanced mediator certification. Specifically, he asked: 1) whether the Commission has authority to grant advanced certification, 2) whether the Commission has any authority to charge fees for advanced certification, 3) whether staff will be able to shoulder responsibility for the applications, 4) whether advanced certification will be reasonably attainable or is the Commission opening the door to criticism by creating an elite class of mediators and 5) whether staff will be asked to make arbitrary decisions. His concerns expressed, Judge Walker concluded by saying that the fully supports efforts to encourage and reward mediators for improving their skills. Mr. Beason agreed that Judge Walker's comments should be taken seriously and that the Committee is not trying to rush the matter. Mr. Little commented that he believes the evaluation is too long. He would strike sections 1 and 2. Mr. Stuart asked whether this matter should go to the new Dispute Resolution Committee. Judge Eagles feels it is too early. Mr. Beason indicated that as long as the Commission is not vetoing the concept, the Committee will keep moving forward.

Lastly, Mr. Beason discussed an issue brought to the Commission's attention by an attorney. Briefly, Mr. Beason noted that two attorneys had agreed to let a mediator hire a CPA to give an opinion on an accounting matter in the case. Later one of the attorneys sought to subpoena the CPA to testify about documents he had been given. Mr. Beason noted that he felt the situation was, more than anything, the result of poor lawyering. Mr. Beason did not suggest the Commission take any action.

Judge Walker reported for the **Executive Committee**. The Executive Committee had met by telephone conference call. Ms. Ratliff had requested the purchase of additional software and that request was approved. He noted that he planned for the Committee to meet again soon.

Judge Eagles reported that the Rules, Training and Certification Standards Committee had not met. She added that the only matter before the Committee was the issue of reciprocity.

Mr. Sauls reported that the **Fees Committee** had not met but would, prior to the next meeting, consider certification fees for 20001/2002 and the issue of dual certification. Mr. Little agreed to give Mr. Saul's committee some input from the Family Financial Settlement Committee.

At this point, Judge Ben F. Tennille of the Business Court and Professor John Redmond of UNCG's Bryan School of Business. Judge Walker asked Judge Tennille to explain how the Business Court is using mediation. Judge Tennille noted that his office has formed a partnership with the Bryan School to train prominent, often retired, members of the state's business community as mediators. Judge Tennille noted that in his years on the bench he has observed that business executives are often more inclined to listen to other members of the business community than to lawyers. He hopes to tap this respect and credibility by encouraging senior

level, retired members of the business community to be trained as mediators. He noted that he had also had good results encouraging co-mediators involving both a businessman and a lawyer. Mr. Redmond also spoke briefly and said that the Bryan School has been very gratified by the response of the executives and hopes to offer the program in other cities and states.

Judge Walker thanked Judge Tennille and Mr. Redmond for attending and asked them to keep the Commission apprised of their efforts. After the guests departed, Judge Walker asked for comments on their remarks. There was some confusion over the fact that UNCG was training. Judge Eagles explained that UNCG's applications for certification had been denied because the Committee deemed them incomplete. However, the Committee was also concerned that the applications were, in effect, seeking certification for specialized training. She added that the training UNCG recently provided was not a full 40-hour training and was not touted as leading to certification. Mr. Gumbiner expressed concern that parties were feeling coerced by Judge Tennille to select the retired executive mediators. In effect, he suggested, Judge Tennille had set up a list to compete with the Commission's list. Judge Walker asked whether the Commission should continue to monitor the situation. Judge Eagles suggested that perhaps the Commission could offer to send a representative to the UNCG trainings to talk about how non-attorneys applicants can become certified. Other Commission members expressed concern about the consistent use of non-certified mediators. Judge Walker suggested that the Commission may want to continue its dialogue with Judge Tennille at a later date.

Mr. Little reported for the **Ad Hoc Family Financial Settlement Committee**. He began by saying that the Committee had finished its work with the exception of giving Mr. Sauls's Committee some input on dual certification fees. He called attention to the revised copy of N.C. Gen. Stat. §7A-38.4 expanding the pilot program statewide and moved for its adoption. The motion passed and Ms. Ratliff was asked to forward the Commission's recommendation along with the proposed statute under Judge Walker's signature to the Dispute Resolution Committee.

Next, Mr. Ray reported for the **panel** assembled to review the Broughton complaint. Mr. Ray reported that the panel found no probable cause to conduct a hearing. Judge Walker thanked the panel for their efforts. There followed some discussion as to whether Ms. Broughton had any further recourse in the matter. None of the Commission members were sure how she would go about appealing the decision. Judge Morgan asked whether the Commission had a lawyer. Judge Walker indicated that he believed the Attorney General would represent the Commission.

Judge Walker called for **liaison reports**. Mr. Gumbiner reported that the Section is going to be looking into dispute resolution on the web. Mr. Bradley reported that US Attorney General Janet Reno had been in Chatham County recently to highlight the work being done by peer and community mediation centers. Robin Jones reported for the judicial assistants. She noted that mediators are a priority in her district and that her district was very pleased with the postponement fee rule. She also noted that her district requires all requests for extensions to come from the mediator. Lastly, Mr. Stuart followed with a brief report on the Book Committee. He noted that editor, Jackie Clare, is encouraging contributors to get their chapters in. Judge Walker thanked everyone for coming and adjourned the meeting.