

MINUTES

NC Dispute Resolution Commission

February 16, 2001

North Carolina Bar Association Center, Cary, NC

Members present were: Walker, Eagles, B. Davis, Little, White, Cunningham, Beason, Isenhower, Ray, DeRamus, Morgan, Sauls, and Bradley. Liaison members present were: Stuart, Gumbiner, Schafer, Laney, Wrenn, and Peeples. Also present were guests and staff: Diann Seigle (Carolina Mediation Services), Mark Van Der Puy (AOC), Jacqueline Clare (ADR Book Editor), Hohenberger and Ratliff. D. Davis and Miller-Moore were excused.

Judge Walker began by obtaining approval of the November minutes. Next, he called for an update from ADR Book Editor Jackie Clare. Ms. Clare thanked the Commission for its support. She has received a majority of the contributions and she thanked Messrs. Stuart and Schafer for their help in encouraging the authors. She added that the book will be a history and a review of how the programs operate. Judge Walker asked her to let Commission members know if they could help.

Judge Eagles reported for the **Rules, Training and Certification Standards Committee**. She reminded Commission members that her Committee had revised the recertification materials for fiscal year 2001/2002 in order to require additional reporting on character, including disciplinary actions and criminal convictions. She suggested her Committee review character disclosures made in connection with original applications and that the Ethics Committee review those made in connection with renewals. She believes there may be a number of character issues to consider in light of 900 renewals and drew attention to a log of disciplinary actions/criminal convictions reported on recent applications.

Mr. Gumbiner expressed concern about how disclosure will impact certified mediators. Judge Eagles responded that the Commission has placed a heavy emphasis on ethical conduct and that the Commission's Rules mandate it make such inquiries. She said she did not expect to see large numbers of decertifications, but she does think it could happen. Judge Walker suggested Judge Eagles' Committee draft some guidelines for the review of character submissions in consultation with the Family Financial Settlement and Ethics Committees. Judge Eagles invited other interested member of the Commission to participate. Lastly, she noted her Committee had other issues before it, including reciprocity, the Report of Mediator, and conflicts between district court appearances and settlement conferences. Judge Walker thanked Judge Eagles for supplying Commission members with a copy of Chappell v. Roth, an appeals court case involving parties who failed to clarify the terms of their release at mediation.

Mr. Cunningham reported for the **Fees Committee**. He noted the Committee had met to discuss certification renewal fees for 2001/2002. The Committee suggests assessing an annual fee of \$120 from superior court mediators and a \$120 prorated annual fee from family financial mediators beginning with statewide expansion of that Program. He added that Ms. Ratliff will notify family financial mediators in April of the prorated fee and advise them that a reduced fee for dual certification will follow the next year. Mr. Little expressed some concern that the dual fee will not commence this coming fiscal year. Judge Walker suggested the Committee revisit the family fee in May. Judge Walker reported that he plans to sit down soon with Judge Hobgood, AOC Director, to discuss budgeting issues for the Commission and the pilot given the state's fiscal crisis. Judge Walker called for a motion to adopt the superior court annual fee at \$120 with the family fee to be revisited in May. The motion passed.

Judge Walker reported for the **Executive Committee**. He noted the AOC is becoming more involved in the Commission's personnel decisions. As a result of negotiations, it was agreed that DRC staff would receive salary increases effective February 1, 2001 and these are reflected in the personnel records. Judge Eagles added there were budgetary restrictions on what the Executive Committee could do for staff this year.

Mr. Beason reported for the **Ethical Conduct and Standards Committee**. First, he noted proposed revisions to Rule 6.B.(6) requiring mediators to distribute an evaluation following mediation. Revised 6.B.(6) provides for mediators to use a DRC form rather than one of their own design. Moreover, the Rule was reworked to make it clear that the evaluation is for the mediator's benefit only and will not be reviewed by the Commission. Mr. Beason described the evaluation as a way to encourage professional growth and development through feedback. Next, Mr. Beason called attention to the proposed Advanced Mediator Designation and the Committee's intention to seek comment in the newsletter and on the web site. He explained there is some ambivalence about the Designation even among Committee members and there is no consensus on how to best encourage CME without fostering elitism. He suggested that the Commission let him publish the Designation for comment and see what happens.

Returning to Rule 6.B.(6), Mr. Bradley asked why the language requiring the mediator to keep the completed evaluations for a year was dropped. Mr. Beason said that language made it appear the evaluations served a regulatory purpose. Judge Eagles noted that the Commission should be prepared for lots of questions and that decisions will need to be made about what the Commission will do with the evaluations it receives, especially negative ones. Ms. Davis noted that she had been working with a professional survey designer and has been advised to use a four point scale, *i.e.*, poor, satisfactory, good and excellent. Judge Walker said that he did not think the Commission's office should contact the mediator or respondent even if the evaluation had all "poors". Judge Eagles suggested that perhaps the office should keep any evaluations received in a separate file for six months and then report back to the Commission. A motion was made to adopt Rule 6.B.(6) as presented and it was approved. Ms. Ratliff was asked to mail it with the April renewal materials. If the Rule change has not been adopted by the Court before the renewal materials are mailed, it was suggested the evaluation be mailed anyway with a note that its use is optional until approved by the Court. Ms. Ratliff will redistribute the evaluation with revisions to the Committee and Ms. Davis for further review. The Commission then expressed its approval of Mr. Beason's request to publish the Advanced Mediator Designation for comment.

Next, Judge Walker introduced Diann Seigle with **Carolina Mediation Services**. She noted that her NC Central law clinic students are excited about proposed changes to the confidentiality standard and are following the Commission's work. At Judge Walker's request she gave a brief update on the Center's activities.

Mr. Little next reported for the **Family Financial Settlement Committee**. He noted the Family Law Section had requested some amendments to the proposed statute expanding the Family Financial Program statewide and that the revised legislation will cover actions to enforce separation agreements. Representative Baddour would introduce the legislation. Next, Mr. Little reported that the Family Financial Settlement Rules will need to be revised in light of expansion. He suggested the Dispute Resolution Committee might be the appropriate body to perform this task as the legislation did not mention the Commission. Judge Walker asked whether the Commission was not mentioned as far as certification and regulation. Mr. Little did not see a reference and said he would look into it.

Mr. Beason next reported on the NC Association of Professional Family Mediator's concern that recently revised Standard III might lead to liability in an instance where a mediator did not warn and someone was hurt or their property damaged. Mr. Beason introduced some language designed to clarify that the rule revision does not negate the immunity protections in the statutes. Mr. Little suggested that

the revised language would not cover private mediators. Judge Eagles questioned whether the proposed language would offer any additional protection to that already afforded. Mr. Beason suggested that private mediators build some protection into their agreements to mediate. Judge Walker noted that he did not think it was the sense of the Commission to adopt the language presented today. However, he added that he did not want to take a proposal to the Supreme Court if the NCAPFM had objections. He suggested Mr. Beason's Committee revisit the issue and run the proposed language by the NCAPFM.

Mr. Beason next reported for the **Advisory Opinion Committee**. He explained that a mediator had asked for advice on whether to give an affidavit relating to comments made in the general session of a mediation. He added that the mediator, in the interest of fairness as he saw it, was inclined to assist. Ms. Ratliff had cautioned the mediator that the confidentiality protections in Standard III took precedence over the impulse to help. The mediator had suggested that Standard III did not apply in general sessions. Mr. Beason asked that the Commission authorize him to contact the mediator and informally advise him that Standard III does not permit such an affidavit with the understanding that a written opinion will follow once the full Commission has had an opportunity to approve it. The mediator will also be advised that the Standards do not distinguish among stages of the mediation process. Mr. Beason was authorized to proceed.

Committee reports finished, Judge Walker noted that Duke University will host a regional mediation advocacy competition on February 23-24, 2001 and that Professor Tom Metzloff was in need of volunteer mediators. He asked Commission members to let Professor Metzloff know if they could help. He also reminded Commission members of the ABA-ADR seminar in Washington, D.C. the last weekend in April. He noted the program is an extensive one and that Commission members have not previously taken advantage of such opportunities. He asked whether the Commission wished to send members. Those interested in attending were asked to let Ms. Ratliff know. The Commission authorized an expenditure of up to \$500 per member for registration and travel/lodging expenses. Ms. Ratliff will check on whether a freeze has been placed on out-of-state travel given the budget crisis.

Ms. Ratliff's report followed. She noted that fillable forms and applications were now up on the Commission's web site and that some of the February newsletters were late due to an error in the number printed. She noted that she would be participating in a number of upcoming seminars and meetings and that she has been making arrangements for the Commission's May retreat. She reported that a new superior court training program developed by Cotton Harness (a South Carolina mediator) was approved and that two new pilot sites were added to the Family Financial Settlement Program (Districts 8 and 12). Lastly, she noted the office had completed purging its computer and hard copy files during the slow period around the holidays. Judge Walker added that this quarter Ms. Ratliff had completed a review of the Commission's Rules and Internal Operating Procedures. He indicated that he planned to sit down with her soon to review her suggestions and make recommendations back to the Commissions for any changes.

Next, Judge Walker called for liaison reports. Mr. Gumbiner said he intended to take the Advanced Mediator Designation to the **Dispute Resolution Section** for comment. He noted that the next Section meeting will be March 23 in Greensboro. Mr. Laney followed with a description of the program for the May Commission/Section retreat and meeting. Mr. Bradley, reporting for the **Mediation Network of North Carolina**, noted the Network had submitted the Centers' annual report to the General Assembly. He offered to share a copy with those interested. Mr. Bradley also reported that he attended the last meeting of the UMA drafters. He said that he did not expect much opposition to the final draft. Ms. Wrenn reported for the **Judicial Assistants** that their April conference was getting organized. She noted that Ms. Ratliff will attend and speak. There being no further business, Judge Walker adjourned the meeting at approximately 1:45 p.m.

MINUTES

NC Dispute Resolution Commission

May 18-19, 2001, in Boone, NC

Members present: Ralph Walker; Catherine Eagles; Merritt White; George Cunningham; Lewis Sauls; Judson DeRamus, Jr.; Scott Bradley; Lewis Sauls; Michael Morgan; Danny Davis; Barbara Davis; Joseph Ray; and J. Anderson Little. Ex-officio members present: Ken Gumbiner, Ralph Peeples, Carmon Stuart, Debi Miller-Moore, John Schaffer, Roy Baroff, Ella Wrenn, Frank Laney, and Mark Van Der Puy. Guests and staff present: Andy Silver, Bill Mitchell, Madge Dillard, Celia O'Briant, Robert McElroy, Charlie Bolton, Mike Haswell, Leslie Ratliff and Yvette Hohenberger. Robert Beason was excused due to a family emergency.

Judge Walker welcomed members and guests to Boone. Minutes of the February meeting were adopted without amendment. Ms. Ratliff next gave her report. She began by saying that the annual certification renewal period was underway. She added that disciplinary actions and convictions reported are being monitored. Caseload statistics for FY 2000/2001 are also being compiled. She was pleased to note that the AOC had approved the Commission's hiring of a programmer to post the lists of certified mediators on the web with search functions. Lastly, Ms. Ratliff reported that she would be in Richmond the following week at a program celebrating the Virginia Department of Dispute Resolution's 10th Anniversary.

Judge Walker noted that at the previous meeting the Commission had authorized partial funding for members planning to attend the ABA Dispute Resolution Section meeting in Washington, D.C. He reported that he did not attend due to the State's fiscal crisis. He added that the he and AOC staff are working to keep the Commission's appropriation for the coming fiscal year. He suggested there will be cuts. Next, Judge Walker presented certificates of appreciation to Mr. Gumbiner and Ms. Miller-Moore for their service to the Commission.

Next, Ms. Miller-Moore, who has been promoted to Vice-President for E-Commerce at the American Arbitration Association, followed with a presentation on e-commerce. She reported that the AAA is planning to become very active in on-line dispute resolution and has developed a protocol. She suggested that the Commission should begin to think about on-line dispute resolution for court-based programs. Mr. Baroff noted that some cases are being mediated via e-mail now. Judge Eagles observed that it would be good if orders, designations and reports could be sent over e-mail. Mr. Schafer noted that the Business Court is already using electronic filings. Lastly, it was suggested that the Commission and ADR Committee ought to establish a committee to look at these issues long term.

Next, Mr. McElroy (District 30) addressed the Commission about a matter of concern to him. He began by noting that he is a retired Lieutenant Colonel, holds a doctorate in psychology, and is a certified non-attorney family financial mediator. He observed that he is troubled by the tendency of attorneys to select untrained, non-certified family lawyers to conduct their family financial mediations. He offered illustrations of practices occurring which he believes are not consistent with good mediation. He also suggested that what is happening is undermining the work of the Commission in that it sends a message that certification is unnecessary. Judge Davis (District 30) responded that if attorneys feel comfortable using non-certified mediators and high percentages of cases are settling, then he does not see any problem. Judge Walker asked whether Mr. McElroy was suggesting that the Commission recommend that only certified individuals be permitted to

mediate? Mr. McElroy responded by asking whether it is important to the Commission that mediation be done by trained individuals? Also, is it important that cases be settled consistent with the rules and principles underpinning the FFS Program? Judge Morgan asked how to best promote certification? Judge Walker thanked Mr. McElroy for his presentation and assured him that the Commission would consider his remarks.

Committee reports followed. Judge Eagles reported for the **Rules, Training and Certification Standards Committee**. She noted that Commission members had received proposed revisions to the IOP's in their packets. She reviewed the proposed changes and most especially the requirements that applicants disclose certain information bearing on character for purposes of certification or renewal. She noted that a new committee, the **Disciplinary Screening Committee**, would be established to review disciplinary actions/convictions reported. The proposed changes to the IOP's were adopted unanimously.

At this point, Judge Walker returned to the issues raised by Mr. McElroy. He announced that he would ask Mr. Little and the members of his Committee to consider ways that the Commission could encourage non-certified family financial mediators to undergo training and to become certified. Further, he asked Mr. Little to consider whether the Commission should recommend adoption of a rule requiring that only certified mediators be permitted to mediate cases filed in the courts. Mr. McElroy thanked Judge Walker and the Commission for their consideration.

Mr. Sauls next reported for the **Fees Committee**. He noted that both he and the Commission's office have received calls from mediators who are experiencing difficulties collecting their fees. He noted that one mediator who contacted the Commission suggested that the Commission should develop a motion and order to facilitate judges ordering payment of fees. The Commission suggested that Mr. Saul's committee draft such a motion for its consideration. Mr. Sauls further reported that his Committee was continuing to consider whether to adopt a dual certification fee. He noted that Ms. Ratliff had requested that his Committee not make a recommendation today until she had more information about what the budget will look like in the coming fiscal year. At present, he suggested that his Committee was considering \$180.00 as the dual amount.

There followed some discussion during which Mr. Sauls and others present suggested that the Commission had already done quite a lot to aid mediators in the collection of their fees. It was suggested that mediators look to the recent Rule 7 revisions and encourage attorneys to have their clients bring checkbooks to mediation. Mr. Laney asked what the Industrial Commission does? Mr. Schafer responded that three invoices are sent. If not paid, the IC sends out a show cause order. If payment is not forthcoming, then a contempt hearing is held. Several of the guests attending the meeting reported that they have experienced problems collecting fees. Mr. Isenhower asked whether if the mediator must take steps to collect his/her fee in court, could s/he also collect attorney's fees? Judge DeRamus thinks that Rule 7 provides for that. Ms. Davis thinks that the Commission should adopt a motion and order form, that it would be helpful in expediting the payment process both for mediators and the court. Mr. Sauls observed that he hopes mediators would use restraint. Mr. Mitchell favors a form, saying that money is one thing, but what we are really discussing is the integrity of the process. Messrs. Sauls and Little and Judge Eagles believe that Rule 7 provides enough protections as it stands. Judge Walker concluded by saying that he believes that the Commission does have an obligation to protect the integrity of the process and to see that mediators are paid. Otherwise, they will refuse to participate and the program will be harmed. Ms. Ratliff was asked to draft a proposed motion and order.

Mr. Little reported for the **Family Financial Settlement Committee**. House bill 668 which would expand the pilot FFS Program statewide is, he noted, now before the Senate Judiciary II Committee. He added that a problem has arisen. A number of family law attorneys have objected to the pilot rule providing for certification of non-attorneys and are threatening the survival of the bill. Mr. Little stressed that the attorneys involved do not represent the leadership of the Family Law Section. He also added that the Ad Hoc Committee stands by its Rules. Judge Walker asked whether the Commission should take a position relative to the dispute. Mr. Laney responded that he thinks the Commission should defend the Rules and state unequivocally that they reflect the thinking of the Commission on this issue. Mr. Bradley asked whether the Commission should re-endorse the bill to make its support clear. Judge Walker suggested that perhaps the Commission should show some willingness to reconsider the issue since it is of such concern to those objecting. Mr. Little proposed two motions authorizing Judge Walker to communicate: 1) that the issue of eligibility to mediate should be addressed in the Rules and not the statute and 2) that the Rules on eligibility will be reviewed by the ADR Committee of the State Judicial Council. Both motions carried.

Ms. Ratliff reported for the **Mediator Conduct and Ethical Standards Committee** in Mr. Beason's absence. She reported that the Committee had looked at three issues this quarter: 1) concerns raised by the NC Association of Professional Family Mediators regarding the proposed revisions to Standard III, Confidentiality, 2) the mediator evaluation, and 3) the Advanced Mediator Designation. Specifically, she reported that the NCAPFM was concerned about the discretionary nature of the duty to warn being proposed by the Commission and wanted to make the duty to warn absolute. There followed some discussion during which Commission members affirmed that they favored leaving the decision to warn discretionary. Ms. Ratliff was asked to prepare the revisions as adopted previously for transmission to the Court. Next, Ms. Ratliff reported that the office had received several objections to the evaluation along with some positive feedback. Most who called expressed concern that the evaluation will be viewed as a nuisance by attorneys and that the market is already evaluating them since most of their business is repeat. Messrs. Sauls and Cunningham also expressed reservations. Ms. Ratliff reported that Mr. Beason and the Committee favor the form. Their view is that parties do not have to bother with it if they do not want and that perhaps parties and not attorneys could be invited to complete the form. Mr. Laney also reported that federal mediators use a form and that he often gets good feedback from it. Judge Walker asked that further discussion be held in abeyance and that the evaluation be printed for comment in the newsletter and on the web site.

Next Ms. Ratliff reported for the **Advisory Opinion Committee** in Mr. Beason's absence. She noted that the copy of the Opinion now before the Commission was revised. The attorney had raised another issue: whether confidentiality protections were waived if parties and attorneys agree that the mediator may give an affidavit? The Opinion says "no", there is no exception just because everyone agrees. There followed considerable discussion, including discussion about whether to footnote the proposed revisions to Rule III adopted earlier. The Commission determined to approve the opinion as written.

Next, Mr. Stuart reported for the joint **Book Committee**. He noted that the editor is continuing to collect contributions. To date, some 250 pages are in hand and the Committee projects that they will be able to get the book printed with the funds provided. Elizabeth Manley has been selected as the Assistant Editor and will be working with Editor Jackie Clare. The deadline for a draft has been set for September 30, 2001.

Next, Judge Walker called for liaison reports. Mr. Gumbiner reported that the Section is working hard to interact with other sections where there is a common interest in dispute resolution. He

noted that a joint program is planned with the International Law Section for October 4 and an event with the Family Law Section will follow. Mr. Baroff called attention to the ABA'S Mediation Representation Competition. Mr. Schafer of the Industrial Commission reported on the Hanson case. In that case, an insurer was allowed to intervene in a worker's compensation case. He added that the IC has asked mediators to let them know within 24 hours when a case has impassed and is ready to be set for trial. Mr. Bradley reported that the Centers are busy working to secure their funding for the coming fiscal year. Ms. Wrenn reported that Ms. Ratliff attended the Judicial Assistants Conference the previous month and had participated in a round table on dispute resolution.

Saturday Morning Meeting

A informal discussion occurred over breakfast. Thereafter, Judge Walker re-convened the meeting. He began by noting that the terms of three Commission members were expiring: Beason, Bradley and White. Ms. Ratliff was asked to notify appointing authorities and those invited to make suggestions. Mr. Bradley raised the issue of untrained, family lawyers mediating in light of Mr. Little's report that family attorneys were complaining about trained, non-attorney mediators. He asked Mr. Little's Committee evaluate whether untrained family lawyers should be allowed to mediate. Mr. Little responded that he would consider this concern in the context of both the FFS and MSC Programs. Judge Walker noted the difficulties in gathering data on the effectiveness of mediators, particularly non-certified ones. Mr. Little observed that it is always possible to speak to district and superior court judges. It was noted that the next meeting was set for August 24 at the Business Court in Greensboro. Afterward, the meeting was adjourned.

MINUTES

NC Dispute Resolution Commission

August 24, 2001

Greensboro, NC, at the NC Business Law Center

Members present: Judge Ralph Walker; J. Anderson Little; George Cunningham; W. Lewis Sauls; Scott Bradley; Robert Beason; Judge Catherine Eagles; Judge Michael Morgan; Barbara Ann Davis; Judge Danny Davis; J. Merritt White, III. Ex-officio members present: Frank Laney; Professor Ralph Peeples; John Schafer; Carmon Stuart; Roy Baroff; Ella Wrenn; and Mark Van Der Puy. Staff present: Leslie Ratliff.

Judge Walker welcomed everyone and thanked the Business Court for hosting the meeting. Next, he asked for approval of the May 18-19 minutes. They were adopted as submitted. Next, Judge Walker presented certificates to Messrs. Beason and Bradley whose terms will expire September 30, 2001, thanking them for their service to the Commission. Next Judge Walker called for Ms. Ratliff's report.

Ms. Ratliff reported that the annual mediator certification renewal period was completed. She noted that the master list had lost 49 superior court mediators and 7 family financial mediators, but that applications for certification are continuing to arrive. She noted that a number of disciplinary issues have surfaced. Next, Ms. Ratliff noted that the Dispute Resolution Section had named new editors for its newsletter -- Ann Anderson and John Harkavy -- and she noted proposed deadlines for this year's editions. She next noted that the Commission's Annual Report for 2000/01 had been distributed and she called attention to the attached MSC caseload statistics reported in it. She added that there is now a new superior court trainer, Intercede Mediation, a South Carolina trainer focusing its efforts on western North Carolina. She also reported that she and Judge Walker had signed a contract with ITS to post lists of certified MSC and FFS mediators on the web site. Ms. Ratliff also reported that revisions to the Standards of Conduct had been approved by the Supreme Court. Lastly, she noted that she had been contacted by Robert Jones of the Florida Conflict Resolution Consortium and that he reported efforts were underway to establish a southern regional center to promote the use of dispute resolution for resolving disputes among state agencies and offices.

Next, Judge Walker called for committee reports and began by reporting for the Executive Committee. He noted that he was pleased that the Commission and its office had been able to contain expenditures during the 2000/01 fiscal year. He further noted that the AOC is continuing to lobby for Commission funding for this fiscal year. Next, Judge Walker asked Ms. Ratliff to review proposed changes to the Commission's Rules. Ms. Ratliff did so, explaining that the bulk of the changes were to Rule VIII, modifying complaint and hearing procedures in light of what was learned as a result of the Broughton complaint. Judge Eagles moved for adoption and the revisions were approved unanimously, but will not be submitted to the Court immediately.

Judge Eagles reported for the Rules, Training and Certification Standards Committee. She noted that her group had approved some modifications to the Guidelines for Superior Court Trainers and was continuing to look at others, e.g., should there be a requirement that observations be completed within one year of application. She noted that Commission staff had brought to her attention an application that was filed nearly a decade after training was completed. In response to this and other such applications, her Committee adopted a policy

stating that anyone who seeks certification more than three years after his or her training, must satisfy the Commission that they are familiar with current Rules and Standards. She also noted that some additional forms may be developed to improve communication among lawyers, mediators, and the court. She also mentioned that her group would be looking at scheduling conflicts between superior court mediations and district court proceedings. She noted that an application for superior court certification filed by a paralegal had been denied, that the Committee did not believe that such experience would normally be sufficient for purposes of the Rules. Lastly, she noted that the name of her Committee was changing to the Superior Court Mediated Settlement Conference Program Committee.

Since Mr. Baroff had to depart early, Judge Walker asked him to report for the NCBA Dispute Resolution Section. Mr. Baroff called attention to the Section's Annual Meeting scheduled for Raleigh on April 5, 2002. Judge Walker asked for feedback from the group about last year's combined meeting and whether a similar joint meeting might be a possibility this year.

Judge Eagles next reported for the new **Disciplinary Screening Committee** and said that she was seeking guidance from the group. She noted that where an attorney applicant has been disbarred, it is clear that his or her application for mediator certification or certification renewal should be rejected. The situation was, she suggested, much less clear when the license has been suspended and the suspension stayed. She asked whether, if the Bar is letting the offending attorney continue to practice, the Commission should get involved or whether the Commission should hold to some higher standard of conduct. She suggested three possible approaches: 1) de-certify (if your license is suspended, stayed or not, you will not be certified or re-certified until you are fully re-instated), 2) re-certify with conditions, *e.g.*, you may not mediate certain types of cases, 3) case-by-case review of each such applicant to determine whether there are extenuating circumstances or other factors which would permit certification or re-certification. She asked which option the group favored? Judge Walker asked whether the Commission should look into whether applicants were complying with conditions set by the Bar? After some considerable discussion, the group asked the Disciplinary Screening Committee to adopt a "modified bright line approach", *i.e.*, when a suspension, whether stayed or not, is involved, there will be a case-by-case review. However, such applicants are not to be certified or re-certified unless and until they convince the Committee that their suspension is unrelated to their honesty or integrity.

Mr. Little reported for the **District Court Family Financial Settlement Committee**. He noted that H.B. 668, expanding the Family Financial Settlement Program statewide, was adopted and that Rules were on the fast track. Expansion may, in fact, begin on October 1, 2001, the effective date of the legislation. Mr. Little reported that he had called a meeting of the Ad Hoc Committee for September 7 to consider revisions to the Rules. The ADR Committee of the State Judicial Council's District Court Committee will also be working on the Rules. He encouraged any Commission member with comments on the Rules to let him know. Mr. Cunningham asked that Mr. Little be commended for his efforts, noting how Mr. Little had to cope with some unexpected snags. Mr. Little asked that Commission members thank Representative Philip Baddour and Senator Kay Hagan for their efforts in sponsoring and securing passage. Judge Walker also thanked Mr. Little.

Next, during lunch, Commission members heard a presentation on electronic filing by Mr. Mark Shaughnessy of cxcorporation. Mr. Shaughnessy described how the Business Court was using technology to facilitate filings, courtroom presentations, and record keeping. Judge Walker thanked him for his thoughtful remarks and noted the Business Court's success with technology.

Next, Mr. Beason reported for the Committee on **Mediator Conduct and Ethical Standards**. He began with proposed new MSC Rule 6.B.(6) which provides for the mediator to distribute an evaluation form at the conclusion of mediation. Judge Walker asked whether the evaluation should go to the party or the attorney. Judge Walker also raised the issue of redundancy where a mediator mediates for the same attorneys frequently. Mr. Beason responded by saying that the parties are different and that if the attorneys wish to ignore it they can, the evaluation simply presents an opportunity. Ms. Davis noted that EEOC mediators distribute an evaluation. Mr. Beason called for a vote on the Rule and it was adopted. Mr. Cunningham voted "no" and asked that his vote be noted for the record. He explained that he views the Rule as unnecessary. Ms. Ratliff was asked not to proceed to the Court immediately with the revision. Next, Mr. Beason introduced the topic of continuing education. He noted that it had been a long road. He reported that in recent discussions his Committee had determined to drop the Advanced Mediator Designation proposal and to return to consideration of a mandatory CME requirement. He referred members to the new draft proposal before them. Judge Eagles asked whether the draft could not be reduced to one page front and back. There was additional discussion about whether it might be possible for mediators to get CME over the Internet, *i.e.*, by going to a dispute resolution web site and engaging in self-study. The State Bar, it was noted, was beginning to experiment with Internet CLE.

Mr. Sauls reported for the **Fees Committee**. His Committee is recommending that there be a \$120.00 annual fee, pro-rated quarterly, for family certification alone and a \$180.00 fee for dual certification. The fees would be due the date the Program became effective. The Committee's recommendation was adopted unanimously. Mr. Sauls also reported that a mediator had requested that the MSC Order be revised to make it clear that the administrative fee is due up front. Mr. Sauls' Committee thinks this is already clear and is not recommending any revisions. Mr. Sauls also reported that the issue of inactive versus active status has arisen again, with inactive mediators requesting a reduced fee. He noted that his committee is not recommending that an inactive status be created. Lastly, Mr. Sauls reported that his Committee is working on a *Motion to Show Cause and Order of Contempt* to facilitate mediator fee collection. He called attention to a draft form. Judge Eagles raised concerns that the form was deficient, that it would not hold up relative to notice requirements and requirements that indigent parties be notified of their right to legal representation in situations where they could be jailed. She suggested that revisions be made and the form forwarded to Judges Morgan and Davis for comment since district court judges routinely deal with contempt issues, *e.g.*, in child support cases.

Next, Judge Walker called for **Liaison Reports**. Mr. Bradley announced that he is leaving the Mediation Network of North Carolina after 10 years. He also announced that the Network's next conference is scheduled for June 16, 17 and 18 in Greensboro. Ms. Wrenn reported that she has been working with Judge Eagles and her Committee on some rule and forms changes. Ms. Wrenn's report was followed with brief discussion of the Chappell vs. Roth case which the office will mail to all mediators. Mr. Schafer also mentioned the case of Mohammed vs. Simmons which was discussed in the August 20 issue of *Lawyer's Weekly*. This was, he noted, an arbitration case which addressed meaningful participation. Lastly, Judge Walker asked for Commission members to agree on dates for upcoming meetings. The following dates were set: February 15, May 3, August 23, and November 15. There being no further business, the meeting was adjourned.

MINUTES

NC Dispute Resolution Commission

Wednesday, September 26, 2001

Telephone Conference Call

8:00 a.m.

Members Present: Judge Ralph Walker, Scott Bradley, George Cunningham, Judge Danny Davis, Judge Judson DeRamus, C. Randall Isenhower, J. Anderson Little, Judge Michael Morgan, Joseph Ray, and W. Lewis Sauls. Judge Catherine Eagles could not attend the meeting, but contacted the Commission's office to express her unqualified support for the proposed Rules. Barbara Davis was excused. Staff present: Leslie Ratliff.

Judge Walker welcomed everyone to the telephone conference call and noted that the sole purpose of the meeting was to consider the faxed draft (dated September 12, 2001) of the proposed *Rules of the North Carolina Supreme Court Implementing Settlement Procedures In Equitable Distribution And Other Family Financial Cases*. The draft was submitted to the Commission upon recommendation of its Ad Hoc Family Financial Settlement Committee chaired by Mr. Little. Judge Walker acknowledged the hard work of the Committee and Mr. Little. He also noted that the State Judicial Council's Alternative Dispute Resolution Committee was also working on proposed revisions to the Rules. Judge Walker asked Mr. Little to walk the group through the proposed revisions.

Mr. Little began by explaining how to interpret the draft, that underlining and strike throughs indicated language agreed upon by both the Ad Hoc Committee and ADR Committee. Language which was in bold was favored by the Ad Hoc Committee, but problematic for the ADR Committee. Next, Mr. Little took the Commission through the document page-by-page, focusing on more substantive changes and areas where there might be disagreement. In particular, he noted the language striking through references to arbitration in Rule 1.A., language in Rule 1.C.(2) providing that in districts where there is no Custody Program that custody and visitation issues may be incorporated into family financial mediation, language in Rule 7.E. regarding postponement fees, and the changes to the certification requirements proposed in Rule 8.

There followed discussion about the arbitration language and the postponement fees. Judge Walker and Mr. Little explained that the ADR Committee was reviewing the Rules for Court-Ordered Arbitration and that area was in flux right now. Mr. Little also explained that the postponement fee language tracked the superior court rules. He noted that the ADR Committee's objection to that language rested largely on cultural difference between superior and district court. Mr. Sauls responded, based on his MSC Program experience, that if they don't add the postponement language now, they will have to revisit the matter in three months. Mr. Cunningham noted that many attorneys in his district already think that postponement language is in the FFS Rules because they are accustomed to working with the MSC Rules.

Next, there followed discussion about the proposed changes to Rule 8 which Mr. Little acknowledged were substantial. He noted that both groups, the Ad Hoc Committee and ADR Committee had struggled with the fact that none of the groups listed in current Rule 8.A.3. had all the pieces needed for mediation. By going with the new approach and eliminating the grand-fathered superior court mediators and the occupational groupings, everyone felt they would be bringing in the more well-rounded candidates. He explained that under the new grouping only

the equivalent of AFM practitioner mediators and mediation trained attorneys would be eligible for certification. Mr. Bradley briefly described what a candidate must do to become an AFM practitioner member. Ms. Ratliff asked whether there would be any grace period for those seeking to apply for certification under the old Rules. She noted that the Commission's office had recently received a number of calls from non-attorneys and superior court mediators seeking grand-fathering. Judge Walker noted an e-mail that he had received from the Greensboro Bar's Dispute Resolution Committee expressing concern that it was very difficult to get observations in family cases. Following some considerable discussion, it was determined that Mr. Little would draft some language to be inserted in Rule 8 that would allow applicants in process at the time the new Rules were effective, an additional six months to complete observations and the 6-hour training course. Mr. Little also noted that some language from Rule 8.A.3. had been left out of the draft and would need to be inserted.

Judge Walker asked if there were further questions of Mr. Little. There being none, he asked if anyone wished to move for adoption of the Rules with the additional language inserted in Rule 8 as discussed above. Mr. Little moved for adoption and Mr. Sauls seconded. The Rules were adopted unanimously. Judge Walker indicated that he would not be available to attend the upcoming meeting of the ADR Committee, but he asked Mr. Little to make the revision and present copies at the ADR meeting.

MINUTES

NC DISPUTE RESOLUTION COMMISSION

November 16, 2001 at 10:00 a.m.

NC Bar Center, Cary

Members present: Judge Ralph A. Walker; Joseph L. Ray; J. Anderson Little; Judge Judson D. DeRamus, Jr.; Judge Catherine C. Eagles; George G. Cunningham; Judge Michael R. Morgan; W. Lewis Sauls; Barbara Ann Davis; Judge Danny E. Davis; and C. Randall Isenhower. Ex-officio members, guests and staff present: John Shafer, Roy J. Baroff, Carmon J. Stuart, Professor Ralph Peeples; Mark Van Der Puy, Celia O'Briant, Yvette Hohenberger, and Leslie Ratliff. Merritt White and Judge Kimberly Taylor were excused.

Judge Walker began the meeting by noting there were two vacancies on the Commission – Messrs. Beason and Bradley's positions. He also announced that Judge Eagles would be leaving the Commission and that Judge Kimberly S. Taylor, Resident Superior Court Judge in the 22nd Judicial District had been appointed to succeed her. Next, he asked Mr. Stuart to report for the Section/Commission Book Committee. Mr. Stuart estimated that \$40,000 additional dollars were needed to publish 2,000 copies of a hardback book. He hopes to be able to publish early next year. Judge Walker added that the Committee is approaching various foundations to seek funding.

Next, Judge Walker asked Ms. Ratliff for her report. She reported that invoices and copies of the revised Rules and G.S. 7A-38.4A were mailed to family mediators. She added that copies of the statute, rules and a list of certified family mediators were also mailed to Chief District Court Judges. The AOC has notified the Commission's office that training will be provided for new districts. Lastly, Ms. Ratliff noted that there will soon be some revised family forms. Next, Ms. Ratliff reported that the Commission's appropriation was affected by budget cuts. Specifically, she noted that no appropriation was provided for the MSC Program and a reduced appropriation of \$31,327 for the FFS Program. In addition, the AOC has notified the Commission that in the future all its printing needs will be handled privately which will likely result in much higher expenses. Next, as requested by Judge Walker, Ms. Ratliff shared information on how to access the new AOC web site relative to MSC and FFS Program materials. She also noted that she hopes the list of certified mediators will go on line by the end of January which should reduce Commission mailing expenses. Next, Ms. Ratliff noted that Carolina Conciliation Services had been approved to conduct the six-hour training program on NC courts, rules of civil procedure, etc. Lastly, she discussed the upcoming May retreat and the possibility of holding it at the Green Park Inn in Blowing Rock. The Commission authorized her to proceed.

Following the office report, Judge Walker called Judge Eagles to the front and presented her with a certificate acknowledging her contributions to the Commission's work. Next, Judge Walker called for Committee reports.

Judge Eagles reported for the **MSC Superior Court Committee**. She asked to leave the Commission with the observation that too often when a concern has been raised, the Commission has addressed it by revising the rules. She suggests that working to improve communication may be a better approach. Next, she reported that there are some issues before her Committee,

including: the matter of who should be able to request extensions of time and scheduling priorities. She noted that the Conference of Chief District Court Judges has asked the Supreme Court to look at scheduling priorities. She suggested that perhaps the Dispute Resolution Committee or the Commission should consider asking the Supreme Court to look specifically at the issue of conflicts between district court matters and superior court settlement conferences. Judge Walker asked her whether she thought the Commission should focus more on issuing advisory opinions than proposing rule changes. Judge Eagles responded that she believes that education is really the key and that perhaps the Commission should focus more on meeting with superior and district court judges and attorneys. Lastly, she noted that she was preparing a full list of the matters pending before her Committee for Judge Walker.

Next, Judge Walker announced that Mr. Ray had agreed to serve as chair of the **Mediator Conduct and Ethical Standards Committee** succeeding Mr. Beason. Mr. Ray reported that a proposal for a combined CME policy and report form had been distributed. His Committee, he noted, will ask for action on the policy/form at the next meeting. He also noted that a rule change was in order to authorize CME for superior court mediators and he called attention to proposed new MSC Rule 8.I. which parallels FFS Rule 8.K. Ms. Ratliff asked whether the draft rule and CME report form should be distributed to mediators for comment? The consensus was no. Judge Walker observed that the Committee had gone from mandatory CME, to a proposed advanced mediator designation, then back to mandatory CME. He asked for Mr. Ray's perspective on this. Mr. Ray responded that the Committee was uncomfortable with an Advanced Designation. He noted also that the new proposal was not really for mandatory CME in that mediators were "asked" to comply and that no one would be de-certified if they did not complete CME hours. Judge Eagles asked whether the Commission could go ahead and vote on the rule change and consider the actual CME proposal at the next meeting? She observed that she favors the proposal and considers it the minimum the Commission could ask for. Mr. Ray added that he favors the Commission encouraging CME and asking mediators to reflect on their practice. Judge DeRamus suggested that mediators will want to be recognized for completing CME and he suggested that an asterisk be placed next to their name on the master list. Mr. Little noted that he does not favor mandatory CME. However, he observed that the Commission had struggled with this issue for a long time and this proposal seems to be about all that everyone can agree on. Moreover, it is a way for the Commission to encourage CME which he believes is important. Mr. Ray called for a vote on proposed MSC Rule 8.I. Judge Eagles seconded the motion and it carried. It was agreed that the word "ask" in the first sentence of the policy/report form be changed to "encourages". Ms. Ratliff was asked to circulate a revised policy/report form before the February meeting.

Next, Mr. Ray reported on a mediator who had not re-certified, but who was continuing to advertise herself as "certified". Ms. Ratliff noted that State Bar staff said this would be considered false advertising. Mr. Ray reported that his Committee had asked Ms. Ratliff to contact the mediator using a draft letter proposed by Judge Eagles and report on the response. Judge Eagles suggested that perhaps the Commission should consider adopting some guidelines for advertising. Next, Mr. Ray noted that the preamble to the Standards of conduct should be revised to reflect that the FFS statute was now numbered 7A-38.4A. The Commission voted to make the revision. Next, there followed some discussion about the requirement in the FFS Rules that all mediators accept court appointments in a least one judicial district and the absence of similar language in the MSC Rules. Ms. Ratliff noted that the office advised mediators that they

were expected to accept court appointments in at least one district, but it was short of a requirement. Judge Eagles and Mr. Little opined that the Commission could mandate such service based on MSC Rule 8.H. alone which requires mediators to agree to mediate indigent cases without pay. Ms. Ratliff was asked to advise superior court mediators during the next renewal period that they must agree to accept court appointments in at least one district to be re-certified.

At this point Judge Walker noted that the minutes from the previous meeting had not been adopted. He called for a vote and they were approved.

Mr. Little reported for the **Family Financial Settlement Committee** noting that this Committee met in September to consider revised Rules to implement expansion. He suggested that perhaps the Section and the Commission could play a role in recruiting mediators to help with orientations for attorneys and court staff in new districts. Judge Walker suggested that could be discussed with Miriam Saxon when she arrived. Judge Walker thanked Andy and his Committee for all their hard work in connection with statewide expansion.

Mr. Sauls reported for the **Fees Committee** noting first that his Committee was working on a Motion for Show Cause Hearing and Contempt Order. There were some revisions suggested at their meeting this morning and he asked Ms. Ratliff to make the edits and distribute the form to the group for discussion at the next meeting. He noted that the Committee had also considered various revisions to Rule 7.E., postponements, drafted by John Schafer. These drafts will also be distributed prior to the next meeting. Lastly, Mr. Sauls observed that, given the Commission's reduced appropriations, that it may be time to consider increasing certification fees. His Committee would, he noted, have a proposal on fees for the February meeting.

Next, Judge Eagles reported for the **Disciplinary Screening Committee**. She reported that her Committee had addressed some correspondence it received regarding whether a mediator whose whose certification was denied, could still hold himself out as a mediator as long as he made no reference to being "certified". Judge Walker next asked Judge Morgan if he would replace Mr. Beason as chair of the **Advisory Opinions Committee**. Judge Morgan agreed to do so.

Next, the AOC's Miriam Saxon spoke. She discussed AOC plans for expanding the FFS Program. She noted that Judge Hobgood wrote all Chief District Court Judges offering Jane Clare's assistance in establishing the Program in their district. Mr. Little recounted how much better the original MSC pilot districts had fared than the add-on districts where there had been little effort made to educate court staff and attorneys. He and Mr. Baroff offered to help mobilize some mediator volunteers. Ms. Saxon noted that it had never been the AOC's expectation that Ms. Clare act alone and she welcomed the assistance. Judge Walker volunteered the services of all Commission members. Next, there followed some discussion on the family court pilot program. Judge Walker thanked Ms. Saxon for coming.

Following, there was some discussion about moving the Commission's February meeting to February 22 to allow the Commission to meet with Section Council members. In addition, it was suggested that the May meeting be moved to the last week of the month. Ms. Ratliff was asked to contact Duke Law School to learn whether meeting space was available on the 22nd. Next, Judge Walker called for **Liaison Reports**. Mr. Baroff reported for the **Dispute Resolution**

Section and noted the ABA Negotiation/Mediation Competition to be held at Duke on February 22. He added that the Section was contemplating filing amicus briefs in cases where there are significant dispute resolution issues at stake. He asked Commission members to let him know when they become aware of such cases. He suggested also that the Commission and Section might consider establishing a joint task force to take a look at the UMA and what its effect will or should be on North Carolina assuming it is adopted. Lastly, he noted that there is a case before the Industrial Commission involving a party who reneged on a settlement agreement. The question is, "Can a mediator be required to turn over his/her notes from a caucus session?" Mr. Schafer reported for the **Industrial Commission**. He discussed the IC's experiences with conflicts and suggested that perhaps these matters are best handled by judges on a case-by-case basis. There is at least, he suggested, some flexibility that way. He is concerned that the Commission may not like the answer it gets from the Court. Mark Van Der Puy reported for the **DR Committee**. He thanked Mr. Little and Wade Harrison for their work on the FFS Rules. He added that the AOC was struggling with budget issues and had lost Judge Hobgood as Director. He reported that the Committee is considering a menu approach for the MSC Program. There being no further issues, the meeting was adjourned.