

Minutes

NC Dispute Resolution Commission

March 7, 2003

AOC Anderson Drive Facility

Members present: Andy Little, Judge Judson DeRamus, Randy Isenhower, Ken Gumbiner, Dottie Bernholz, George Cunningham, Judge Kim Taylor, Sherman Criner, Judge Danny Davis, Diann Seigle, Judge Sanford Steelman, and Merritt White. Ex-officio members present: Don McKee, Bob Beason, Mark Morris, John Schafer, Jackie Clare, Frank Laney, Ella Wrenn, and Judge Ralph Walker. Guests and staff present: Susan Hardaway, Leslie Ratliff and Sharon Laue. Excused absences: Judge Michael Morgan, Barbara Davis, and Carmon Stuart.

Mr. Little began the meeting by introducing new members Judge Sanford Steelman, Diann Seigle and Sherman Criner and asking them to take the oath of office. He next asked for approval of the minutes. Judge Walker asked that the effective date of staff raises be noted in the third paragraph on the first page. (The effective date of the raises was November of 2002).

Next, Mr. Little introduced Susan Hardaway of the AOC and explained that she had been instrumental in helping design the new Commission website found at www.ncdrc.org. Using a laptop and screen, she walked Commission members through the site and noted comments and suggestions of Commission members relating to both design and content. She also talked briefly about upcoming Commission projects that her office is working on, including posting profiles and isolating e-mail addresses. Mr. Little thanked Ms. Hardaway for all the help her office has provided Commission staff and remarked on how far the web site had come in just a short time.

Next, Judge DeRamus gave the report of the Program Operations Committee. He began by calling attention to two proposed mediator appointment policies, one drafted by former Commission member Judge Catherine Eagles and the other drafted by Judge DeRamus for his district. Mr. Little briefly put the issue of appointments in a historical context. Then, he noted that the issue had arisen again in the form of complaints that judges are refusing to appoint non-attorneys to mediate. Mr. Little suggested that he is very concerned about barriers to appointment no matter how they are manifested and believes they are potentially harmful to mediated settlement. Judge DeRamus added that he believes that geographic restrictions on attorney appointments may be unconstitutional. Thereafter, there followed some discussion about how to blend the two models in a way that incorporated practical geographic restrictions but still allowed interested mediators from outside the area to participate. Ms. Wrenn said that she would work on some language synthesizing the two.

Judge Taylor noted that Senior Resident Superior Court Judges should be advised of the change in the rules requiring them to set out an appointment policy in local rule. Ms. Ratliff suggested that they could be advised when the model appointment policy is distributed. Judge Davis raised the issue of why there should be geographic restrictions

at all. Mr. Little noted that in the past judges had problems with mediators who expressed a willingness to receive appointment from districts at some distance from them, and then refused such appointments when they were made. He suggested that maybe there should be an advisory opinion to address the judges' concern. Judge DeRamus noted his policy gave judges discretion to deviate from a strict rotation down the list in appropriate circumstances. He noted that the Committee felt that open-ended discretion was important. Mr. Little suggested that the matter be put back on the agenda for the May meeting.

Mr. Little next reported that a bill had been introduced which would limit the Court-Ordered Arbitration Program's jurisdiction solely to district court and he moved that the Commission express its support for the legislation. The motion carried unanimously. He also advised the members of the Commission that the State Judicial Council will consider whether a unified trial court should be established in North Carolina. He suggested that such action could have a tremendous impact on dispute resolution and that the Commission should stay informed.

Next, Mr. Little asked for Ms. Ratliff's office report. Ms. Ratliff reported that Yvette Hohenberger had left the Commission to divide her time between Ohio and Florida. She noted that Yvette had been a real asset to the office and would be missed. She also noted that Sharon Laue's hours had been increased by ten which was helping enormously with the workload. Ms. Ratliff reported that she planned to conduct interviews for Yvette's position this quarter. Ms. Ratliff also reported that Mediation, Inc., had been certified to provide the new 16-hour dual certification course. She added that there had been many calls about the course. She noted that the office was really beginning to gear up for the renewal period which typically runs from April to July. Two new computers and a scanner have been ordered and there are discussions ongoing with the AOC about the need for a better back-up system for the office's computers. Ms. Ratliff also reported that Andy will be writing a regular column on dispute resolution for both the Family and Litigation Section newsletters. She also reported on efforts to work with the AOC to get the profiles posted on the web and to isolate data on e-mail addresses so that the Commission can begin to communicate with mediators more by e-mail. Lastly, she cautioned members to be sure and may their hotel reservations for the May retreat.

Mr. Little next introduced a Resolution thanking Ms. Hohenberger for her many contributions to the Commission and it was unanimously approved.

Mr. Little next reported for the Executive Committee. He first asked for the Commission to consider certification fees for the coming fiscal year. The Commission agreed that the fee should remain as set in the previous year. He next called attention to a proposed records retention policy for the Commission's own files. It was approved unanimously. Next, he discussed Ms. Ratliff's proposal that mediator profiles be posted on the web with a key work search index. Mr. Little said that he was concerned about the self-promotion aspects of this idea and also the notion that the Commission could be perceived as suggesting that mediators should be experts in case law. Ms. Seigle responded that she believed that the public had a right to know about the backgrounds and experiences of certified mediators, that such knowledge was important if they were to make meaningful choices. Judge DeRamus suggested that perhaps the Section could

offer this service on its web site. Judge Walker suggested that there not be unlimited categories. Ms. Ratliff explained that there would be a definite list of descriptive words from which parties could select and that they would be limited in the number of words they could use to describe themselves. Mr. Little moved that Ms. Ratliff be authorized to proceed with the general idea of a posting on the web with a search function. The motion was approved.

Ken Gumbiner reported for the **Mediator Certification and Training Committee** in Barbara Davis' absence. He noted that the Committee had developed a proposed FFS Rule 8 which would make it easier for non-attorney mediators (at least those who are licensed professionals) to qualify for certification. Mr. Little suggested that he did not want to hurry this matter and asked that the draft be run by family lawyers Jaye Meyer, Wade Harrison and George Cunningham for their comments. He also noted that it should be submitted to the Family Law Section. Next, Mr. Gumbiner raised the issue of whether the Commission should recognize mediators who complete continuing education. He suggested noting them by posting an asterisk next to their names on the web. Ms. Ratliff was asked to contact web personnel to see if this was possible. Mr. Criner expressed some concern that such recognition would, in effect, make CME mandatory.

Mr. Cunningham reported for the **Mediator Certification and Training Committee**. He called attention to a proposed Advisory Opinion which addressed mediator file retention. He reported that it was largely the sense of the Committee that file retention was solely a matter for the discretion of the mediator. Several members expressed their concerns about some of the language in the AO and offered suggestions. After a consensus was reached, Mr. Cunningham said that the changes would be made and the draft re-circulated at the May meeting. Mr. Cunningham also pointed out proposed mediator advertising guidelines that this committee had drafted. Again, some edits were suggested and Mr. Cunningham will re-circulate it at the May meeting. Next, he reported that the application forms for both MSC Program and FFS Programs had been revised consistent with the new 16-hour dual certification training. Also, he noted that his committee had suggested that some language calling attention to the list of mediators on the web site should be added to the MSC and FFS order and designation forms.

Next, Judge DeRamus continued the report of the **Program Operations Committee**. He began by discussing some proposed changes to MSC Rule 4.C., Finalizing the Agreement and Rule 6.B.(4), Reporting Results of Conference. He pointed out that Commission members had two versions before them and he walked them through both. After some lengthy discussion, it was determined that the committee would need to reconcile the two versions or decide which they thought should be considered for adoption. The matter would be put on the agenda for the May meeting. Next, Judge DeRamus discussed proposed revisions to Rule 7.E., Postponement Fees. He noted that he had been concerned that the current rules make the fee mandatory while the comment speaks in terms of good cause exceptions. The proposed rule gives mediators more discretion. Some minor suggestions were made and Judge DeRamus will put this matter back on the agenda for the May meeting.

Next, some ex-officio members gave brief reports. There being no further business Mr. Little adjourned the meeting.

Dispute Resolution Commission

Minutes

Friday, May 16 and Saturday, May 17, 2003
Wilmington, NC

Friday, May 16

Commission members present: Little, Steelman, Isenhower, Cunningham, Morgan, B. Davis, Bernholz, Taylor, Criner, and DeRamus. Ex-officio members and staff present: Beason, Schafer, Van Der Puy, Wrenn, Morris, Walker, Clare, Laney, and Ratliff.

Mr. Little called the meeting to order and welcomed everyone. He first asked for approval of the minutes from the March meeting. Mr. Cunningham noted that on page three that his committee was listed under the wrong title, that it should appear as the "Standards and Discipline Committee." The minutes were adopted with this change.

Mr. Little next called for Ms. Ratliff to give the **Commission's Office Report**. Ms. Ratliff began by noting that the office had been very busy with the certification renewal period which generally runs from mid-March to the end of July. In addition, she noted that the Committees had all been very active and were keeping the office busy. Ms. Ratliff announced that the office had hired a replacement for Yvette Hohenberger who departed in January. Karen Griffith holds a master's degree in library science and will work 20 hours per week. Ms. Ratliff added that she is now trying now to get the new computers that she ordered for the office installed so that Ms. Griffith would have a better machine to work with. Ms. Ratliff next discussed Funds 1715 (MSC) and 1716 (FFS) and noted that AOC staff had informed her that the Commission's small appropriation would likely be cut further, probably by \$10,000. She added that this is particularly problematic in that the loss cannot be made up by additional revenues unless the General Assembly increases its budgeted amount for the Commission. Ms. Ratliff reported that a newsletter will be out soon and she hopes that it will be the last full snail mail edition. She thanked the Dispute Resolution Section for their patience in waiting for the Commission to get its e-mail technology up to speed. She explained that the AOC web folks have been working with her to develop software refinements that will enable the mediator database to isolate e-mail addresses and to communicate them to the AOC's TAO and to print labels for mediators who have not supplied the Commission with an e-mail address. Lastly, Ms. Ratliff reported she attended a regional meeting of program coordinators in Baltimore in April. She mentioned that she hoped the Commission might be willing to host a similar such a meeting at some future date.

Mr. Little next asked Mr. Schafer to report for the **ADR Book Committee**. Mr. Schafer reported that the book would soon be delivered to two locations and would be ready for distribution probably in early August. He added that the list of recipients who would receive the book gratis was still being prepared. He described the book as a 350-page hardbound volume. Any remaining copies will be sold at minimal charge to recoup distribution and mailing costs. He added that Carmon Stuart is really excited.

Next, Mr. Little called for committee reports. He spoke about legislative activity in connection with his report from the **Executive Committee**. He noted that the survival of the District Court Arbitration Program was in question. One legislative body proposed eliminating it; the other

recasting it as a user pay program. Mr. Little asked Mr. Van Der Puy whether he had any comments. Mr. Van Der Puy reported that the outcome was still very uncertain.

Mr. Little then called on Ms. Davis to report for the **Mediator Training and Certification Committee**, but he first asked her to report on her cross-country bike trip to raise money for cancer research. She reported that it was a wonderful challenge and that she and her cohorts raised some \$28,000. Ms. Davis first reported that her group had been looking at possibly recommending some revisions to FFS Rule 8 to broaden the eligibility criteria for certification of non-attorneys. She explained that her committee was specifically considering qualifying certain professions, e.g., master's level therapists and CPA's. Other non-attorney applicants who were not members of the specific professions would still need to qualify as Advanced Practitioner members of ACR. Mr. Isenhower said that he could understand accountants, but why therapists when you are talking about money issues. Mr. Little responded that traditionally therapists were considered as naturals for mediation. He noted that there has been concern about both therapists and accountants in NC. Judge Walker said he is uncomfortable with the whole notion that certain professions are better suited than others. He suggests that the Committee consider the approach taken in the MSC Rules. Mr. Van Der Puy observed that it may be much better to have non-attorneys eligible for certification in that they will be motivated to get trained and they will be regulated. Otherwise, they may be practicing without either safeguard. Mr. Cunningham asked why licensed appraisers were not among the approved professionals? Mr. Van Der Puy added that in reality he believes there are very few non-attorneys interested in certification, that there is a recognition that attorney mediators dominate the market. Mr. Little observed that very few mediator appointments are being made. Mr. Little asked for a show of hands indicating whether the Commission should even proceed with this issue. Members favored proceeding. Ms. Ratliff was asked to set up a meeting with members of the family bar to discuss the issue.

Next, Ms. Davis reported that her Committee was monitoring the newly adopted Guidelines for the 16-hour FFS short course. Mr. Little added that he taught the 16-hour course and did not find it to a positive experience. The short time frame did not give him much of an opportunity to interact with the participants. He noted that he distributed a survey to participants at the end of the course and is still reviewing it. Ms. Ratliff was asked to monitor demand for the course. Next, Ms. Davis reported that her Committee was considering developing criteria for an inactive certification category. She asked for a show of hands as to whether the group favored creation of such a status. They group asked her to move forward. Lastly, Ms. Davis reported that her Committee was considering whether the 6-hour course on NC court structure, civil procedure, etc., could be offered on-line. Ms. Davis noted that it was difficult to offer the course often, because demand was relatively slight. Professor Morris who teaches the class noted that he has a new on-line registration system which he hopes will simplify registration and make him more accessible to would-be, non-attorney mediators. He plans to offer the course twice per year. Concerns were expressed about an on-line approach to offering the course. Specifically, there were concerns expressed about the Commission grading the test. It was suggested that the Commission's office should put some materials up on the web to assist out-of-state attorneys in their independent study of the same material.

Mr. Cunningham next reported for the **Standards and Discipline Committee**. He began by calling attention to proposed Advertising Guidelines for Mediators. There followed discussion about the Guidelines and some relative minor amendments were suggested, including the addition of more gender inclusive language. The Guidelines were adopted as amended. Next, Mr. Cunningham called attention to a proposed Advisory Opinion addressing mediator file retention. There followed discussion as to whether this Opinion was consistent with proposed rule changes before the Program Oversight Committee. Judge DeRamus noted that there may be a conflict

with local rules requiring the mediator to retain a copy of the agreement. After further discussion, a vote was held and the Opinion was approved with one modification, the word "attorney" was changed to "party."

Next, Mr. Little called on Judge DeRamus to report for the **Program Oversight Committee**. Judge DeRamus noted that his Committee had a number of matters to bring before the Commission. He began with a discussion of proposed changes to MSC and FFS Rules 4 and 6 that address finalizing the agreement and reporting the conference results to the court. There followed some discussion and some proposals for additional, minor changes, e.g., changing 96 hours to 4 business days. The proposed rule revisions were adopted. Next, Judge DeRamus introduced a proposal to revise MSC and FFS Rule 7 relating to postponements. Mr. Criner noted that he did not like the language providing for a mediator to charge a \$75.00 fee to postpone a scheduled mediation without a finding of good cause. He thought it might cause mediators to be seen as greedy. He also noted the "shall" language and asked whether the mediator was to collect the fee if s/he was the one who requested the postponement? Mr. Beason observed that he would like to eliminate the three-step approach and cut back to two steps. He also pointed out that he believes the "shall" language is important if a mediator was going to be able to collect the money without offending the lawyers. Mr. Little noted that either "may" or "shall" was acceptable to him, that this was largely a matter for mediators who are court-appointed. Selected mediators, he noted, will already have an agreement regarding postponements. The two-step approach suggested by Mr. Beason was favored and the MSC and FFS Rule 7 revisions were adopted with amendments. Next, the Commission reviewed a number of forms changes, particularly changes to the MSC and FFS Reports of Mediator. The revised forms were all approved with minor revisions. Next, Judge DeRamus called attention to the model appointment policy designed to encourage Senior Resident Superior Court Judges and Chief District Court Judges to rely on the Commission's list of approved mediators rather than developing short lists. The policy also addresses geographic restrictions. The Commission adopted the policy with one minor revision. In the last sentence, "State Mediation Rules" was replaced with "Supreme Court Rules."

Since time was drawing to a close, Mr. Little adjourned the meeting and asked Commission members to reassemble on Saturday morning at 7:30 a.m. for a breakfast meeting.

Saturday, May 17

Commission members met for a brief breakfast meeting to begin to brainstorm about issues which should be before the Commission in the coming fiscal year.

Dispute Resolution Commission

Minutes

Friday, August 1, 2003
Smith Moore Law Offices
Greensboro, NC

Commission members present: Little, Steelman, Cunningham, Morgan, B. Davis, Bernholz, Taylor, DeRamus, Seigle, Gumbiner, and White. Ex-officio members and staff present: Walker, McKee, Van Der Puy, Laney, McCrodden, and Ratliff. Also present were guests Tanya Gentry and Scott Hientzelman.

Mr. Little presented the minutes for adoption. The minutes were approved with one amendment – the minutes should say that the meeting was adjourned, not recessed. Next, Mr. Little called for Ms. Ratliff's office report. She first reported that the 2003/04 renewal period was now concluded and that 922 certified superior court mediators remained on the list. Eighty-nine were removed from the list for electing to withdraw or for failing to respond to the renewal packet. She also reported that to date \$116,600 had been collected in renewal fees. With regard to the Family Financial Settlement Program, she reported that 193 certified family mediators remained on the list and that \$28,710 had been collected to date in certification fees.

Ms. Ratliff also reported that the office is moving forward with posting the newsletter on-line. She noted that 121 mediators had supplied them with no e-mail address. She also reported that the office had undertaken a trial run of its new programming only to find that 49 notices were undeliverable. She was told that this was due to viruses. She thanked Ms. McCrodden and the Section for their patience while the office worked out technology issues. Ms. Ratliff next reported that she was still having some difficulty getting complete caseload statistical data from the AOC. Mr. Van Der Puy offered to try and assist her in getting information. Lastly, she noted that the office is now keeping lists of the following callers: non-attorneys who are unhappy that they are not eligible for family certification, certified MSC mediators who want the 16-hour course, and mediators who do not want us to contact them via e-mail.

Ms. Ratliff was asked whether the Commission has received any appropriation. Mr. Little stated that he did not have a final answer. Ms. Ratliff responded that it was her understanding from AOC staff that the Commission had lost only \$10,000 of its appropriation. Mr. Little asked Mr. Van Der Puy to comment if he had any update on the AOC's budget or the final outcome of the Court-Ordered Arbitration Program. He reported that matters were still not fully settled. Next, Mr. Little gave a brief legislative update. Specifically, he noted a piece of legislation that had been passed which provided for concurrent jurisdiction between district and superior court in four pilot districts to be determined by the AOC. He noted that he was particularly concerned that the bill tacked on language that seemed to blur the boundary between superior and district court alternative dispute resolution programs. He anticipated that that the new language might be used to, again, provide for district court arbitration of superior court cases, even though new legislation had been introduced to limit the reach of the district court program to district court cases. He added that he is also concerned that the legislation appears to suggest that the court will assign the case to a particular dispute resolution process rather than leaving that decision to the parties. Mr. Little indicated that he was concerned that there had not been more open discussion of this legislation relative to its potential to impact dispute resolution programs. Mr. Little noted that there would be a meeting to discuss the legislation on August 22 in Raleigh.

Mr. Little next noted that the ADR Book is scheduled to be come off the press this month. He invited Commission members to contribute ideas for generating publicity about the book.

Next, Mr. Little introduced Betsey McCrodden who joins the Commission as an ex-officio member in her capacity as Chair of the NCBA's Dispute Resolution Section. Ms. McCrodden spoke about the results of a survey the Section had conducted of its members. The survey asked questions about practical aspects of their work as mediators and any difficulties they had experienced, including payment problems, subpoena issues, and so forth. There followed discussion about fee payment issues and what, if anything, more the Commission might do to ensure payment of mediators. Mr. Little noted that he was concerned that the subject of fees frequently surfaced as the foremost concern of the Section.

Next, Mr. Little explained that it was his intention to have each of the Committees meeting during the lunch period and that afterwards there would be reports to the Commission. He asked whether any Committee had any matter that should be brought before the Commission before the Committees began to meet. Barbara Davis asked to report for the **Mediator Certification and Training Committee**. Ms. Davis reported that her Committee has been working on an inactive status policy. She noted that her Committee has struggled with the issue of whether to have the policy be open-ended, that is anyone could apply, or to make it more restrictive, only those who cannot actively practice would be eligible, e.g., mediators unable to practice due to their employment situation or health care concerns. She noted that they had also struggled over the amount to charge. Ms. Davis expressed concern that the inactive fee established by the policy might be too high (one-half the amount of the certification fee). She said that the Committee believed that a higher inactive fee might encourage more mediators to simply remain certified. Judge Walker noted that he felt that the one-half amount was too high. Others expressed concern that eligibility for inactive status should not be limited, i.e., that is should be open to anyone not interested in actively practicing for whatever reason. Mr. White noted that the policy needed to be very clear about the protocol for returning to active status. At this point in the discussion, it was suggested that the policy as submitted needed more attention.

At this time, the Commission broke for lunch and each of the Committees met in separate session. Following lunch, the Commission re-convened and Mr. Little called for Committee reports. Ms. Davis again reported for the **Mediator Certification and Training Committee**. She introduced a revised inactive status policy. This policy provided for anyone to apply for inactive status regardless of their circumstances and cut the application fee to \$35 for single certification and \$50 for dual certification. The protocol for returning to active status was clarified. There followed some discussion as to what amount of activity could be anticipated in terms of mediators seeking inactive status. Mr. Little called for a vote and the policy was adopted.

Judge DeRamus next reported for the **Program Oversight Committee**. He submitted proposed revisions to MSC Rule 10 and FFS Rule 10 which address the alternate procedures. He explained that the Committee was recommending revisions to these rules relative to finalizing agreements and reporting results of conferences. The revisions were intended to make finalizing and reporting requirements for the alternate procedures consistent with those recently adopted by the Commission for mediated settlement. The revisions were adopted and Ms. Ratliff was asked to submit them to the ADR Committee along with the revisions adopted for the MSC and FFS Rules. Judge De Ramus reported that his Committee would next be considering Ms. Davis' request that the FFS Rule on *ex parte* communications prior to mediation be revised to reflect the more liberal MSC Rule. Mr. Little noted that *ex parte* communications in family cases had been a source of some contention during the rule development process. He asked Ms. Ratliff to write

to George Cunningham, Wade Harrison and Jaye Meyer to ask for their input. Judge DeRamus noted that he may also have his Committee look at some of the fee concerns that Ms. McCrodden had raised and specifically late fees for failure to make timely payment.

George Cunningham reported for the **Standards and Discipline Committee**. George noted first that his Committee had been processing a number of disciplinary matters reported by applicants for certification and renewal of certification. He noted that the Supreme Court's Rules for the Commission, which address investigation of complaints and the conduct of hearings, do not specifically address self-reporting by mediators, the work of the standing committee appointed by Mr. Little to oversee self-reporting, or provide an appeals process in instances where the Commission takes adverse action against a mediator who has self-reported a disciplinary or criminal matter. He noted that this group would be working on revising the Commission's Rules to address self-reporting issues and the work of his Committee. He also reported that the Committee was working on developing two Advisory Opinions which would likely be submitted at the next meeting. Lastly, he noted that the Committee had adopted some Guidelines that would help streamline processing of self-reported matters and address privacy concerns. Mr. Little stated that he would like to give the full Commission an opportunity to consider the Guidelines more thoroughly and he asked that the matter be put on the agenda for the upcoming meeting.

At this point, Mr. Little asked for the members of the full Commission and staff to remain and excused everyone else so that Commission members could discuss certain disciplinary matters confidentially. First, they discussed Mediator A who was reprimanded by the State Bar for mediating a family matter and then proceeding to represent the husband in the ensuing divorce litigation. The Standards and Discipline Committee recommended that the mediator be suspended for six months beginning July 1, 2003, and that she be required to complete two hours total of ethics education under the supervision of Judge Walker and Mr. Little. The Commission approved. Next, the Commission was advised of Applicant for Certification B who had been disciplined five times by the State Bar beginning in 1989. The Committee advised the Commission that it had authorized the Executive Secretary to contact the applicant for certification and inquire about his conduct, including whether he had some underlying problem that was ultimately responsible for his conduct, *e.g.*, depression and drugs/alcohol, and if so, to inquire what steps he had taken to address such problem. The Committee had also authorized the Executive Secretary to contact the Senior Resident Superior Court Judge, Chief District Court Judge, and District Attorney in the mediator's home district to ask for references relative to his character and professional conduct. The Commission ratified the Committee actions.

Lastly, Mr. Little adjourned the meeting, but asked for members of the Executive Committee to remain so that they could discuss issues pertaining to the web site. Ms. Ratliff explained that she would like to be able to post the profile notebooks on the web accompanied by a search index. She submitted a list of key work divided by topic. There followed considerable discussion with Mr. Little expressing concern that the key word search was tantamount to the Commission endorsing the concept of mediator specialization. Others suggested that parties and attorneys should be able to consider such information in making their selection. Ultimately, the Committee determined that Ms. Ratliff could proceed to post the profiles but that she should limit the key word search to the broader topic headings. Ms. Ratliff had also suggested that mediators be permitted to select five key terms to describe their experience and qualifications. The Committee determined to permit mediators to make up to fifteen selections. There being no further matters, Mr. Little adjourned the Executive Committee meeting.

Minutes
NC Dispute Resolution Commission
November 7, 2003
10:00 a.m.
Anderson Plaza, Raleigh

Members present: Andy Little, Judge Judson DeRamus, Barbara Davis, Randy Isenhower, Ken Gumbiner, Dottie Bernholz, Judge Mike Morgan, George Cunningham, Judge Kim Taylor, Diann Seigle, and Judge Sanford Steelman. Ex-officio members present: Don McKee, John Schafer, Frank Laney, Ella Wrenn, Mark Van Der Puy, and Professor Mark Morris. Staff present: Leslie Ratliff. Excused absences: Betsy McCrodden, Sherman Criner, and Merritt White.

Mr. Little began the meeting by welcoming everyone and calling for approval of the minutes. They were approved. Mr. Little next called for Ms. Ratliff's office report. Ms. Ratliff reminded members that at the last meeting there had been a question raised about whether the Commission received any appropriation this fiscal year. She reported that AOC budget staff person, Elisa Wolper, had advised her that the Commission's appropriation had been cut to \$10,000 dollars. She said that the budget was still not finalized in some respects and there was a possibility, though very remote, that the Commission could still lose this funding.

Ms. Ratliff also noted that the Commission had published its first on-line version of *The Intermediary*. Ms. Ratliff explained that mediators would receive an e-mail message whenever a new edition was published and be told how to access it. She added that there were still some 150 mediators that either had no e-mail address or had told the Commission not to use their address. Those mediators, she explained, would receive a hard copy of the Commission's portion of the newsletter only with instructions on how to access the Section's portion on-line. Ms. Ratliff hopes this will serve as some incentive for them to supply her with an e-mail address. She reported that on-line delivery cut printing and mailing costs significantly. However, she added that the office would probably make the 150 hard copies and prepare them for mailing internally which would mean a little more work for staff.

Next, Ms. Ratliff reported that AOC warehouse personnel had mailed all certified mediators and judges copies of the ADR Book and was holding additional copies in storage. She next discussed CME reporting. She noted that a small majority of mediators had not returned the required CME reporting form for Fiscal Year 2003/04. Also, she noted that many who did report claimed credit for activities that the Certification and Training Committee had deemed unacceptable, e.g., 40, 16, and 6-hour training courses and CLE courses with no apparent dispute resolution nexus.

Lastly, Ms. Ratliff noted that AOC Director John Kennedy had responded to a letter from Mr. Little regarding caseload statistics for the MSC and FFS programs and that she had now received some preliminary data for both Programs. Ms. Ratliff noted that she was pleased to have the data, but concerned about the large number of notations on the report denoting districts with questionable numbers. There followed a lengthy discussion about caseload statistics. Ms. Davis suggested the Commission's office explore grant funding and IOG involvement with data collection. Ms. Seigle noted that other universities, including NCSU, have staff available to assist government agencies and the private sector with research projects. Mr. Little concluded the discussion by noting he was pleased that the AOC had responded to the Commission's letter and concerns and had reported some numbers, though they might not be as solid as the Commission would like. He added that he planned to respond to Mr. Kennedy's letter.

John Schafer next reported for the **Book Committee** saying that the Committee was now winding down. Remaining funds, he reported, would be used to partially fund a CME Program that would highlight the book and its effective use. He noted that he and other Book Committee members had received much positive feedback. There followed discussion about distribution of the book to legislators and Ms. Seigle asked whether copies could be given to district attorneys? Mr. Little said that he

thought enough copies remained. He then extended his special thanks to John Schafer, Carmon Stuart, and Jackie Clare for a job well done.

Mr. Little next called for Committee Reports and began with his report for the **Executive Committee**. He began by noting he had appointed a three-member panel to hear complaints filed by an attorney and a litigant alleging that a certified family financial mediator had violated the Standards. He observed this would be the first such hearing held. He added that he was concerned that the Commission's Rules for conducting hearings were not as complete as they should be and, he believed, raised some possible due process issues. He next called the group's attention to a rough draft of some proposed rule revisions. In putting things in an historical context, he observed that in the past the Commission had been confronted with few ethical concerns. Revised applications and certification renewal forms mandating reporting of convictions and disciplinary matters were now bringing these matters to the forefront. Attorneys and litigants, he suggested, were also becoming more sophisticated about matters of mediator conduct. He believed it was now time that the Commission re-visit its rules regarding discipline and the conduct of hearings. He asked for Commission members to comment on the document before them. Mr. Cunningham suggested the Commission look at State Bar and Judicial Standards Commission Rules. Judge Taylor was concerned that the document did not go far enough in providing due process protection for mediators. She and others expressed concern that, the right of appeal to the full Commission notwithstanding, the document did not guarantee a mediator the opportunity to be heard by the Standards and Discipline Committee before it imposed discipline. Ms. Bernholz suggested asking administrative law experts at the IOG to review the document. Ms. Davis raised quorum issues, what number of votes should be necessary for discipline to be imposed? The question was also raised whether the Commission's decision was final? Mr. Laney suggested there would be a right of appeal. Professor Morris suggested that the Commission should look at the Administrative Procedures Act and might even need to reference it in the document. The notion of a record was also raised and it was noted that the Judicial Standards Commission video-tapes its hearings. In concluding, Mr. Little suggested the Commission is now moving into a judicial role. He noted that he would keep all the foregoing comments in mind and the Executive Committee would do some further drafting in preparation for the next Commission meeting. He asked Ms. Ratliff to contact the State Bar and Judicial Standards Commission to obtain information about their investigative and hearing procedures.

Continuing his report for the Executive Committee, Mr. Little noted that he had received a letter from State Bar President Jim Dorsett responding to his request for assistance in bringing the Commission into the loop when the Bar receives complaints involving mediated settlement or an attorney acting as a mediator. He reported that Mr. Dorsett had asked Bar staff to be on the lookout for such situations and, that when they occurred, to notify the Commission. Ms. Ratliff added that she had discussed the matter with Carolin Bakewell. Ms. Bakewell said they would try to assist the Commission but with so many complaints and staff attorneys involved, she could not provide assurances that everything would be flagged. Ms. Bakewell also told her that the names of attorneys who are publicly disciplined are reported on the State Bar's web site. Commission staff will review the web site monthly for the purpose of noting any mediators appearing on the list.

Next, Mr. Little noted that efforts would soon be underway to establish a new mediation program. He stated that the purpose of the program will be to offer mediated settlement in cases before Clerks of Superior Court, including but not limited to estate, guardianship, and foreclosure matters. Ms. Seigle noted that because many of the cases filed before the Clerk involve family issues and the expectation of a continuing relationship, they are ideal candidates for mediation. Mr. Little noted that he would soon be appointing a Committee to begin drafting some legislation.

Next Ms. Davis reported for the **Mediator Certification and Training Committee**. First, she reported that 6-hour trainer John Motsinger had requested permission from the Committee to explore offering that program on-line. Mr. Motsinger and Mr. Lewis Edwards of Randolph County Community College spoke with the Committee. They discussed ways to make the course interactive and to provide assurances that participants mastered one level of material before proceeding to the next. The

Committee, Ms Davis reported, had given Mr. Motsinger permission to proceed with the expectation that they would review the actual on-line program before approving it.

Ms. Davis next reported that Ms. Ratliff had asked whether she could allow a non-attorney applicant for certification to complete an independent study in lieu of attending Professor Morris' 6-hour course? Ms. Ratliff added that the applicant's daughter was getting married on the date of the next scheduled course and that she would have to wait some months for the next offering. Ms. Davis reported that the Committee told Ms. Ratliff that, in this instance, the independent study would be approved. Such approvals, the Committee determined, would be on a case-by-case basis and allowed only when the applicant had a compelling reason for not attending. It was pointed out that once the on-line course is in place, such situations would be moot.

Third, Ms. Davis reported that Ms. Ratliff had asked the Committee to consider what fee should be charged for certification of the 16-hour course. The Committee had decided, she explained, to charge the same \$200 fee assessed 40-hour trainers because it took essentially the same amount of time to time and effort to review the applications. She added that her Committee had decided that it was time to review the entire certification fee structure. Fourth, Ms. Davis reported that her Committee had determined to apply MSC Guidelines relating to stale training to the FFS Program. Mr. Little suggested that this might be a good time for the Commission to review all the various Guidelines that had been adopted by the Committees since the Commission's inception.

Fifth, Ms. Davis raised the issue of what, if anything, should be done about mediators who fail to return the CME report form or who report hours that are not acceptable? After some discussion, it was decided that Ms. Ratliff would contact only those who did not file a form and remind them to report.

Next, George Cunningham reported for the **Standards and Discipline Committee**. First, he began by reminding those present that a mediator had recently been suspended upon recommendation of his Committee. Specifically, the mediator was suspended for six months and required to complete two hours of mentorship on the Standards during that period. Mr. Cunningham noted that the mediator had yet to comply or even schedule the additional training. Next, he reported that his Committee had contacted judges and a DA for references on a candidate for certification with a history of disciplinary problems. Based on the references and the mediator's forthright and sincere attempt to address the Committee's concerns, the Committee determined to certify him with a warning that the Committee expected his full compliance with all rules and standards.

Next, Mr. Cunningham asked those present to consider the proposed advisory opinion (AO) dealing with *ex parte* communications occurring after a mediation. Ms. Davis raised a concern that some of the language in the last paragraph was not gender neutral. This opinion was adopted by the full Commission with the changes Ms. Davis suggested. Next, Mr. Cunningham asked the Commission to consider the proposed AO addressing the bankruptcy of a party ordered to mediation. Mr. Little commented that it was clear that a mediation on equitable distribution issues would be stayed, but what about a mediation that was to address only child support or alimony? Others suggested that the opinion ought to be cast as a better practice opinion, rather than as one appearing to dictate the mediator's conduct. Mr. Cunningham noted that he had some reservations that the opinion was tantamount to the Commission practicing law. Judge Taylor responded that she felt this was more in the nature of giving useful information that mediators and state court officials would appreciate. The discussion concluded with Mr. Little suggesting that the Committee fine-tune the opinion. Mr. Cunningham next asked those present to consider the AO prohibiting a mediator from representing one of the parties to a mediation in an ensuing divorce. This AO, he noted, was tied in with a proposed amendment to Standard VII.C. That proposed language would clarify that a mediator should not take a case that is closely related to a case s/he mediated, that is an outgrowth of that case, or that involves the same parties. There followed quite a lot of discussion about the opinion and the proposed revision to the Standards. Judge Walker suggested that particularly in small towns, mediators would be reluctant to practice if they thought they would be foreclosed from accepting additional legal work from the parties. He believed it needed to be clarified that the prohibition did not extend to other actions that the parties

might be involved in. It was also suggested that the opinion and Standard only addressed impropriety and that the appearance of impropriety was just as important. Another suggested that perhaps the Standard should specifically address family disputes. Mr. Little suggested that the Committee needed to fine-tune the proposed Standard and AO further.

Lastly, Mr. Cunningham discussed the Committee's recommendation for a proposed revision to the preamble to the Standards. He noted that this proposal was the result of an issue raised by Ms. Seigle. She had asked the Committee to consider revising the standards in light of her office being hired by a federal agency to mediate cases evaluatively, *i.e.*, to give the parties an opinion on what the case is worth and/or how it might be decided in court. The Committee, Mr. Cunningham explained, had considered the matter and noted that many other agencies such as the EEOC use certified mediators but operate under different rules and standards. The Committee was suggesting that the preamble be revised to exempt mediators who were certified but working in a program governed by different rules and standards. It was suggested to Mr. Cunningham that the revision was too broad, *i.e.*, that the language should not generally exempt mediators operating under different rules or standards in general, but only those operating under standards or rules that conflict with the Commission's standards. Mr. Little next raised an additional question about the preamble. Does statutory authority exist for the Supreme Court to govern the conduct of mediators operating outside the context of mediated settlement conferences, whether in a federal program, other state program, or privately? If the Commission believes that such mediators should be governed by the Standards, then Mr. Little suggested that a statutory amendment would probably be in order.

Mr. Little also raised the issue of an anonymous complaint that had been filed with the Commission. He suggested that this Committee consider how the Commission should respond to anonymous complaints. Mr. Little said the Commission may want its response to hinge upon whether the complaint can be verified through the public record.

Next, Judge De Ramus reported for the **Program Oversight Committee**. Judge DeRamus noted first that his Committee had reviewed all the Rule changes approved by the Commission to date in preparation for forwarding them on to ADR Committee. He also reported that Ms. Ratliff had met with Forms Committee personnel to review the forms accompanying the proposed rule changes. His Committee had met this morning to consider revisions proposed by the Forms Committee. Mr. Little noted that he had four matters that he wished this Committee to consider with a view to amending the statutes: 1) Should observers, students, and experts present at mediated settlement conferences be protected from subpoena? 2) Should a mediator be permitted to testify (if the parties have no objection)? 3) Is the "in mediation" language in the statute limited to conduct and statements occurring during the conference or does it also cover conduct and statements occurring in preparation for and following mediation? 4) Are the mediator's own statements and conduct confidential and inadmissible?

There being nothing further from the Committees, some tentative meeting dates were discussed which Mr. Little noted would be confirmed. Mr. Little thanked everyone for coming and working so hard and adjourned the meeting.