

# Dispute Resolution Commission

## Minutes

Friday, February 6, 2004

10:00 a.m.

Smith Moore Law Offices

Greensboro, NC

Commission members present: Little, Criner, Cunningham, B. Davis, DeRamus, Gumbiner, Morgan, Seigle, Steelman and White. Ex-officio members and staff present: Beason, Laney, Morris, Walker, Wrenn, and Van Der Puy. Staff present: Ratliff.

Mr. Little welcomed everyone and noted that the agenda would start with committee reports following approval of the minutes. The minutes were approved as submitted.

Mr. Little first called on Mr. Cunningham to report for the **Standards and Discipline Committee**. Mr. Cunningham first introduced the proposed Advisory Opinion addressing the mediation of a case involving a party who declared bankruptcy. There followed some considerable discussion about this opinion. Some wording changes were suggested. Mr. Laney noted that he was a little uncomfortable with the opinion and thought the Commission appeared to be giving advice on bankruptcy law. He suggested the Commission should consult with someone knowledgeable about bankruptcy law. Others noted that this situation was likely to arise in mediation and that mediators might benefit from some guidance. Mr. Cunningham offered to withdraw the opinion. Mr. Little suggested that the Committee seek to work with it one more time. Then, he referred it back to committee.

Next Mr. Cunningham introduced the Advisory Opinion addressing whether a mediator who mediated for and drafted a separation agreement for a couple could then represent the husband in the ensuing domestic litigation. There followed some considerable discussion about the last paragraph. Judge Walker noted that the use of the word "divorce" in a global sense was probably inappropriate in the last paragraph. Eventually the group settled on the following language for the last paragraph: "For the reasons given above, the mediator should decline to represent either party on any matter arising out of the marital relationship." With that revision, the Opinion was adopted. Ms. Ratliff noted that she would be sending the Opinions to *Lawyer's Weekly* for publication.

Next, Mr. Cunningham introduced proposed revisions to the Standards of Professional Conduct for Mediators. Mr. Little suggested that the Commission walk through the proposed revisions paragraph by paragraph. The group began by discussing the preamble. With one small revision, the group approved of this change which provides that when certified mediators are working in other programs that the Standards apply unless they conflict with the other program's rules. Next, Mr. Little asked whether there were objections to revisions making the Standards gender neutral. There were none, but members noted that consistent terms needed to be used, *e.g.*, he/she or s/he.

The next portion of the Standards examined was Standard VII.C. which discusses a lawyer's obligation not to represent the parties in future matters relating to the extant dispute. There followed much discussion about this language with Mr. Beason maintaining that the language about the "same parties" should remain. The discussion moved back to earlier comments from Judge Walker in which he had expressed concern that small town mediators might lose work if the Standard was drawn too broadly. Eventually, the group agreed on the language submitted by the committee.

Next, Mr. Little took the group back to discuss Standard III. Confidentiality. They began to discuss this Standard and made some punctuation changes before deciding that they needed to first discuss proposed revisions to G.S. 7A-38.1(l) and 7A-38.4A(j) which also address confidentiality. Mr. Little deferred to Judge DeRamus whose committee was considering this matter.

Judge DeRamus began his report for the **Program Oversight Committee** by sharing the committee's suggested revisions to these statutes. Mr. Laney noted that he had some major concerns with the proposed revisions to the statute and Standards: The first paragraph of (l), he observed, provided that statements made and conduct occurring in a mediated settlement conference are inadmissible. Then, the revised language in the second paragraph suggests that mediators can testify if everyone agrees. There followed much discussion as to whether mediators should be allowed to testify even if everyone agreed. Mr. White gave an example where fraud was involved at the mediation and suggested that perhaps there should be a fraud exception. Ms. Davis expressed concern that if mediators testify, even with permission from the parties, that it could undermine confidentiality in the eyes of the public.

It was also pointed out that the exceptions to the prohibition on mediator subpoena and testimony should extend to observers and others if they are provided protection by the statutes. Lastly, it was questioned whether the protection against subpoena should extend to expert witnesses or anyone else not there as an observer. After much discussion, Mr. Little asked Judge DeRamus' Committee to work on the statute further. He also put the proposed revisions to Standard III on hold given the need to work further on the statute.

Next, Judge DesRamus called the group's attention to proposed revisions to Rule 3.1. of the Guidelines for Resolving Scheduling Conflicts. The Commission adopted the proposal as submitted. Judge DeRamus asked if there were any comments on the draft letter which he noted was for the Chairman's consideration. There were no comments.

Next, Ms. Davis reported for the **Mediator Certification and Training Committee**. Ms. Davis noted that one of the items her committee had considered this quarter was trainer certification fees. The committee had determined not to recommend raising fees at this time. She reported that the committee had also looked at confidentiality issues relative to the Commission's certification files and its files addressing disciplinary matters. She also noted that her committee was looking at whether Commission hearings are subject to the Open Meetings Law. She added that her committee had gotten some conflicting advice from the IOG and AOC. Ms. Davis noted that some of the

information in Commission files could be considered sensitive: 1) application information including, name, address, social security number, pending complaints, convictions, disciplinary actions which might be confidential under the rules of the body which imposed the punishment; Ethics Log materials; and files addressing complaints against mediators. It appeared to be the consensus of the group that application materials should remain confidential. Mr. Laney suggested that he favored a more open complaint process in the public's interest, *i.e.*, once the mediator had responded, he believed complaints should be public record. Ms. Davis asked for guidance from the group. Judge Walker suggested the committee look at all the issues, decide what should be confidential and then draft an internal protocol. Rule and statutory changes, if needed, could flow from the protocol.

Next Mr. Little reported for the **Executive Committee**. He noted that the Executive Committee had not met this quarter, but would be getting together prior to the March meeting to consider proposed hearing procedures. He added that Ken Babb, a Winston-Salem attorney, had agreed to chair a new ad hoc committee charged with considering whether a settlement procedures program should be established for cases under the jurisdiction of Clerks of Superior Court, including adult guardianship and estate matters. Mr. Little added that members of the committee would be appointed soon.

Next, the group returned to the matter of proposed revisions to 7A-38.1(l) and 7A-38.4A(j). There was further discussion about who besides mediators should not be compellable to testify. Mr. Little and Mr. Cunningham raised concerns about the inclusion of expert witnesses. Several noted that they believed that only those who are present as true "neutrals", *i.e.*, with no stake in the proceedings should be covered, including observers seeking certification, students, interpreters. Ms. Davis and Mr. Van Der Puy reiterated their concerns that allowing mediators to testify under any circumstances could undermine public confidence in confidentiality. Mr. Laney noted that he was concerned about the situation where a party might try to perpetrate a fraud in mediation and suggested he would be comfortable with a fraud within mediation exception.

Next, Mr. Little asked for the full Commission to meet in private session to discuss the matter of family financial Mediator X who was the subject of a recent disciplinary hearing conducted by a panel appointed by the Chair. Ex-officio members departed. The members of the panel (Judges Steelman and Morgan and Mr. Criner) discussed their recommendations with Commission members. Judge Steelman noted that two separate complaints were addressed at the hearing. In the first complaint, it was alleged that Mediator X acted both as a mediator for the couple and as attorney for the husband. The panel recommended dismissal of this complaint having found that no mediation occurred, that instead there was a negotiation during which Mediator X represented only the husband. In the second complaint, it was alleged that Mediator X acted both as a mediator and as an attorney for both the husband and wife. In this instance, the panel found that Mediator X had, in fact, served as the mediator and attorney for both the husband and wife. The panel recommended the following sanctions against Mediator X: that she complete two observations and six hours of family CME. There followed some

discussion of the recommendation in the second case. Mr. Cunningham noted that the Commission had recently suspended a mediator for drafting a separation agreement and then representing the husband. Mr. Little noted that this disparity concerned him also. However, there followed discussion about the fact the Mediator X seemed very concerned about the proceeding, took it very seriously, and expressed remorse. It was noted that had not been the case with the first mediator. After some further discussion, the Commission adopted the panel's recommendation with some minor wording changes in the second recommendation, *i.e.*, change "Executive Director" to "Executive Secretary" and insert the word "written" in front of the word certification. Ms. Ratliff was instructed to forward the final orders to Mediator X by certified mail, return receipt requested.

Next, Mr. Little asked Ms. Ratliff for her report. She briefly noted that certifications and collections were up for both programs with numbers already exceeding those for the end of the last fiscal year. The Supreme Court, she reported, had not yet acted on the proposed rule changes before it. Ms. Ratliff also recounted that the Commission's Annual Report for FY 2002/03 had been published along with caseload statistics for both the MSC and FFS Programs. The office, she added, was sending out reminder letters on continuing mediator education and would be folding the report into the renewal form for the coming year. She noted that there were additional written complaints regarding mediator conduct and that they were being addressed now and she explained why the Commission and Dispute Resolution Section's newsletters were being published separately this quarter. In the coming quarter, she noted that she would be focusing on web site and certification renewal issues.

Mr. Little next suggested two possible dates for an August meeting: August 13<sup>th</sup> or August 20<sup>th</sup>. There followed some discussion of how many Commission members terms would expire this coming September 30<sup>th</sup>. It was suggested that if seats are filled, the new appointees should attend the August meeting. There being no further business the meeting was adjourned.

# Dispute Resolution Commission

## Minutes

Thursday, March 18, 2004  
AOC Anderson Drive Offices  
Raleigh, NC

Commission members present: Little, Bernholz, Criner, Cunningham, B. Davis, D. Davis, DeRamus, Gumbiner, Isenhower, Morgan, Steelman, Taylor, and White. Ex-officio members present: Beason, Laney, Schafer, Walker and Wrenn. Staff present: Laue and Ratliff. Guests present: Ms. Oliva and Mr. LaRue. Excused absences: Seigle, McCrodden, and Morris.

Mr. Little welcomed those in attendance and noted that he intended to run the meeting until approximately 3:30 p.m. Several noted that they needed to depart earlier and Mr. Little observed that there are a lot of matters before the Commission now and that folks needed to plan for longer days. Next, Mr. Little called for approval of the minutes which were approved as submitted. Next, Mr. Little asked Mr. Beason to introduce his guests, Mr. LaRue and Ms. Oliva. Mr. Beason explained that they were with Mediation Management, Inc., a firm that assists mediators in managing their practices, including the scheduling of cases. He explained that were in town from New Orleans to attend the Dispute Resolution Section's annual meeting scheduled for tomorrow.

Next, Mr. Little called for Ms. Ratliff's report for the Commission's office. Ms. Ratliff noted that she would be brief and touched on a few matters only. She reported that there are currently 1,021 certified MSC mediators and 201 FFS mediators. 104 individuals hold dual certification. She added that she had certified a number of folks just in the past month. Next, Ms. Ratliff called attention to the fact that the office routinely receives a number of calls from mediators, lawyers, and parties with questions about certification, ethical matters, rule interpretation issues, and miscellaneous inquiries. She noted that the vast majority of the inquiries are handled internally, but that she frequently needs to seek guidance. In such situations, she noted that she usually goes to the Chair and she wanted to acknowledge the assistance that Mr. Little, and Judge Walker before him, had provided her. Next, Ms. Ratliff noted that the proposed MSC and FFS rule changes before the Supreme Court had been adopted as submitted. Also, she added, the proposed additions to the scheduling conflicts rules were adopted as submitted. She reported that mediators would be notified of the revised rules and attendant forms as soon as AOC staff had posted them. Next, Ms. Ratliff noted that a newsletter had gone out a few weeks earlier. She then described some technical issues the office had encountered in trying to do a mass e-mail notifying mediators of the new edition. She explained that the software the AOC had supplied failed, then the TAO directory failed, so Ms. Laue had to manually input e-mail addresses. This was time consuming, she noted, and indicated that the AOC had promised to get the matter resolved in the near future. Next, Ms. Ratliff noted that she was continuing to work with AOC staff to get mediator profile forms posted on the web. Lastly, she reported that the office was gearing up for the next certification renewal period set to begin in April.

Next, Mr. Little said that the committees would meet during the course of the day. He asked first, though, whether any committee would like to make preliminary reports. Ms. Davis spoke for the **Mediator Certification and Training Committee**. She noted that her committee had been looking at confidentiality issues and she asked for feedback on some aspects of their work:

- 1) **Should information in mediator certification files be confidential?** The group agreed that potential identity theft information such as social security numbers and date of birth should always be held confidentially. Other contact and biographical information could be posted on the web. Judge Taylor and Ms. Bernholz raised concerns about Commission liability in general --- in instances where this body refuses to release information upon request, in instances where it posts information about a mediator believing it to be accurate and it is not. Ms. Ratliff noted that a disclaimer will accompany the profiles when they are posted and she suggested that one of the committees may want to review that language.
- 2) **Should self-reported information regarding convictions, including expunged convictions, or convictions as a young adult be treated confidentially?** Judge DeRamus suggested that if the applicant disclosed the information to the Commission, he saw no reason for the Commission to keep it confidential. Judge Walker expressed concern about applicants who fail to disclose negative information. If the Commission does not do a records check and certifies an applicant on the strength of what the applicant reports alone and s/he leaves out material information, is the Commission vulnerable to suit if the applicant is certified and others rely on that certification to their detriment? Ms. Bernholz and Judge Taylor again voiced their concerns that the Commission needs to post disclaimers. Judge Walker asked, is the Commission negligent if it does not do a records check? After much discussion, the consensus seemed to be that expunged convictions should be treated confidentially. Other convictions are a matter of public record and, as such, available elsewhere and there is no reason for the Commission to release this information to the public.
- 3) **Should disciplinary action taken by other agencies and self-reported to the Commission by applicants be treated confidentially?** Ms. Davis noted that lesser bar punishments, such as admonishments, are treated confidentially. There followed prolonged discussion. The prevailing view was that the Commission should gather this information, but not release it to the public or press. It was noted that it would be a burden on staff to have to determine what actions taken by other agencies were, in fact, treated confidentially by those agencies. Judge DeRamus dissented believing that if the information was self-reported by the applicant, there was nothing to prohibit the Commission from revealing it.
- 4) **What information in the Commission's own disciplinary files should be treated as confidential?** The group agreed that all pending complaints should be treated as confidential. Judge Walker asked does this mean that staff do not even say that there was a complaint? It was agreed that the prohibition extended to that as well. Next, Judge Walker asked about a situation where there were multiple complaints involving multiple parties against a single mediator. Could one complainant demand to see the additional complaints? Ms. Davis responded "no", if the complaints are all pending, they should be confidential. Ms. Wrenn noted that many complaints are addressed to judicial assistants and never make it to the Commission.
- 5) **Should the Commission publish its decisions to impose sanctions or to dismiss complaints?** There was support expressed for the position that if a complaint is dismissed, it should not be published. Where disciplinary action was taken, the view was generally that the complaint, response, counter response, and decision should be public record upon request. Ms. Davis asked about whether only sanctions above a certain level should be made public? The Commission did not reach consensus on this matter and Ms. Davis noted that she would like to receive input from the Standards and Discipline Committee. There followed additional discussion about where the materials disclosed should be published. This matter was not resolved, but strong support was expressed for publishing the mediator's name when there has been a censure, suspension, or de-

certification. Judge Taylor noted that she believed the Commission should not pick and choose, but rather publish all disciplinary actions. Mr. White wondered how long such information should be published, should it be a matter of the public record indefinitely, or just until a mediator has been reinstated?

- 6) **Should the ethics log maintained by the Commission's office be confidential?** It was widely agreed that the log should be confidential so as not to chill inquiries. It was suggested that the ethics log might be discoverable.
- 7) **What about the privacy of third parties involved in a mediation that results in a complaint?** The group agreed that all efforts should be taken to protect the privacy of third parties by the deletion of identifying information. However, Ms. Davis noted that it may be impossible to always remove identifying information. She gave the example of a family mediation where it is impossible to conceal the identity of a complaining party's spouse. Ms. Davis suggested that such third parties be notified before complaints, etc., are released and given an opportunity to object. Mr. Little did not favor giving parties a right to object because they had no remedy unless the Commission was willing to give them veto power over publication.
- 8) **Should confidentiality be addressed only through internal rules or a statute?** There was much discussion on this. It was suggested that a statute might draw the attention of those who wish to keep all records public. Ms. Bernholz suggested having internal operating procedures adopted by the Court for the time being. If they are challenged, then the Commission could seek a statute. Ms. Ratliff was requested to contact authorities to determine whether a statute was necessary or desirable.

Mr. Little asked whether the other chairs wanted to briefly state what matters they were considering. Mr. Cunningham stated that his committee was looking at Advisory Opinions. Judge DeRamus noted that his committee was looking at the inadmissibility/subpoena statute. Mr. Little suggested that perhaps the Commission should create a statute of frauds for settlements. Next, Mr. Little called for the various committees to meet and report back to the group following lunch.

Following a working lunch the committees reported, beginning with the **Standards and Discipline Committee**. Mr. Cunningham introduced the bankruptcy advisory opinion which had already before the group at previous meetings. Mr. Cunningham reported that, as requested by Mr. Laney at the last meeting, the committee had gotten feedback from bankruptcy experts. There followed several minutes of discussion about the opinion with the group finally voting to adopt it with some revisions to the final paragraph including language specifying that the mediator should ask the court to clarify his/her duty in light of the bankruptcy filing.

Next, Judge DeRamus reported for the **Program Oversight Committee**. Judge DeRamus first distributed copies of a proposed revision to MSC Rule 8.C.(2) which would add Court of Appeals mediations to those eligible for observation. The proposed revision was adopted unanimously. Next, Judge DeRamus introduced proposed new revisions to the inadmissibility/subpoena statute. Commission members suggested several edits to the draft. Following that discussion, Mr. Little asked Judge DeRamus to take another look at the statute for the purpose of: 1) conforming the MSC and FFS statutes to the fullest extent possible and 2) making the requirements in MSC and FFS Rule 4 symmetrical with the language in the statutes.

Mr. Little reported for the **Executive Committee** that they were continuing to work on proposed new investigative and hearing procedures for the Commission and would hope to have a draft to share at the next meeting. He noted they would be doing some more drafting to clarify what the Standards and Discipline Committee's proceedings would look like. Judge Walker added that

Carmon Stuart would be celebrating his 90<sup>th</sup> birthday in June and noted that Mr. Stuart was interested in raising funds to conduct some research into how mediators and others were using the ADR book.

Lastly, in Ms. Davis' absence, her committee members gave the report for the **Mediator Certification and Training Committee**. It was noted that committee members had reviewed the earlier discussion and would be doing some rule drafting in the near future. The also reported that they recommended that the certification fees remain the same this year as last year and the Commission adopted this recommendation. A couple of pieces of correspondence directed to the Committee were also discussed. In one piece a mediator had asked to receive CME credit for attending mediations at which he represented a party. The Committee said, "no". Mr. Little said that he would call the mediator. In the other instances a mediator had requested to be exempt from completing CME. The Committee simply noted that CME completion was voluntary anyway, so there was no need for a waiver. Mr. Little indicated that he would call this mediator also.

Mr. Little noted that the next meeting was set for August 20<sup>th</sup> in Greensboro. It was suggested that the meeting start at 9:30 a.m. and Mr. Little agreed. There being no further business, the meeting was adjourned.



# Dispute Resolution Commission

## Minutes

Friday, August 20, 2004  
Smith Moore Law Offices  
Greensboro, NC

Commission members present: Little, Bernholz, Criner, Cunningham, DeRamus, Gumbiner, Isenhower, Morgan, Steelman, Lewis, and White. Ex-officio members: Beason, Laney, Schafer, Van Der Puy, Wrenn and McKee. Guests and staff: Judge W. David Lee, N. Lawrence "Larry" Hudspeth, Jim Turner, and Leslie Ratliff.

Mr. Little called the meeting to order and asked those present to introduce themselves. He particularly welcomed the Commission's newest member, Judge Robert D. Lewis, an Emergency Superior Court Judge and active mediator from Asheville. He also welcomed Judge Lee and Mr. Hudspeth, both newly appointed to the Commission effective October 1, 2004. Mr. Little also noted that there were additional appointees named to the Commission effective October 1, 2004, but who could not be present today: mediator and lawyer, Jesse Conley, and district court judges John J. Carroll, III, and Joseph Turner. Mr. Little next called for Committee Reports and reported for the **Executive Committee**.

### Standard V, Self-Determination

Mr. Little began with proposed revisions to Standard V, Self-Determination. He noted that the Standards and Discipline Committee had struggled for some time with the question of whether mediators should give opinions or evaluate cases. He said that while he had reservations, he no longer felt comfortable with the blanket prohibition in the current Standards. He acknowledged that the reality is that some mediators do give opinions and that some parties want to hear those opinions. The proposal before the Commission would, he noted, permit a mediator to give an opinion in limited circumstances. Mr. Beason noted that he was an ardent supporter of self-determination, but that he had discussed the matter with Mr. Little and was comfortable with the proposal on the table. Mr. Van Der Puy noted that he also favored the proposal. He suggested that it gave mediators and parties more flexibility, acknowledged what was happening in the field, but still set limits on the giving of opinions. Judge Lewis expressed concern about the proposed change. He stated that he favors a bright line approach and would prohibit the giving of opinions entirely. He noted that this is not mediation, that other processes such as neutral evaluation are already available, and that a mediator is on shaky ground whenever s/he tries to predict what a judge or jury will do. Lastly, he believes that this is opening the door to greater abuses. Mr. Beason followed up on Judge Lewis' concerns by stating that the reality was that mediators were giving opinions even through a bright line existed now. He added that the Commission had not been enforcing the Standard as written, which brought things back to what Mr. Little said about the Commission being uncomfortable with enforcing such a prohibition.

Judge DeRamus expressed concern about language in the second paragraph of C., which he read to say that if one party wanted an opinion and the other did not, the mediator

could proceed to give the opinion. Mr. Beason stated that what the rule intended was that an opinion never be forced on one party regardless of what another party wanted. Judge DeRamus and Mr. Beason came up with the following further revision: "It does not prohibit the mediator's expression of an opinion as a last resort to a party or attorney who requests it and the mediator has already helped that party utilize his/her own resources to evaluate the dispute and options."

Following discussion, Mr. Little asked for a vote on the proposed revisions to Standard V., Self-Determination. The proposal was adopted with one dissenting vote, Judge Lewis. Ms. Ratliff was asked to prepare the matter for submission to the Supreme Court.

### **Rule 8, Investigation and Hearing Procedures**

Next, Mr. Little called for discussion of Draft #8 of proposed revisions to Rule 8 of the Supreme Court's Rules for the Commission. Rule 8 establishes investigation and hearing procedures. Mr. Little began by explaining that currently there are two separate disciplinary tracks, one for complaints filed by third parties and another for matters self-reported by mediators in the certification context. He noted that the new rules seek to establish a single track for the investigation and hearing of all matters involving conduct, regardless of how the matters arise. Mr. Little noted that he would go through the draft section by section.

Mr. Little first asked about the confidentiality language in Section A.3.a. He explained that the Program Oversight Committee was considering the advisability of recommending a statutory revision addressing confidentiality. He added that the Commission was subject to the Open Records Law, but not the Open Meetings Law. The Executive Committee, he noted, had determined to go ahead and add confidentiality language though the rule would probably not withstand a challenge. He asked Commission members whether they were comfortable with this approach. Mr. Little added that the rules seek to protect disciplinary files only to the point where a probable cause determination is made. This is, he observed, consistent with an informal AG opinion obtained by the Commission. Mr. Laney noted that he did not think the Commission should try to shield mediators once there has been a probable cause determination. He thinks the public has a right to know.

Judge DeRamus said that he was concerned that Subsections iv and v of Section A.3.c. were vague. They speak in terms of "lack of fitness" and "bringing discredit" on the program. Mr. Criner raised concerns about the lack of an appeal process in Section A.4.a. in instances where the Committee finds no probable cause and dismisses a written complaint against a mediator filed by a third party. Others raised questions about Section A.5 which provides for the Chair to dismiss a complaint as "groundless" even though there is a right of appeal to the full Commission. Andy was asked how often "groundless" complaints are filed. He noted that they arise fairly often and he suggested that this provision may be necessary as an administrative aid.

Judge DeRamus asked what would happen if there was a tie vote by the Commission sitting *en banc* and suggested the rules should address this. There was also a question as to whether the Commission or the complaining party was the prosecuting officer for purposes of the hearing. It was also suggested that some mention of the Law of Evidence

be made in the rules. The Commission was divided over the issue of whether hearings should be conducted in private. There were concerns also raised about the wording of the first line of Section B.8., Transcripts. It was suggested that forfeiture of fees be added to the Section 11, Sanctions. There was a question about whether there would be an appeal as a matter of law to the Superior Court if a petition for reinstatement was denied. Judge DeRamus suggested that there should be a cap on how often a petitioner may apply for reinstatement. Mr. Little said the Committee would address all the issues raised in preparation for the September meeting when he hoped to ask for a vote on the Rule.

Ms. Bernholz reported for the **Standards and Discipline Committee**. She noted that the Committee met that morning to discuss two applications. In the first instance, the mediator was convicted of a felony and had applied for inactive status. She reported that the Committee had determined to treat this as a certification renewal and to deny it. In the second instance, a mediator had self-reported numerous serious complaints filed against him with the State Bar. All were pending but two, which resulted in relatively light sanctions. The Committee determined to indefinitely suspend the mediator until such time as the State Bar had processed the additional pending complaints.

Next, Ms. Bernholz called attention to proposed changes to Standard VII.C, Conflicts of Interest. Mr. Little noted this matter had been pending for a while. Concerns were raised about the last portion of the revision. A motion was made to adopt the revision to C. absent the words, "or an action involving the same parties". It was adopted. Lastly, Ms. Bernholz reported that the Committee had adopted a revision to its *Guidelines for Reviewing Pending Grievances/Complaints, Disciplinary Actions Taken and Convictions* eliminating the need for the Committee to address situations where an applicant reports that his/her professional license was temporarily suspended/revoked for administrative reasons only, e.g., failure to timely pay certification fees, and has now been reinstated.

Mr. Criner reported for the **Mediator Certification and Training Committee**. He began by noting that a number of questions had come up in connection with the inactive status category and that the Committee had resolved some issues and was considering others. He noted that Ms. Ratliff would be writing the OAH, IC, and other agencies using the Commission's list to notify them of those that have elected to become inactive.

Next, Mr. Criner noted that the Committee was recommending that a requirement for a 4-year college degree be reinserted in both MSC and FFS Rule 8. Considerable discussion followed. Mr. Little called for a vote. The MSC degree requirement passed with one vote cast against it by Mr. Criner. The FFS degree requirement also passed. Judge DeRamus raised the issue of grand-parenting currently certified mediators and it was agreed that the following language be inserted in both rules: "The 4-year college degree requirement shall not be applicable to mediators certified prior to January 1, 2005." Next, Mr. Criner reported that Ms. Ratliff was beginning to receive applications from graduates of non-accredited law schools and that she was concerned because they could be admitted to practice in some states. The Committee was recommending that both MSC and FFS Rule 8 be revised to provide that "attorney applicants be graduates of law schools recognized as accredited by the North Carolina Board of Law Examiners". This passed unanimously.

Next, Mr. Criner reported that his Committee had determined that both the MSC and FFS Trainer Guidelines should be revised to provide that trainers must specify in their advertising and registration materials that the Commission is the certifying body for mediators and provide a number to contact the Commission. Lastly, Mr. Criner reported that the Committee was recommending that the first comma be removed from MSC Rule 8.C.(2) because it was leading some applicants to view the two clauses as independent of one another when they were not. This recommendation was unanimously approved.

Judge DeRamus reported for the **Program Oversight Committee**. He noted that his Committee was considering proposed statutory changes that that would address confidentiality consistent with the AG's informal opinion and would authorize the Commission to issue subpoenas and the superior courts to enforce them. Judge DeRamus noted that the Committee was still drafting, but he asked for and received Commission approval to move forward. Next, Judge DeRamus called attention to proposed revisions to the MSC and FFS statutes addressing inadmissibility. He noted that these had been before the Commission earlier and had been essentially approved with the proviso that the committee go back and make the FFS and MSC statutes as consistent as possible and make the program rules consistent with the proposed statutory changes. The Commission adopted the proposed statutory changes as submitted and the change to the FFS Rules, but not the revision to the MSC Rules which was adjudged unnecessary. Judge DeRamus also noted that there were proposed revisions to Standard III, Confidentiality, which tracked the statutory changes and those changes were approved by the Commission as well. Lastly, Judge DeRamus reported that his Committee had determined to make a minor revision to the Designation of Mediator form and would be considering whether to recommend that the Commission draft a form order to request extensions. Mr. Little cautioned that some districts have their own such forms and may be protective of them.

Committee reports concluded, Mr. Little called for approval of the minutes from the March meeting. They were approved and he asked for Ms. Ratliff's report. Ms. Ratliff noted that the office had concluded the certification renewal period for FY 2004/05. She noted that 994 mediators remained on the MSC list and 84 on the FFS list with an additional 110 dually certified. She reported that 34 mediators had elected inactive status. She noted collections were up slightly over last year. Ms. Ratliff also called attention to the budget report for June, 2004, and noted that the Commission had total collections of \$160,315.00 for the fiscal year and total expenditures of \$128,096.94. The difference had reverted. Ms. Ratliff noted that she was still working with AOC staff to get the profiles posted by the target date of December 1, 2004. Lastly, she reported that she was waiting for statistics in order to publish the Commission's Annual Report for 2003/04. She suggested that the Commission might want to approach Judge Walker about turning data collection over to the Commission.

There being no further business, Mr. Little announced that the next meeting date would be September 17 in Cary and closed the meeting.

# NC Dispute Resolution Commission

## Minutes

NCBA Bar Center in Cary, NC

September 17, 2004

9:30 a.m.

Members present: Little, Cunningham, DeRamus, Morgan, Seigle, Steelman, and Taylor. Ex-officio members present: Laney, McKee, Morris, Schafer, Walker, and Wrenn. New Commission appointees (effective October 1, 2004) present: Jessie M. Conley, N. Joanne Foil, N. Lawrence Hudspeth, Judge W. David Lee, and Judge Joseph E. Turner. NCBA Dispute Resolution Section Council members, NCBA officials, and Commission staff present: Ann Anderson, Roy Baroff, Bob Cone, Ellen Gelbin, Deborah Isenhour, Maggie Sloane, Leslie McCandless, Gray Wilson, and Leslie Ratliff.

Mr. Little began the meeting by thanking everyone for attending. He noted this would be his last meeting as Chair and he recognized his successor, Judge Steelman, and the new Commission appointees in the room. He noted that later in the day, the Commission would be honoring those members whose terms were expiring. Mr. Laney invited those present to stay for lunch and the Council meeting following the Commission meeting at 12:30 p.m. He noted that the meeting would include a tribute to the late Carmon J. Stuart, a founding member of the Commission and a leader in the dispute resolution arena.

Mr. Little next spoke about the formation of an *ad hoc* committee by the Commission and the Section to explore establishment of a new program for mediation of matters heard by Clerks of Superior Court, including adult guardianship, estate, and boundary disputes. He noted that he and Mr. Laney were serving as co-chairs and that they would be reporting back to the Commission as the Committee's work got underway.

Next, Mr. Little, reporting for the **Executive/Operations Committee**, suggested that the Commission begin its major task for this meeting-- reviewing the proposed draft of new investigative and hearing procedures designed to address conduct and disciplinary matters coming to the Commission's attention as a result of self-reporting by mediators or third party complaints. Mr. Little gave a brief overview of why the Executive Committee felt it was necessary to revise the existing rules. He spoke about the need to flesh out the existing rules and to build in more due process protections for mediators. He also noted that the new rules provided for a two-tiered process. The Standards and Discipline Committee would conduct the initial review of disciplinary matters and either dismiss complaints or order certification or re-certification or, on the other hand, deny certification or impose sanctions. If an applicant or mediator appealed a denial of certification or a sanction, then the matter would be heard *de novo* by the full

Commission. There followed some considerable discussion of the proposed rule and several changes were suggested as discussed in the paragraphs below.

Commission members requested deletion of language in 3.a. which allowed third party character references or witnesses to request that information they provided the Commission regarding applicants, mediators, or trainers be kept confidential. This led to a broader discussion of matters of confidentiality. Mr. Little noted that it was his understanding from an informal opinion issued by Deputy Attorney General Grady Balentine and from discussion with School of Government staff attorneys that the Commission was on firmer ground in terms of confidentiality of its certification files than its disciplinary files. Once a finding of probable cause was made, the disciplinary files would be open to the public.

At this point, Mr. Laney, Judge Turner and others pointed out that though mentioned in A.2.e., the proposed draft did not provide a framework for the review of staff denials of applications for certification and re-certification for reasons not relating to conduct. Mr. Little agreed with them and suggested that perhaps there needed to be an entirely separate rule for addressing staff denials of applications for reasons not relating to conduct.

There followed discussion about whether Committee members who participated in initial determinations should hear the matter when it came before the full Commission on appeal. The Commission agreed that Committee members should not hear appeals even if it meant that in some cases, the matter might be heard by as few as three members. There was additional discussion about whether the Commission should publish all sanctions or just those more serious in nature. It was suggested that the sanctions in Section B.11 be reordered according to their seriousness.

Mr. Little concluded the discussion of Draft 11 by reiterating that the Executive Committee would look into the development of a separate rule for staff denials of certifications or revocations of certifications for non-conduct reasons. He also noted that the Executive Committee would make other changes suggested by the Commission members at the meeting and then submit the draft to the ADR Committee for comment.

Next, Mr. Little called for Committee Reports. Ms. Seigle reported for the **Standards and Discipline Committee**. Ms. Seigle noted that she was reporting for Ms. Bernholz who was away on vacation. Ms. Seigle reported that her Committee had considered two applications for certification that morning and upheld staff decisions to deny in each case. In one of the instances, she noted that the applicant held law and doctoral degrees from unaccredited universities. She noted also that staff and the Committee felt there had been a misrepresentation made regarding what the applicant told staff regarding a master's degree. She noted that the Commission's office had seen an increase in applications involving unaccredited schools. In the other application which involved a renewal, the applicant was a convicted felon. Ms. Seigle concluded by suggesting that the Commission might want to expedite sending proposed rule changes to the Supreme Court that would require lawyers to be graduates of accredited schools and non-lawyers to possess four-year degrees. Lastly, Ms. Seigle reported that the Committee had also

discussed a third matter on which the Committee had already taken action, but which they had revisited at the request of staff.

Judge DeRamus reported for the **Program Oversight Committee**. Judge DeRamus shared some new statutory language with Commission members revising N. C. Gen. Stat. § 7A-38.2 to provide for confidentiality of Commission files and proceedings. There followed some discussion about the effect of the Open Meetings and Open Records Law on the Commission. The members of the Commission voted to approve the provisions, but with the understanding that since the Executive Committee was still drafting in connection with the investigative and hearing rules that there might be a need to tweak or further revise the statute. Judge DeRamus noted that his Committee had also discussed development of a form to facilitate requests for extensions. He noted that Ms. Ratliff would further refine the form and prepare it for submission to the Forms Committee.

Since Mr. Criner was not in attendance, there was no report from the **Mediator Certification and Training Committee**.

At this point, Mr. Little called for a number of Commission members whose terms were expiring to come forward and be recognized. He presented plaques and the Commission's thanks to: Judge Judson DeRamus, Judge Michael Morgan, George Cunningham and Merritt White. Mr. Little also acknowledged Judge Danny Davis whose term was expiring, but who was not in attendance to receive his plaque. Next, Judge Steelman asked Mr. Little to come forward and receive a plaque thanking him for his dedication and service as the Commission's chair and as a member. Judge Steelman noted that he was very pleased that Mr. Little had agreed to remain as an ex-officio member of the Commission.

Lastly, Mr. Little called for approval of the minutes from the last meeting. They were approved unanimously. Lastly, he asked Ms. Ratliff for her office report. Given that time was running short, Ms. Ratliff briefly reported that staff had now tabulated the first two year cycle of CME Reports and that just under half of all certified mediators had complied with the Commission's request that they complete six hours of CME every two years. She also noted that she still had not received caseload statistics for the MSC and FFS Programs from the AOC and was hoping to receive them before transmitting the Commission's Annual Report for FY 2003/04. Lastly, Ms. Ratliff reported that AOC technology staff had pushed back the deadline for posting mediator profiles on the Commission's web site and that the project would not be completed before January at the earliest.

There being no further business, Mr. Little closed the meeting and, again, reminded Commission members that they were invited to remain for lunch and the Council meeting.

# NC Dispute Resolution Commission

## Minutes

December 3, 2004

Smith Moore Law Offices  
Greensboro, NC

Members present: Steelman, Bernholz, Carroll, Conley, Criner, Gumbiner, Hudspeth, Isenhower, Lee, Lewis, Seigle, Taylor, and Turner. Ex-officio members present: Beason, Laney, Little, Morris, and Van Der Puy. Staff present: Ratliff.

Judge Steelman called the meeting to order and thanked everyone for attending. He administered the oath of office to the following new and re-appointed members whose terms commenced October 1, 2004: Bernholz, Carroll, Conley, Gumbiner, Hudspeth, Lee, and Turner. Judge Steelman then called for approval of the minutes from the September meeting. Mr. Little asked to reserve the right to amend the minutes at some future date to add remarks that he had made on the occasion of the conclusion of his term as Chair. There was no objection to this request. There being no further comments, the minutes were adopted.

Ms. Ratliff presented the office report. She first noted that the Commission's Annual Report for 2003/04 had been distributed last month and asked anyone who did not receive a copy to call her. Ms. Ratliff next called attention to the caseload statistics in the Annual Report. She noted that she was concerned that the total number of filings referred to superior court mediation had been dropping the past few years while, during the same period, the total number of civil filings had grown. She suggested this might simply be a failure to capture the data since some districts had not reported during the period, but she suggested the Commission might want to monitor the situation. Ms. Ratliff added that Mr. Van Der Puy had advised her that in the future the AOC may be interested in collaborating with the Commission's office on data collection. Ms. Ratliff also noted that the FFS Program seemed to be in a holding pattern and was not expanding, *i.e.*, no new districts had been added this year. Next, she reported that the Supreme Court had adopted the Commission's recommendation for revisions to the Standards of Conduct. They were adopted, she reported, on October 6, 2004, with an effective date of October 20<sup>th</sup>. She reported that all certified mediators and trainers had been either e-mailed or mailed a copy. Lastly, Ms. Ratliff noted that she was concerned because she had been advised by Tom Nevlud at the AOC that the Commission's project to post mediator profiles on its web site had been put on indefinite hold pending completion of an AOC project with priority status. Ms. Ratliff noted that she specifically asked Mr. Nevlud whether the Commission's project would be reactivated pending completion of the priority project and was told, "no", that someone would have to specifically tell him to



reactive it. At that point, it was suggested that perhaps the Commission should contact Judge Walker.

Next, Judge Steelman called for Committee Reports and noted that the **Executive Committee** had circulated drafts of proposed changes to statutes and rules in the meeting packet. He asked Mr. Little to walk the Commission through the drafts. Ms. Little began with Draft #15 of Commission Rule VIII which sets out a process for investigating and hearing complaints regarding applicant, mediator, or trainer conduct or ethics. Since the Commission had seen earlier drafts, Judge Steelman suggested that perhaps the group ought to focus directly on subsection B.2.(d) where alternative language asked Commission members to decide whether disciplinary hearings should be conducted in private or be open to the public. After some discussion, Judge Turner moved for adoption of the second alternative which provided for the hearings before the Commission to be public. Ms. Bernholz seconded and the proposal was unanimously approved.

With regard to Draft 15, Mr. Isenhower asked about the status of sanctions pending the appeal period. Mr. Little explained this was not really an issue as the Committee would only be recommending a proposed sanction. Those sanctions would only be imposed if the affected person agreed. After some additional discussion, Mr. Criner moved for the adoption of Draft #15 of Rule VIII, Mr. Hudspeth seconded, and the revisions to Rule VIII were unanimously approved.

Next, Mr. Little suggested that the group look at the draft of Commission Rule IX which sets out a process to review and hear matters relating to qualifications for certification or certification renewal not pertaining to conduct or ethics. He pointed out that in this case, Rule B.2.(f) provides for hearings before the Commission to be conducted in private. Mr. Little explained this was different from Rule VIII in that here the Commission is functioning as a "licensing" and not a regulatory body and applicants had a greater expectation of privacy. After a short discussion, Mr. Criner moved for adoption of Rule IX and Mr. Gumbiner seconded. The revisions to Rule IX were unanimously approved.

Mr. Little next outlined the changes to N. C. Gen. Stat. § 7A-38.2. These changes to the statute were necessary to implement Commission Rules VIII and IX. First, he noted that the Committee is proposing to flip the first two existing sections of the statute. He suggested that it made more sense to provide for certification of mediators first before addressing their regulation. Next, he noted that Section (c) was revised to authorize the Commission to employ staff and to hire special counsel when necessary or to call upon the Attorney General to furnish counsel to the Commission to assist the Commission with hearings. New subsection (d) authorizes the Commission's chair or his/her designee to administer oaths/affirmations and to sign and issue subpoenas in the Commission's name again in connection with investigations and hearings. New (e) was necessary to insure enforcement of subpoenas issued pursuant to section (d). Language in Section (f) provides for the Commission's files to be maintained as confidential except that disciplinary files will be open to the public after probable cause is found. New section (g) provides for the review and hearing of matters not pertaining to conduct or ethics to

be conducted in private. Mr. Little explained that meetings and hearings where the Commission is functioning solely as a licensing and not a regulatory body may be treated as confidential. New section (h), he continued, provides for the initial review of matters pertaining to conduct or ethics to be conducted privately, but if the findings are appealed to the full Commission, the hearing is to be open to the public since the Commission is functioning as a regulatory body. Lastly, Mr. Little noted that (i) provides for appeals of final determinations by the Commission to be to the Wake County Superior Court.

Judge Taylor added that (j) had also been revised to provide for a fifteenth member of the Commission who would be a Clerk of Superior Court. She added this revision was occasioned by the *Ad Hoc* Committee's plan to soon introduce legislation to create a new program for mediation of matters pending before Clerks.

There followed some discussion of the proposed changes to 7A-38.2 and Mr. Little answered questions. At the end of the discussion, the revisions were approved unanimously. Ms. Ratliff noted that this statute had not yet been before the ADR Committee of the State Judicial Council.

Next, Mr. Little brought to the group's attention proposed changes to 7A-38.1(l) and 7A-38.4A(j) addressing inadmissibility of statements made and conduct occurring in mediation. He reminded the group that the Commission had previously adopted revisions to these statutes and forwarded them to the ADR Committee. The Committee had expressed concerns about the inclusion of a fraud exception. The Committee suggested that including an express exception for fraud would be productive of litigation in that the revisions permitted mediators to testify in actions to rescind agreements for fraud. Mr. Little noted that the Executive Committee was now suggesting additional revisions to address the Committee's concerns. The new version strikes express references to fraud and adds "or rescind" to the language in Sections (1)(b) of both statutes. In this way, attorneys could introduce evidence of fraud occurring in mediation in another civil proceeding, but the mediator would be precluded from testifying. Mr. Little suggested that this approach would address lawyer/mediator concerns about fraud being perpetrated in mediation and also the Committee's concerns about an express fraud provision and mediator testimony being productive of litigation. Following Mr. Little's explanation, there was considerable discussion about the issue of fraud perpetrated in mediation. At the close of the discussion, Judge Taylor moved to adopt the revised 7A-38.1 and 7A-38.4A containing the "or rescind" language. Mr. Hudspeth seconded and the motion passed unanimously.

Next, Mr. Criner reported for the **Mediator Certification and Training Committee**. He noted that his Committee had met in connection with Rule IX. He noted also that there were a number of matters currently pending before his Committee, but that they were not yet ready for Commission consideration and action. He did note that with Don McKee's departure, his Committee was short-handed. Judge Carroll said that he was willing to serve on this Committee.

Judge Lee next reported for the **Program Oversight Committee**. He noted that Judge DeRamus had done a great job of clearing this Committee's decks before his departure. Judge Lee added that there were, however, a couple of matters on the Committee's agenda, including complaints about the use of short lists relative to mediator appointments and concerns expressed about recently adopted time frames for finalizing agreements reached in mediation and reporting to the court. Ms. Ratliff called the group's attention to the new form in their packet to facilitate requests for extensions of deadlines set for completion of mediation. She added that the form was developed by this Committee.

Ms. Bernholz reported for the **Standards and Discipline Committee**. Ms. Bernholz and Ms. Ratliff noted the Committee had considered an application for certification involving an applicant who had been censured by the State Bar for having sex with a client. The Committee determined to certify him. Ms. Ratliff noted it was a consensual relationship, the State Bar found no evidence of coercion, and it was the only disciplinary action taken against him. Ms. Ratliff noted that the Committee had recently found no probable cause in connection with one complaint filed by a *pro se* party and, in the coming weeks, would be considering two additional complaints filed against mediators by *pro se* parties. Ms. Bernholz reported that Ms. Ratliff had asked the Committee for assistance in developing a protocol for conducting investigations of complaints, *e.g.*, should the office forward an actual copy of the complaint to the mediator and or to any witnesses contacted? The Committee would, Ms. Bernholz said, be working on this in the coming weeks.

Lastly, Ms. Bernholz noted that Mr. Little had been asked to chair an *Ad Hoc* Committee to look at the roles of the ADR Committee and the Commission. She noted that her Committee had asked Mr. Little to have this group also consider whether some agency or body should be assigned responsibility for the regulation of arbitrators. It was pointed out that Canons of Ethics for Arbitrators exist. Ms. Bernholz responded that that is precisely the problem; the Canons exist but no one is really enforcing them. Ms. Ratliff noted that recently a local court had told a litigant that the Commission regulated arbitrators and cited her to the Commission's complaint form. Ms. Ratliff further noted when she sent the litigant back to the local court, the litigant was again told to contact the Commission. Judge Carroll reported that his office received these kinds of complaints periodically and simply suggested to the parties that if they are not happy they can seek a trial *de novo*. Mr. Little acknowledged that during his term as chair, questions had come up regarding arbitrator conduct. He asked whether the Commission was willing to take on the job of regulating arbitrator conduct. He noted the Canons are in place, but there are no procedures or forms. Mr. Little's inquiry was, overall, positively received. Judge Steelman suggested that it was very important that the Conference of Chief District Court Judges be consulted on this matter.

The Committee reports being concluded, Judge Steelman reminded Committee Chairs of the need for their Committees to meet early enough to get their agenda items to Ms. Ratliff at least two weeks prior to the next scheduled Commission meeting. He next asked Mr. Little to report for the *Ad Hoc* Committee working to develop a statute and rules to implement a mediation program for matters pending before Clerks of Superior

Court. Mr. Little began with some history noting that Ms. Seigle's office, Carolina Dispute Settlement Services, had been a driving force behind this project. The original focus, he noted, had been adult guardianship cases, but the focus had now broadened to include other matters pending before Clerks, including estate and boundary/partition disputes. He observed that the *Ad Hoc* Committee had been unable to rely too heavily on the MSC and FFS statutes and rules in its drafting, since the Clerks' situation was different. For example, the issue of who could be required to attend the mediation took on a wholly different dimension here. Mr. Laney noted that there is also a significant difference in that the Clerk is required by statute to enter an order in some types of cases and that the agreement can only serve as a recommendation. Judge Lewis asked who will initiate the mediation? Mr. Little replied that the Clerk will order it and the mediator will do the scheduling. He added that he does not envision that the Clerk will be routinely referring cases to the extent that Senior Resident Superior Court Judges do. Mr. Gumbiner asked about payment of the mediator. Mr. Little responded that this program will operate on the party pay model, but that unlike the MSC program the Clerk will ultimately decide who will pay on a case-by-case basis. Mr. Little added that they are still working on certification criteria, but as it stood now, anyone certified to mediate superior court cases would be eligible to mediate Clerk cases with the exception of adult guardianship and estate cases where additional training would be required. The Commission would be responsible for certifying estate and adult guardianship mediators. Mr. Laney observed that Section members had some concerns about the proliferation of mediation specialties within the field. Judge Steelman thanked Mr. Little and Mr. Laney for their efforts on behalf of this new Program

Judge Steelman next called for **Liaison Reports**. Mr. Laney reported for the **Dispute Resolution Section** that they had ordered a reprinting of the ADR Book and now had some 2,000 copies in stock. He and Ms. Seigle noted that the ABA Dispute Resolution Section planned to have a panel presentation on the Book at its next annual meeting. Mr. Laney also noted that the Section will be working on a project to see whether mediation can help facilitate the settlement of escrow disputes. Mr. Laney also reported that the Section would be sponsoring a CLE on collaborative law and that Ms. Seigle would sit on the panel. Lastly, he noted that the Section is interested in working with Mr. Van Der Puy who was spearheading efforts in the area of permanency mediation. Ms. Seigle reported for the **MNNC** that Mr. McKee had left as the Director and that they were recruiting now for his replacement. She added that two Centers, the Piedmont Center and the Blue Ridge Center, had left the Network due to disputes regarding the apportioning of State funding for member Centers. She noted that the MNNC was still working on a funding formula acceptable to the remaining members.

There being no further business, Judge Steelman noted that the next meeting would be February 11th in Raleigh and the meeting was adjourned.