

## **Dispute Resolution Commission**

### **Minutes**

**Friday, March 16, 2007**

**North Carolina Central University School of Law  
Durham, NC  
11:00 a.m.**

Commission members present: Steelman, Banzet, Conley, Criner, Gumbiner, Hay, Hudspeth, Lee, Seigle, and Turner. Ex-officio members present: Anderson, Beason, Cohen, Fuqua, Laney, and Schafer. Staff present: Ratliff. Guests present: Zeb Barnhardt.

Judge Steelman welcomed everyone and then asked for approval of the minutes from the November meeting. They were approved with no changes. Next he administered the oath of office to Larry Hudspeth who began serving his second term on the Commission.

Because he had to leave the meeting early to attend to other commitments, Judge Lee gave his report of the Program Oversight Committee. He reported that a mediator had contacted Ms. Ratliff regarding concerns about MSC Rule 7. The mediator complained of difficulty in enforcing the administrative fee when a substitution occurred. Ms. Ratliff had sent revisions to Rule 7 that had been approved earlier by the Commission (but had not yet gone to the Supreme Court) to the mediator for his review and he responded with comments. The mediator's comments were discussed at the Committee meeting. Judge Lee suggested that many mediators are reluctant to enforce that fee for fear of losing business and he added Ms. Fuqua had pointed out at the Committee meeting that she believed the number of requests for substitutions was rising and that it was creating additional work for court staff. The Committee asked Ms. Fuqua to contact support staff and inquire about substitutions and whether they believed corrective action was warranted. Judge Lee asked Ms. Fuqua to report on the survey. She noted that 27 of 28 court staff had responded that they considered substitutions to be a problem and were supportive of the Commission taking corrective action, including assessing a fee to be paid to the court. It was noted that the Industrial Commission requires that a substitution fee be paid to the Commission. Judge Lee suggested that if an additional fee was to be paid to the courts, it would probably require a statutory change. Judge Lee was asked whether requiring this fee might build more delay into the process. He noted that his committee was continuing to discuss this matter.

Next, Judge Lee proposed some minor revisions to MSC/FFS Rule 2 clarifying that biographical information about mediators is now available on the web only and to FFS Rule 8 clarifying the cases eligible for observation by non-attorney applicants. The revisions were approved unanimously.

Next, Judge Steelman reported for the Executive Committee. First, he reminded everyone that it had been determined that Commission members and staff were exempt from reporting under the State Ethics Act. Judge Steelman also reported that legislation introduced by the Commission relating to the new district court program for mediation of criminal matters and to the Commission's retention of unspent revenue was moving forward.

Next, Ms. Ratliff reported on the Insurance Department's Disaster Mediation legislation. Ms. Ratliff noted that since she and Judge Steelman had met with Insurance Department managers, she has had several discussions with their legal counsel, Rose Williams, and that Judge Williams had expressed a willingness to make the changes that had been discussed at the meeting. Ms. Ratliff reported that she understood they were working on the revisions now. Judge Steelman then asked Ms. Ratliff to report on a request that she had made regarding her work schedule. Ms. Ratliff noted that the impending relocation of the Commission's office would make it difficult for her to transport her daughter to and from her charter school and still maintain the 9:00 to 3:00 work schedule she currently had. She asked whether she might be able to work from home to make up whatever part of the workday she missed due to transporting her daughter. The Commission indicated that it would not object to her doing so.

Next, Judge Steelman asked Ms. Ratliff to proceed with her office report. Ms. Ratliff first noted that Judge Steelman, Ms. Seigle, Professor Morris and AOC Director Ralph Walker had all recently appeared on a television show discussing mediation. She added that her office had alerted mediators and that many had watched and registered a positive response with the office. Next, she reported that beginning this year, the certification renewal process would be conducted entirely on time, less mailing of the check. Ms. Ratliff also reported that out of more than 1,000 sets of program rules, the Center for Analysis of ADR Systems (CAADRS) had selected 16 as model rules. Five of the 16 were North Carolina program rules. She added that she intended to peruse the remaining 11 rules to see if they contained provisions that might be useful. She also noted that the March 1, 2006, deadline for implementing FFS Programs had expired. She noted that she had asked AOC staff whether they knew how many programs were operating at this point and was told her question was premature. Lastly, Ms. Ratliff reported that the Commission's office was starting to receive a significant number of calls relating to disputes that had nothing to do with the Commission's work. She thinks that the Commission's name might be too amorphous. She has asked staff to start logging in the calls.

Next, in the absence of Ms. Bernholz, Professor Morris reported for the Standards, Discipline and Advisory Opinions Committee. He first noted that Alice Mine from the State Bar had met with the Committee to discuss the State Bar's request for comment on the issue of whether, pursuant to State Bar Rule 8.3., an attorney acting as a mediator is obligated to report unethical conduct on the part of an attorney participant that the attorney-mediator learns about in mediation. Ms. Mine told the Committee that there was no hurry in this matter, that it was a difficult provision to enforce and that the State Bar was willing to work with the Commission in addressing the issue. Professor Morris also

reported that the committee had met with Mel Wright from the Chief Justice's Committee on Professionalism. Mr. Wright explained that in his program, volunteer lawyers met with colleagues who had been the subject of reports regarding unprofessional conduct. The volunteers try to get the individual in question to assess his/her situation and if there is a problem, to seek help, if necessary, and make constructive changes. Committee members thought this approach might have some utility for the Commission. Next, Professor Morris asked Ms. Ratliff to summarize proposed Advisory Opinion 07-11. She explained that the Opinion grew out of a complaint and that it largely addressed the requirement that mediation agreements be reduced to writing. The proposed Opinion was adopted without revision. There followed some discussion about the fact that the Report of Mediator does not provide a place for a mediator to report that an agreement reached in mediation is not enforceable until after a certain period of time has lapsed. Some proposed language to revise the Report was discussed and Ms. Ratliff was asked to bring the form before the appropriate committee.

Next, Professor Morris and Ms. Ratliff briefly discussed some disciplinary matters that the Committee had been addressing and noted that others would be brought to the Committee's attention very soon. Judge Steelman noted that prior to the hearing that was held that morning, that the mediator had contacted Ms. Ratliff to ask whether he could attempt to negotiate a different sanction with the Committee or Commission's chair or whether he could negotiate the issue of publication of the sanction. Judge Steelman noted that he Rules did not provide for this, especially now that the matter was before the full Commission. He suggested that perhaps the rules should permit such negotiations. He suggested that an *Ad Hoc* Committee be formed to look at proposed revisions to the Standards and also to review the new hearing rules now that the Commission had actual experience implementing them. Ms. Anderson, Mr. Beason, and Mr. Gumbiner agreed to serve.

Since Ms. Fuqua had to leave, Judge Steelman called for her liaison report from judicial support staff. She noted that there had been some confusion over Ms. Ratliff's participation at the Judicial Support Staff Conference and that she was concerned that district court staff were not being adequately trained regarding the FFS program rules and that perhaps the Commission should have been more involved in the AOC sponsored training that was offered both at the Conference and in the field. She hoped for more cooperation in the future.

Mr. Criner next reported for the Certification and Training Committee. He noted first that his Committee had met over the telephone with Ellen Gelbin who teaches a mediation class at Wake Forest Law School. Ms. Gelbin had asked the committee to consider whether it could approve a trainer application for a 40-hour course that involved significantly less than 40-hours actual classroom instruction, but provided for additional reading and writing assignments outside class. The Committee determined that MSC Rule 9 required 40-hours of actual classroom instruction. Judge Steelman agreed that if Ms. Gelbin wished, he would write a letter to the University explaining the requirement and encouraging it to offer a three credit hour course that could lead to certification. Mr. Criner and Mr. Laney noted that there had been some problems with a recent application

that contained material that had apparently been reproduced without the permission of the author. He polled some Commission members and trainers and their sense was that it was appropriate for Commission staff to call such concerns to the attention of the trainer, but not to withhold approval on that basis alone. The Commission felt this was an appropriate approach. Mr. Laney also suggested that perhaps it was not appropriate for trainers to advertise their program or hold courses prior to their certification. Ms. Ratliff suggested that perhaps the Trainer Guidelines should be revised in that respect and she offered to work on some language. Next, Mr. Criner directed attention to proposed changes to the MSC and FFS Trainer Guidelines which addressed the time frame over which programs could be offered, *i.e.*, all training must be completed with 30 days from start to finish. Mr. Beason asked what happens when a student attending a training becomes ill and misses a day and then tries to make it up at the next training which may be some months off? Mr. Criner noted that the change is not intended to address that kind of situation. The revisions were unanimously adopted. Next, Mr. Criner reported that Ms. Ratliff had drafted a proposed *Guide to Selecting a Mediator* and had circulated it for comment. Ms. Anderson and Mr. Gumbiner noted that they had some objections to the *Guide* being posted on the Commission's web site and want to discuss them with the Committee.

Mr. Laney next reported for the Ad Hoc Committee on mediation of district court criminal matters. He noted that Senator Hartzell had introduced SB 728 authorizing the new program and that over the spring and summer his Committee would focus on drafting rules which he hoped would be ready for the Commission's August meeting. Judge Steelman asked that Mr. Laney try to insure that the legislation's effective date would allow leeway to get rules and forms in place.

Next, Judge Steelman called for Liaison reports. Ms. Anderson reported for the Dispute Resolution Section that Judge Melzer Morgan had asked for Commission input as to whether Legal Aid could recruit a panel of mediators who would be available to mediate for their clients without charge, but might assess a fee of the adverse party. She noted that certified mediators are obligated to serve indigent parties, but that Legal Aid was still uncomfortable asking. The Commission saw no impediment to Legal Aid exploring this matter with mediators. Ms. Anderson added that her term as Chair expires this summer and that Lynn Gullick would be replacing her as liaison from the Section. Lastly, she noted that the Section's Annual Meeting would be held on March 22 at the Bar Center with a reception at Frank Laney's home the night before. Ms. Cohen reported for the AOC that AOC staff would soon be consolidated in a new building and she distributed updated contact information for Court Programs' staff. Mr. Morris reported that the Mediation Institute was moving forward and they were finalizing course offerings. Judge Steelman reported that the Court of Appeals Mediation Program was continuing to resolve mediated cases.

There being no further business the meeting was adjourned.

# Dispute Resolution Commission Minutes

Friday, May 18, 2007

Mecklenburg County Courthouse, Charlotte, NC

10:00 a.m.

Commission members present: Steelman, Bernholz, Conley, Criner, Curran, Gumbiner, Hay, Hudspeth, Seigle, and Turner. Ex-officio members present: Anderson, Huffman, Laney and Little. Staff and Guests present: Taylor and Ratliff.

Judge Steelman welcomed everyone and thanked Judge Curran for hosting the meeting. He noted a guest, Richard Taylor, a certified mediator from Charlotte and introduced Alisa Huffmann, who has replaced Nina Cohen as AOC liaison. He requested a motion for approval of the minutes and they were adopted as submitted. He asked Ms. Ratliff for the office report. She first noted that the certification renewal period for fiscal year 2007/08 was well underway and that Phases I and II of on-line renewal had been implemented and favorably received by the mediators. She added that she has formally requested that the AOC work with her to design and implement Phase III to permit credit card payment of renewal fees. Maureen Robinson has been with the Commission for more than a year. Ms. Ratliff will ask the Commission to review her salary. Ms. Ratliff reported that the office will be moving this summer to the AOC's new building. She described concerns about a new copier that was delivered to the office unannounced and which her staff wished replaced with a more efficient model. She indicated that she planned to approach the AOC about this matter and also to request flat screen monitors for Ms. Laue and Ms. Robinson. Ms. Ratliff reported that she and Judge Steelman would be speaking on mediation at the upcoming NCBA Practical Skills Seminar. Lastly, she reported she had heard nothing from the AOC relative to FFS expansion.

On behalf of the Executive Committee, Judge Steelman asked Ms. Ratliff to report on a request she had received regarding grandparent visitation. She said the Commission had been asked to help draft legislation to provide for mediation of disputes involving grandparent visitation. She discussed the request with Judge Steelman and he had raised concerns about Commission involvement in efforts to alter substantive law and had suggested it might be more appropriate to forward the request to the NCBA's Dispute Resolution and/or Family Law Sections. Ms. Ratliff had called Ms. Anderson and she agreed to discuss the matter with her successor, Lynn Gullick, to determine whether the Dispute Resolution Section might be interested in pursuing the matter. Ms. Conley and Judge Turner urged caution. They suggested the family law bar might not be supportive. Next, Judge Steelman asked Ms. Ratliff to comment on the new Parenting Coordinator legislation. She stated that the statute was enclosed for informational purposes since the office had received several calls. Judge Turner noted that he and a few other judges had established parenting coordinators by local rule in their districts and that he thought the legislation was intended to formalize this new tool.

Judge Steelman next reported on the various pieces of pending legislation in which the Commission had an interest. First, he noted that Mr. Laney had made an excellent

presentation before the Senate Judiciary Committee II (Criminal) on the bill to create a program for mediation of criminal disputes filed in district court. The bill, he added, had unanimously passed the Senate and now gone to the House. He reported that the bill to permit the Commission to retain its unspent revenues had passed the House and gone on to the Senate. Judge Steelman asked Ms. Ratliff about the Disaster Mediation legislation and she responded that she understood there had been no action. Lastly, Judge Steelman reported that the new *Ad Hoc* Committee to consider revising the Standards and Disciplinary Rules had met and Ms. Ratliff had been asked to review both documents to determine where there might be inconsistencies or other concerns. Mr. Little added that the Committee had begun by considering the larger issue of whether the Standards should be treated as rules or as guidelines.

Ms. Bernholz reported for the Standards, Discipline and Advisory Opinions Committee. She began with the State Bar's request inquiring whether an attorney/mediator was obligated under State Bar rules to report attorney misconduct that comes to light in mediation. She noted that the ABA had set up a committee that could address the matter, but that her Committee preferred to move ahead and would do so at a full-day meeting set for June 12. She invited others to also attend. Next, Ms. Bernholz asked the group to consider proposed Advisory Opinion 07-12 which dealt with a contract used by a court-appointed mediator which purported to modify program rules and the Standards of Conduct. The Opinion was adopted unanimously with one change. Ms. Ratliff was asked to insert: "This opinion applies to situations where the parties fail to select a mediator and the court is required to appoint a mediator pursuant to the Rules." Ms. Bernholz then called attention to proposed Opinion 07-13 which addressed a situation in which a mediator lost his temper and his neutrality and used foul language. Mr. Gumbiner expressed reservations that the text describing the situation that gave rise to the Opinion was too specific. He wanted readers to understand that the Opinion had broad application. He suggested language substantially revising the "Concern Raised" portion of the opinion and the Opinion was adopted as revised.

Next, Ms. Bernholz asked Ms. Ratliff to report on several matters considered by the Committee this quarter: 1) An attorney mediator had been the recipient of 18 grievances filed with the State Bar during the course of his 26 year career. The grievances had resulted in two Letters of Warning. The Committee approved the applicant on a probationary basis pending resolution of two grievances still pending. 2) Applicant for certification allowed his certification to lapse. The applicant had been in treatment for over a year for alcoholism and depression. He had also had a grievance filed against him by a client for failing to communicate with the client and follow through with legal representation. The Committee determined to reactivate the certification but place the applicant on probation for one year. 3) An attorney contacted the Commission about a mediation agreement he had been asked to sign and which he believed ran afoul both program rules and Standards. Since no formal complaint was filed, the Committee addressed the matter with an Advisory Opinion (07-12) to be expressly shared with the mediator in question. 4) An applicant for superior court certification failed to report a criminal conviction for writing worthless checks (he did disclose another for making harassing phone calls). The office's investigation disclosed several other concerns including judgments for failure to pay child support, attorney's fees, money owed and a

recent bankruptcy. The Committee determined that it could not consider the civil matters and voted to certify the applicant, but asked Ms. Ratliff to write to him and admonish him for failing to disclose the conviction. Ms. Bernholz asked the Commission whether certification/renewal applications should require applicants to disclose civil judgments and bankruptcies? The Commission referred the matter to the Training and Certification Standards Committee. 5) A certified superior court mediator failed to disclose a reprimand that he had been given by the State Bar. The Committee asked Ms. Ratliff to write to him and remind him that MSC Rule 8 required disclosure of pending grievances and disciplinary actions upon notification. Lastly, Ms. Ratliff reported that one disciplinary matter remained before the Committee, a mediator who had failed to disclose a censure.

Ms. Bernholz next reported that her Committee had received a letter from Mel Wright, Executive Director of the NC Chief Justice's Commission on Professionalism. In the letter, he offered to include mediators in the existing Professionalism Support Initiative or to assist the Commission in establishing its own such program. She explained that when concerns were raised about a lawyer's professionalism, that Mr. Wright and a volunteer lawyer(s) meet with the lawyer in question to discuss the concern raised and to offer support for constructive change. She added that her Committee planned to discuss the offer. Judge Steelman suggested that Mr. Wright come to the Commission's November retreat and talk more about the PSI. Lastly, Ms. Bernholz noted that Ms. Seigle had asked this Committee to consider the following queries directed to her: "May an attorney who represented a party in a divorce matter later serve as the couples' mediator, what if there was only an initial consultation and no confidential information was exchanged, what if the party goes to the mediator/attorney's partner?" Mr. Little added that Standard VII prohibited a mediator from later representing a party in the same litigation or closely related litigation, but that this query goes the opposite direction and is not expressly addressed. Mr. Laney noted the Bar would approve either way as long as there was a knowing, written waiver. Ms. Bernholz concluded by noting the Committee was referring this matter to the *Ad Hoc* Committee on the Standards.

Judge Steelman called on Ms. Anderson for her liaison report. The Section, she reported, held its Annual Meeting on March 22 and Judge Walker was awarded the Peace Prize. She added that the Section was still organizing *pro bono* mediator panels to assist legal aid clients. She alerted the Commission to House Bill #1671 providing for voluntary arbitration of medical malpractice cases. Lastly, she reported that Lynn Gullick would be her successor as Section Chair and Liaison to the Commission.

Mr. Laney reported for the Mediator Certification and Training Standards Committee. First, he addressed an MSC application denied by Ms. Ratliff because the applicant did not possess a four-year degree. The applicant argued that he had the equivalent of a four-year engineering degree. The Committee affirmed Ms. Ratliff's decision. Next, Mr. Laney reported that Ms. Ratliff had received complaints from non-attorney applicants for FFS certification notifying her that they found the Association for Conflict Resolution to be slow and unresponsive (non-attorneys must hold Advanced Family Practitioner Status in ACR in order to be FFS certified). Ms. Ratliff added that her own staff had difficulty getting information from ACR. Ms. Seigle added that she felt ACR was hostile to

attorney mediators. Mr. Laney noted that the Committee believed it was time to revisit this rule and to consider severing the connection with ACR. Mr. Little briefly set out the history leading to the adoption of the current rule. He observed that he, too, had concerns about ACR and thought the rule should be re-written, but he added that the family bar and members of the State Judicial Council's ADR Committee might oppose such action. The Commission expressed agreement that the matter should be revisited.

Mr. Laney next called attention to proposed revisions to the MSC and FFS stale training policies. Ms. Ratliff noted that, on occasion, she receives applications submitting training that is ten years old or older. She wants the flexibility to require applicants who submit stale training and observations to complete additional observations. Revisions to both policies were approved with minor editing to the language in the MSC Policy. Next, Mr. Laney called attention to proposed revisions to the MSC and FFS Trainer Guidelines. Because there was confusion about the extent to which the modification would impact a trainer's ability to advertise, the proposed revisions were returned to Committee.

Ms. Conley reported for the Program Oversight Committee. She called attention to proposed revisions to the FFS and MSC enabling legislation and Rule 7 requiring a party seeking a mediator substitution to pay not only a fee to the court-appointed mediator, but to the court as well. Mr. Laney explained that appointed mediators were not assessing substitution fees for fear of alienating lawyers and driving away future business with the result that there was, in effect, no penalty for seeking a substitution. Given that there was no penalty, the numbers of requests for substitutions were rising. Ms. Ratliff added that Ms. Fuqua had polled court staff who reported in overwhelming numbers that rising substitutions were becoming a real problem. Mr. Little stated that he opposed this change. He asked why the rule could not be re-written to require the attorney seeking the substitution or the mediator to simply submit proof of payment to court staff? That approach would not require a legislative change. After a short discussion, the matter was returned to Committee. Then, Mr. Laney called attention to proposed revisions to the FFS statute and FFS Rule 4 relating to the finalizing of agreements. He explained that the office had received a call from a family mediator asking for clarification on what Chapter 50 required for a mediation agreement to be enforceable, *i.e.*, did she have any obligation to ensure that the agreement was notarized, to ensure that it contained certain language? The Committee proposed language that, in essence, provided that by signing a summary memorandum, the parties had agreed to comply with whatever requirements were set forth in Chapter 50. Proposed changes would also have provided that any agreement reached in mediation is deemed to comply with Chapter 50. Mr. Little objected to these changes, stating that they would result in a substantive revision of Chapter 50 which was beyond the Commission's purview. He suggested there were more subtle ways to respond to this inquiry. Mr. Laney observed that perhaps the mediator who posed the question was confused, *i.e.*, that it is not the mediator's job to make the agreement enforceable. The matter was returned to Committee.

Mr. Laney next reported for the *Ad Hoc* Committee for District Criminal Court Mediation. He stated that his Committee had a draft of rules to submit to the Commission as soon as the program's enabling legislation was enacted. In his absence, Ms. Ratliff read a report from Mr. Minor on behalf of the Mediation Network endorsing the proposed



legislation and rules. Mr. Minor also reported that he has formally requested that the AOC change its reporting to differentiate between criminal district court cases settled in mediation versus those dismissed.

Following the conclusion of Committee reports, Mr. Little presented a copy of this newly published book, Making Money Talk, to Judge Steelman. Then, Judge Steelman called for Liaison reports. Ms. Huffman noted that she was new and was not sure what kind of information to provide. Mr. Little suggested that the Commission would be interested in hearing about expansion of the FFS Program and what efforts were being taken to ensure better collection of caseload statistics. Judge Steelman reported that the Court of Appeal's Mediation Program was still operating successfully with 50-55% of cases, which had already been tried, settling.

Judge Steelman asked whether there was further business. Judge Turner noted that the Chief District Court Judges Conference would meet this summer and he asked what he should report. He noted that he would discuss the grandparent visitation matter that had come up earlier. There then followed a brief discussion about the enforcement of the district court Canons of Ethics for Arbitrators. Judge Steelman suggested that the Commission already had too much going on to get involved. Judge Steelman noted that the next Commission meeting would be held on August 10 in Greensboro. There being no further business, he adjourned the meeting.

# **Dispute Resolution Commission**

## **Minutes**

**Friday, August 25, 2007**

**UNC Greensboro – North Campus  
Browns Summit, NC  
10:00 a.m.**

Commission members present: Steelman, Bernholz, Curran, Gumbiner, Hudspeth, Lee, Seigle, and Taylor. Ex-officio members present: Fuqua, Huffman, Laney, Little, and Minor. Staff and guests present: Hayes, Labreche, Mewhinney, Ratliff and Witty.

Judge Steelman thanked Dr. Cathie Witty, her office, and UNC-Greensboro for hosting the meeting. He introduced and welcomed Dr. Witty who directs UNC-G's Master's Program in Conflict Resolution and her assistant, Sherril Hayes. He also introduced guests Kate Mewhinney, who directs Wake Forest Law School's Elder Law Clinic, and Judge Steelman's summer intern, Andrew Labreche. Judge Steelman then presented plaques to departing Commission members: Judge Taylor, Mr. Gumbiner, and Ms. Bernholz. During presentation of the plaques he noted the many contributions made by these members and how much their efforts would be missed.

He called for approval of the May minutes which were adopted as submitted and requested Ms. Ratliff's report. She reported that the 2007/08 renewal period had closed and that the renewal numbers were off slightly, but that tardy applications were still arriving. She explained that this had been a difficult year in that there had been many technological and interface problems with implementation of Phase II of on-line renewal. She noted that AOC technology staff had tried to fix problems as they surfaced, but there was still work to do. Given the problems, Ms. Ratliff noted that implementation of Phase III, on line payment, would be delayed. She added that the problems had consumed tremendous staff time and energy this quarter. Next, Ms. Ratliff noted that the Commission's office was in the process of relocating to new quarters at the NC Judicial Center. She distributed copies of the June 2007 end of year budget report and said she was trying to clarify whether there was unspent revenue this year. Lastly, Ms. Ratliff reported that legislation providing for mediation of territorial disputes between electric cooperatives and municipalities that generate electric power had been repealed.

Dr. Witty told those present that UNC-G has begun to offer a master's program in conflict resolution. She reported that the new program had a full complement of students who came from all walks of life. Besides teaching, she said the program would also emphasize conflict resolution in the community including, training and providing pre-litigation dispute resolution services to businesses and non-profits. Ms. Mewhinney noted that she is interested in using mediation to help resolve guardianship disputes and other conflicts that arise in connection with the aging process. She encouraged Dr. Witty to consider ways to promote the use of dispute resolution in such disputes. Judge Taylor noted that programs like this could also play a role in helping police, court staff and others develop strategies for coping with conflict situations involving developmentally disabled young adults and adults.

Judge Steelman next called for Committee reports. He reported for the Executive Committee telling those present that the Commission had been successful in its effort to shepherd legislation through the General Assembly, including legislation to enable the Commission to retain unspent revenues and to authorize certification of mediators in District Criminal Court. He added that the

district court legislation had been modified, but only slightly. He thanked the following individuals whom he said had been instrumental in securing passage: Frank Laney, who headed the committee that drafted the legislation; Diann Seigle who worked with legislators to keep it on track; Senators Fletcher Hartzell and Daniel Clodfelter; Representative Deborah Ross; and NCBA lobbyist, Doug Heron. Judge Steelman also noted that changes to the Disaster Mediation legislation that the Commission recommended to the Department of Insurance had been adopted.

At this point, Judge Steelman asked Mr. Laney to discuss the proposed Rules Implementing Mediation in Matters Pending in District Criminal Court. Mr. Laney began by noting that mediation has been conducted in district criminal court for many years and that this undertaking was an attempt to codify and standardize what was already occurring and to encourage greater use of the process. He noted that the proposed rules track existing MSC and FFS Rules wherever possible, though there are a few significant differences: the program is not mandatory in that districts are not required to establish programs. Complaining witnesses, defendants or others involved in such cases are not required to participate in mediation. Community mediation centers will be largely responsible for case management and mediators will be community mediation center staff or volunteers. Mediator certification will be a joint undertaking of the Commission and community mediation centers. He explained also that mediator certifications issued under the new program were not “free floating”, *i.e.*, a mediator must be affiliated with a community mediation center to participate.

Ms. Bernholz asked where a mediator would complain if they are “blacklisted” by a center? Mr. Minor responded that he would investigate such a charge, but that he did not have authority to mandate that a mediator be put on a list. Judge Steelman noted that the Commission has no authority over centers, only the authority to de-certify mediators qualified under this program. Ms. Fuqua asked whether centers recommend mediators for certification or the Commission makes the decision alone? Mr. Minor responded that centers make recommendations. Judge Taylor asked whether a certified MSC or FFS mediator would need to take additional training? Mr. Laney responded, “no”. Mr. Minor assured everyone that he will be working with Ms. Ratliff and others to iron out the details of the certification process and to address quality control issues and questions like the one raised by Ms. Bernholz.

Mr. Hudspeth asked whether programs already operating must follow the new rules? Mr. Laney does not think that will be an issue, that there is widespread support for the rules. Ms. Fuqua asked how the program will be funded and it was noted that already centers receive appropriations from the General Assembly. Mr. Laney noted that he had a few minor revisions, *i.e.*, correction of typographical errors on pages 8 and 10 and some slight re-wording of Rule 7.E. With regard to Rule 7.E., Ms. Bernholz asked, what does “successfully pass” a background check mean and whether the centers had uniform requirements in that regard? Mr. Minor said that such checks varied from center to center. Following discussion of Ms. Bernholz’ concern, the background check language in Rule 7.E. was re-worded to say “submit to” a check rather than “successfully pass” one. Ms. Ratliff noted that the FBI will run a check at its Virginia facility for a very modest fee. Mr. Laney said that the Committee will look at this issue with an eye to developing standard procedures. Judge Taylor moved for adoption of the rules as amended and with the correction of an additional typographical error on page 11 and Judge Lee seconded. The rules were adopted unanimously. Judge Steelman added that a certified criminal court mediator would be added to the Commission, increasing the Commission’s membership to 16.

Ms. Bernholz reported for the Standards, Discipline and Advisory Opinions Committee. She first drew attention to proposed Advisory Opinion 07-13. She noted that it had been adopted at the last meeting with some changes that Mr. Gumbiner had quickly drafted and that there was a

minor problem with those revisions. She suggested alternate language. There followed some further discussion of the opinion's reference to mediators as "officers of the court". Mr. Little wondered whether, if that declaration did not exist somewhere, the Commission should ask the Supreme Court to clarify that mediators are, in fact, officers of the court? The Commission elected to substitute alternate language for the "officer of the court" reference. The Committee's proposed revisions to the Advisory Opinion were adopted along with the additional alternate language. Next Ms. Bernholz reported that a mediator had been privately censured for failing to report a State Bar censure on her certification renewal form. She reported also that the Committee is continuing to work on the State Bar comment request regarding whether a lawyer mediator must report attorney misconduct that they learn of during mediation. Her committee, she said, had now reached a consensus and, at the next meeting, would propose revisions to Standard III clarifying what must be reported. Ms. Bernholz noted that she particularly wanted to thank Zeb Barnhardt for assisting her Committee. She thanked her Committee members as well, noting that this had been a tough assignment. Next, she reported on a new issue. Ms. Seigle had asked her Committee to consider a matter that had arisen in community mediation. Ms. Seigle explained that a community mediator had mediated a case in which a woman alleged that she had been raped by a co-worker. During mediation it came out that the affair had been consensual and that the woman had alleged rape only because she was afraid of her abusive husband and did not want him to learn of the relationship. The agreement reported the consensual nature of the relationship to the court. Though not containing a falsehood, a second agreement intended for the husband had also been drafted by the mediator. It did not reveal the consensual nature of the relationship. Ms. Seigle asked whether such "decoy" agreements should be drafted? She added that she had conducted a formal poll and believed this was not an unusual practice. Ms. Bernholz noted her Committee will consider whether this matter should be addressed in an Advisory Opinion.

Mr. Hudspeth reported for the Mediator Certification and Training Committee on behalf of Mr. Criner who was having surgery. He noted this Committee had met twice since the last Commission meeting. First, he called attention to major proposed revisions to FFS Rule 8 which sets family financial mediator certification requirements. Mr. Hudspeth reminded everyone that the current rule requires non-attorney applicants to hold Advanced Practitioner Membership in the Association for Conflict Resolution (ACR) in order to be eligible for certification. He explained that this requirement resulted from concerns expressed by the Family Bar at the time the pilot program went statewide that non-attorney applicants lacked sufficient training. It was, in effect, a national certification standard. However, over the past year, he explained that the Commission's office had received several complaints that ACR was not processing applications timely or was losing them. Proposed revisions, he noted, would permit non-attorney applicants who fell within certain professional categories to be certified. This was, he suggested, a return, in part, to the certification requirements that existed during the pilot phase. He added that Mr. Little had worked with the Family Bar to insure that they would support the proposal. Mr. Laney added that he had called ACR and the organization's director had admitted they had problems and agreed to address them. Mr. Little noted the current structure simply was not working and that the new approach was conservative and that it may be appropriate to add additional categories down the road. He added that everyone -- attorneys and non-attorneys -- who seeks certification under the new rules will also be required to complete a course in NC family law. The new certification requirements were approved unanimously.

Next, Mr. Hudspeth reported that the Commission's office was performing rudimentary criminal background checks on applicants using the ACIS system. ACIS revealed that one applicant had failed to report a conviction. In checking further, staff learned that the applicant also had a number of judgments against him for failure to pay child support and attorney's fees as well as various other money judgments. A member of the Committee also determined that the applicant

had filed for bankruptcy. The Committee did not believe that it could consider these matters since the current rules did not require their disclosure. However, that Committee felt the information could be important to the certification process. For example, should the Commission certify as a family mediator an applicant who has not paid their child support? For this reason, the Committee proposed revising both MSC and FFS Rule 8 to require applicants to disclose civil judgments and bankruptcies in addition to convictions and disciplinary matters. Mr. Hudspeth was asked why tax liens were not included? Judge Lee moved for the adoption of the proposed Rule 8 revisions plus an additional inquiry about tax liens. The proposal was adopted unanimously. The Commission also approved the Committee proposal to amend the MSC and FFS certification applications by requiring applicants to supply a birth date and complete Form AOC-A-210, Criminal and Sex Offender Records Search. That form, Ms. Ratliff noted, will enable staff to perform more meaningful background checks. Lastly, Mr. Hudspeth called the group's attention to proposed changes to the MSC and FFS trainer guidelines relating to advertising and the offering of programs prior to their certification. These proposed revisions were also adopted unanimously.

Judge Lee next reported for the Program Oversight Committee. He noted first that a family mediator had asked for clarification of Rule 4.B.(1) and its reference to Chapter 50. Specifically, she asked whether a mediator had an obligation to get agreements notarized since Chapter 50 required notarization. Moreover, she expressed concern that Chapter 50, in effect, forced her to practice law in that she was required to insure that certain "boiler plate" language required by the statute be inserted in agreements. Mr. Little suggested that perhaps this mediator misunderstands her role in the process, *i.e.*, that it is the attorneys' or parties' responsibility and, not the mediator's, to insure their agreement complies with Chapter 50. Ms. Ratliff noted this was not the first such call she had gotten. Judge Lee then called attention to a proposed revision to Rule 4.B. seeking to clarify the situation. Mr. Little noted that he believed the Rule was already clear, but since others were confused, this was an attempt at further clarification. Mr. Hudspeth noted that he understood what the mediator was concerned about -- that in his district the practice is to get mediated agreements in front of judges quickly and that they are enforcing them whether they are notarized or otherwise fully comply with Chapter 50. Mr. Hudspeth added that parties often seek to renege on family agreements and that it would create problems, in his mind, for judges to let them walk away from their agreements. Judge Steelman noted that Chapter 50 is the law and a judge cannot enter an order that expressly violates a statute which calls for certain formalities. Ms. Huffman asked whether a mediator can serve as the notary? Ms. Bernholz responded that she thought the State Bar might have trouble with non-attorney mediators notarizing such agreements and Judge Lee agreed. Mr. Little suggested that he thought the best approach was for the mediator to recess the mediation and not report the matter settled until the agreement complied with Chapter 50 and a consent judgment or voluntary dismissal was filed. Mr. Hudspeth repeated his concern that if the mediator does not make it clear that it is over, the parties will later want to walk away. Judge Lee acknowledged that he understood Mr. Hudspeth's concerns and said his Committee would consider the matter further.

Judge Lee next called attention to concerns that court staff had raised regarding increasing numbers of mediator substitution requests and the time involved in addressing those requests. He noted that his committee is considering revising the rule to require that a substitution fee be paid not only to the mediator, but to the court as well when such requests are made. He added that mediators often elect not to enforce the fee, so it has not served as an effective deterrent. He noted that John Schafer had reported that the Industrial Commission requires parties to pay a substitution fee to the mediator and to the Commission and that this has led to a reduction in the number of substitutions. He added that his Committee will continue its study of this issue. He noted also that Jane Blackburn, a Superior Court Trial Court Coordinator, had suggested that a

form needed to be developed to facilitate substitutions and save staff time. His Committee, he reported, thought this idea had merit and would consider it also. Lastly, he noted that attorney Jerry Myers had requested that the Commission consider exempting Motions to Confirm Arbitration Awards from referral to mediated settlement. Mr. Myers, he reported, explained that the only issue for the court in these cases is whether the defendant was successful in obtaining an order vacating the previously entered arbitration award and, in the absence of a showing by the defendant, the court was required to confirm the award as a judgment. As such, there was nothing to mediate. Ms. Fuqua asked how she would know to exempt these cases since they have CV numbers? Judge Lee asked how many of these cases her district had and she said there were quite a few. Others noted a number of such filings in their districts as well. Judge Lee said that he would talk to the School of Government and the AOC to see whether some adjustment could be made to the VCAP system that would allow these cases to be identified and exempted.

Next Judge Steelman called for liaison reports. Ms. Fuqua noted that there was considerable support among members of the Judicial Support Staff Conference for implementing the substitution fee that Judge Lee had discussed as well as for the form Ms. Blackburn had suggested and she was glad that the Commission was tackling these issues. Ms. Huffman reported that she was working on the caseload statistics for the Family Financial Program and hoped to have them in better shape soon and would be reporting on the extent of FFS program expansion. She added that Judge Walker was monitoring caseload reporting and would make that a factor in considering raises for court staff. Mr. Minor reported that the Mediation Network of North Carolina had a successful legislative session and was excited about the new program.

There being no further business Judge Steelman adjourned the meeting.

# **Dispute Resolution Commission**

## **Minutes**

**Friday-Saturday November 2-3, 2007**

**Green Park Inn  
Blowing Rock, North Carolina**

**Friday afternoon, November 2 at 1:00 p.m.**

Commission members present: Steelman, Conley, Criner, Hay, Huckel, Hudspeth, Lee, Morris, Seigle, and Turner. Ex-officio members present: Beason, Fuqua, Gullick, Huffman, Laney and Little. Staff and guests present: Wright, Johnson, Massiello, and Ratliff.

Judge Steelman welcomed everyone to the Commission's Annual Fall Retreat and acknowledged the kindness of Ella Wrenn and the staff of the Green Park Inn in making the hotel available to the Commission. He introduced guests: Mel Wright, Executive Director of the Chief Justice's Commission on Professionalism; Melissa Johnson, Executive Director of the Blue Ridge Dispute Settlement Center; and Terri Massiello, Executive Director of the Piedmont Mediation Center. Next Judge Steelman called for corrections to the minutes. Ms. Huffman asked that the word "might" be inserted for the word "would" to indicate that Judge Walker had said at the Chief District Court Judges Conference that he "might" consider caseload reporting as a factor in evaluating court staff raises. With that correction, the minutes were adopted as submitted.

Judge Steelman next administered the oath of office to new Commission members Professor Mark Morris and Wayne Huckel. Professor Morris noted that he teaches at North Carolina Central School of Law and directs the school's Dispute Resolution Institute. Mr. Huckel introduced himself as a partner at Kennedy Covington in Charlotte where he practices commercial and business law and is both a mediator and arbitrator. Judge Steelman noted two other new members, attorney Gary Tash of Winston-Salem and Superior Court Judge Michael Morgan of District 10, who could not be present for the meeting. He added that Judge Carroll had resigned and he expected a replacement to be named soon. Following these announcements, Judge Steelman made the following committee assignments: Judge Morgan – Executive, Mr. Huckel – Certification and Training Standards, Mr. Tash and Professor Morris – Standards and Discipline.

Judge Steelman next called on Ms. Ratliff for the office report. She reported that the Commission's office had settled into its quarters at the NC Judicial Center. She added that the space assigned the Commission was larger, nicer, and more usable than provided at Anderson Drive, but that the rent had increased from \$1,100 monthly to \$1,700. Revenues were, she noted, sufficient to cover the increase. Ms. Ratliff also noted that she had met with an AOC technology supervisor relating to on-line renewal application problems. He told her that there had been technical problems with 40% of the applications during the 2007/08 renewal period and promised to rectify the situation prior

to the 2008/09 renewal period. He suggested that she recruit a focus group to test the system for the coming year and she reported great success in recruiting volunteer mediators for that purpose. Ms. Ratliff added that Phase III, credit card payment, would be delayed until the problems were resolved. Next, she reported that she would be assisting Lemuel Hinton at the Public Utilities Commission in developing a database of mediators to work with his office. She also noted that the Commission's office had been working with Mr. Laney to develop materials to implement the new District Criminal Court Mediation Program, including: brochures, forms, policies, and a certification application. She reported that the office was seeing an up tick in non-attorney applicants and that she would soon be mailing the Commission's Annual Report for 2006/07.

Judge Steelman noted that the AOC had advised the Commission that it had \$128,000 in unspent revenue that had been accruing over the last few years. Then, he turned the floor over to guest speaker Mel Wright who gave a presentation on the Chief Justice's Commission on Professionalism (CJCP). Mr. Wright discussed the history of his Commission, explained how he handled referrals and discussed how his Commission might be able to assist in addressing mediator professionalism issues. There followed some discussion about how non-attorney mediators and arbitrators could be included. Mr. Wright noted that when he responds to concerns and counsels with a referral, that he prefers to take a lawyer or judge with him. As such, he would want a member of the Commission or another mediator to go with when he met with a mediator who was the subject of a concern. Mr. Wright stressed that his work was preventative and not regulatory, *i.e.*, he is not there to punish, but to persuade the subject to change or to seek help. Judge Turner moved that the Commission ask Mr. Wright confer with the Chief Justice about whether mediators could be brought under the umbrella of the CJCP. The motion was adopted unanimously. Judge Steelman thanked Mr. Wright for coming and noted that he wished to keep this matter within the purview of the Standards, Discipline and Advisory Opinions Committee.

Judge Steelman next asked the members of the Standards, Discipline and Advisory Opinions Committee to report on the State Bar's request that the Commission consider whether mediators who are also attorneys have an obligation, pursuant to State Bar Rule 8.3, to report attorney misconduct that they learn of during mediation. Mr. Little gave a brief summary of the history of the request and efforts the Committee had taken to address it, including meeting with Mr. Wright and Alice Mine of the State Bar. Mr. Little described this request as "intellectually tough" and noted that Rule 8.3 conflicts with Standard III of the Commission's Standards of Professional Conduct for Mediators which addresses confidentiality. That Standard seeks to preserve confidentiality and allows exceptions only in limited circumstances, *i.e.*, a statute mandates reporting, *e.g.*, child abuse, or public safety is seriously threatened. There is no exception to confidentiality for the purpose of reporting attorney misconduct.

Mr. Little explained the Committee had determined to revise Standard III to require reporting of attorney misconduct. The Committee believed that mediators should not condone or even appear to be concealing attorney misconduct. The Committee believed that such reporting was in the public's interest and that the public would demand it. He next walked the members through the Committee's proposed changes to Standard III. He



enforcing mediation agreements that do not comply with 50-20. Judge Lee explained that while it is the parties', and not the mediator's, responsibility to ensure that agreements comply with G.S. 50-20, that language had been added to clarify that a mediator has the option to recess a conference when it was impossible to get an agreement notarized at the conference or otherwise ensure its compliance with the requirements of 50-20. Calling a recess addresses the situation where an agreement is reached, but a mediator is uncomfortable advising the court that the matter has settled until the agreement has been executed in accordance with G.S. 50-20. There was discussion about whether a participating attorney could notarize the agreement. Judge Turner and Ms. Fuqua thought this was not appropriate. The proposed changes to FFS Rule 4 were adopted unanimously.

Judge Lee next called attention to proposed revisions to the MSC/FFS Rule 6.B.(4) mediator reporting requirements. The Committee proposed revising these rules to provide for mediators to report who was present for mediation rather than who was absent without permission. Mr. Little noted that this change was consistent with how the federal court handled this facet of reporting and would remove the mediator's responsibility to make judgment calls relative to who was absent without permission. These revisions were unanimously adopted and Ms. Ratliff was asked, once the Supreme Court had approved the change, to amend the Report of Mediator forms to reflect this new approach. Judge Lee then directed attention to proposed revisions to MSC Rule 4.A.(1)(a)(ii). This proposed revision is intended to address the reality that corporate representatives are sometimes required by by-laws, articles of incorporation or other corporate documents to obtain board approval of mediated settlement agreements. This revision was unanimously approved by the Commission.

Next, Judge Lee called attention to MSC/FFS/Clerk statutes and rules addressing sanctions for failure to pay mediator fees. Mr. Little noted that the statutes currently addressed sanctions for failure to attend, but not failure to pay. Judge Turner asked why proposed revisions to the statutes did not include Rule 37 sanctions. Mr. Little and others thought that might be considered too severe. Mr. Little noted that the original MSC statute had provided for Rule 37 sanctions for failure to attend, but they were removed when the program was approved for statewide expansion because such sanctions were deemed too heavy-handed for a settlement proceeding. Judge Turner responded that money fines do not always motivate parties in equitable distribution disputes. Mr. Laney suggested that in the corresponding MSC/FFS/Clerk Rule 7 revisions that the rules should expressly cite the statute and "this" section should be changed to "that" section. The proposed statute and rule changes along with Mr. Laney's proposed changes were adopted unanimously along with proposed changes to the MSC and FFS Rules addressing sanctions with regard to other settlement procedures. (The Clerk statute and rules do not provide for other settlement procedures.)

Judge Steelman next asked Mr. Laney to update the Commission regarding the new District Criminal Court Mediation Program. Mr. Laney reported that the Rules were before the Court. He shared a brochure and various program forms. He moved for adoption of proposed *Guidelines Interpreting Rules 7 and 8 of the Rules Implementing Mediation in District Criminal Court* and *Guidelines Amplifying Rules for Certification*

*of 24-Hour District Criminal Court Mediation Training Programs.* Both Guidelines were approved unanimously.

Next, Judge Steelman called for liaison reports. Ms. Gullick reported for the Dispute Resolution Section that the Council would be meeting in December at Elon School of Law to do some long-range planning. The annual meeting of the Section, she added, has been scheduled for April 11, 2008. She added that the Section was looking for ways that mediators could support the NCBA's *pro bono* initiative. Ms. Fuqua reported that court staff were concerned about rising numbers of mediator substitution requests and hoped the Commission would be able to successfully address that matter. Ms. Huffman reported for the AOC that the MSC caseload statistics for the year had been collected. She added that eight FFS districts have not reported and that efforts were underway to begin collecting Clerk Program statistics. Mr. Laney reported for the federal courts that Judge Gates had been asked to initiate a mediation program in the Eastern District. Professor Morris reported that the Alternative Dispute Resolution Institute is considering expanding its curriculum and is busy offering classes. Judge Steelman reported that the Court of Appeals continues to successfully operate its mediation program with 50 to 55% of the cases settling. He reported that he has asked Ms. Ratliff to see whether cases could be mediated at the new NC Judicial Center.

**Saturday morning, November 3, at 8:00 a.m.**

The meeting opened with a return to Judge Lee's Committee and a discussion of proposed changes to the mediator substitution provision in MSC/FFS/Clerk Rule 7. Judge Lee noted that proposed revisions required parties seeking a substitution to demonstrate to the court that they had paid the original court-appointed mediator a substitution fee. This change Judge Lee noted was intended to deter requests for substitutions. Mr. Little was asked how the parties would prove payment and he responded that they would need to submit a canceled check. Judge Steelman asked what was behind these proposed changes? Judge Lee noted that several Trial Court Coordinators and Judicial Assistants had registered concerns with Ms. Ratliff and Ms. Fuqua regarding growing numbers of requests for substitutions and the time involved in processing them. Judge Steelman noted that since MSC and FFS Rule 7 were currently before the Supreme Court, that the Commission would likely need to withdraw them so that the additional change could be inserted. Judge Lee moved for adoption of the new proposals modifying the versions of MSC/FFS Rule 7 that were currently before the Supreme Court and current Clerk Rule 7. The motion was unanimously approved and Judge Steelman said that he would contact the Supreme Court about withdrawing pending MSC/FFS Rule 7.

Next Judge Steelman asked everyone to look at their calendars to schedule meetings for the upcoming year. The following dates were selected: February 15, 2008, in Raleigh; May 16, 2008, in New Bern; August, 15, 2008, in Durham; and November 7-8, 2008, at the Green Park Inn in Blowing Rock.

There being no further business, Judge Steelman, thanked everyone for coming, adjourned the meeting and asked that the members of the Ad Hoc Committee to Revise

the Standards and Disciplinary Rules remain for a committee meeting. He invited any interested Commission member or ex-officio member who was not part of the Committee, to remain for the meeting.