

Minutes

NC Dispute Resolution Commission

Friday, September 9 & Saturday, September 10, 2011
Asheville, NC

Friday, 1:00 p.m.

Present for the meeting: Chairman Lee and Commission Members Anderson, Bryant, Clare, Conley, Curran, Farah, Gullick, Hay, Hudspeth, Little, McKown, Morgan, Tash and Turner. Ex-Officio Members present: Beason, Cole, Doyle, Laney, Schafer, and Whitley. Guests and Staff present: Mike McDaniel and Leslie Ratliff.

Judge Lee welcomed members and guests. He identified George Doyle who replaces Zeb Barnhart as the Dispute Resolution Section's Chair and liaison to the Commission. Mr. Little introduced his guest, attorney and MSC mediator Mike McDaniel of Raleigh. Judge Lee noted that the meeting was very well attended and thanked Ms. Ratliff and Ms. Robinson for their work. Mr. Hay welcomed everyone to Asheville.

Judge Lee began by noting that Judge Curran's second term on the Commission had come to an end and presented a plaque to her as an expression of the Commission's gratitude. Next he administered the oath of office to Mr. Little and Mr. Farah who had been re-appointed to second terms. Judge Lee thanked them for their service to date and ongoing commitment. Judge Lee noted that terms of other members expired September 30th, but that the Chief Justice had as yet taken no action on those appointments. Mr. Laney noted that the Section had sent a letter to the Chief noting that Ms. Clare, Ms. Bryant and Justice Jackson were all eligible for re-appointment and recommending that they, in fact, be reappointed. Judge Turner and Judge McKown noted that there was some question about their eligibility to continue to serve in that Judge Turner had been elevated to the superior court bench and Judge McKown had retired from the district court bench. Judge Lee does not think the statute is clear, but said they should continue to serve until the Chief Justice takes action.

Judge Lee next called for approval of the minutes and they were approved as submitted. Ms. Ratliff was asked for the office's report. She began by thanking Ms. Robinson for her work in coordinating the retreat and Ms. Laue for keeping the office under control while Ms. Robinson focused on the retreat. She noted that Commission members would soon be receiving a memo regarding State Ethics Act training requirements and that several would need to complete a refresher course. She also reported that the 2011/12 certification renewal period was drawing to a close. She characterized it as a strong year with 1,215 MSC, 290 FFS, 107 Clerk and 45 DCC mediator certifications outstanding as of September 7, 2011. She also summed up budget information for FY 2010/11, which ended on June 30, 2011, and reported that total collections for the year were \$211,535.00 with total expenditures of \$187,434.66. Carry forward for the year was \$24,134.00 and when that number was combined with the carry forward from previous years, it totaled

\$113,420.00. Lastly, Ms. Ratliff reported that AOC forms staff had been let go in a recent downsizing and she was concerned about what may happen with the forms approval process in the future. The Commission, she added, currently had some forms in the pipeline in connection with the proposed revisions now before the Court.

Judge Lee reported for the Executive Committee and began by noting that he was extremely concerned that OSMB had confiscated \$12,602.34, or about 10 % of the Commission's accumulated carry forward. He noted that he felt the Commission owed a fiduciary duty to mediators to protect the fees they paid for certification and certification renewal and to preserve them for Commission use. He added that statutory language was very clear (Session Law 2011-145, Section 15.5) to the effect that the Commission's funds are non-reverting and only to be used at the direction of the Commission. He added that Gregg Stahl had offered to assist the Commission in protecting its carry forward by seeking special non-reverting fund status. Judge Lee sees no reason to do this given that the statute was clear, but was willing to try this approach. He also told the group that he had written a letter to OSMB Director Andy Willis complaining about the seizure, but had not mailed it. He noted that he was concerned about possibly alienating General Assembly members and asked for feedback from the Commission. After some discussion, the Commission agreed that Judge Lee should both send the letter to Mr. Willis and seek assistance from Mr. Stahl. Judge Lee and Mr. Laney reported that the Commission's proposed rule revisions had been approved by the ADR Committee of the State Judicial Council and the State Judicial Council and were now ready to go to the Supreme Court which was scheduled to meet in conference on October 6 and November 9. Mr. Laney added that significant revisions to the Rules for the Court Ordered Arbitration Program would also be going to the Court.

Next, Judge Lee noted that revisions to the Commission's Rules were before the group. He noted that these revisions largely related to ex-officio members voting on matters before Committees. He explained that Deputy AG Grady Balentine had advised Ms. Ratliff that ex-officio members may not be covered under the Defense of State Employee's Act. Though it was regrettable, the Executive Committee felt it best to protect ex-officio members from suit by limiting voting to Commission members who are covered by the Act. The proposed revisions were unanimously approved with minor changes, *i.e.*, removal of the word "periodically" in Rules VIII.C.3.(a) and IX.A.3.(b) and expansion of any 120-day time period noted in the rule to 150.

Judge Lee next called for Ms. Clare to report for the Standards, Discipline and Advisory Opinions Committee. Ms. Clare began by introducing a proposed Advisory Opinion (AO) that addressed how a mediator should respond when approached by a State Bar investigator asking to interview the mediator regarding an attorney's conduct in mediation. The AO, she explained, took the position that mediators should not agree to speak with investigators informally. They could, however, cooperate with the State Bar if deposed or subpoenaed to testify at a hearing. In those situations, she explained, safeguards were in place, *i.e.*, attorneys and a hearing panel present. Judge Turner responded that he thought opportunities would be lost to resolve grievances very early if such conversations were prohibited. Ms. Clare responded that the investigator could

speak with others who were also present, including the parties and their attorneys. Mr. Laney asked whether attorneys (and thus attorney-mediators) have any obligation to speak with investigators? Ms. Clare and Mr. Little thought not, but Ms. Clare agreed to contact Alice Mine for clarification. Ms. Bryant asked if the opinion would be different if the investigator were calling regarding the attorney-mediator's own conduct? Discussion followed regarding the wording of N.C.G.S. 7A-38.1(l) and whether the language relating to State Bar hearings and proceedings referred only to grievances filed against attorney-mediators or to those filed against attorneys participating in mediation. Judge Lee asked Mr. Little and Mr. Laney, who argued opposing views, to prepare position papers on the matter for the Commission with the papers due within 60 days. In the meantime, the AO was tabled. Ms. Clare asked how the Commission's office should respond to such inquiries in the near term. Ms. Ratliff was advised to inform callers not to respond to the investigator.

Ms. Clare next drew attention to a proposed inquiry to be directed to the State Bar. She explained that the Commission would be asking the State Bar to comment on the extent that an attorney-mediator working with *pro se* parties can assist them. Specifically, can a mediator reduce the parties' agreement to a final writing and have them sign it and then assist them in submitting it to the court for the purpose of obtaining a consent order, *i.e.*, is it proper for the attorney-mediator to represent both parties before the court. There followed discussion about whether it was best practice for mediators to draft agreements. Messrs. Little and Beason said that they do not draft agreements, Ms. Bryant pointed out that in family mediations the numbers of unrepresented parties are growing and the reality is that there is a need and demand for such services. She noted that she drafts, but does not have the parties sign the agreement and advises them to have it reviewed by a lawyer. Judge Turner noted that in his district, mediators routinely draft and present consent orders for judges to sign. The Commission agreed the inquiry should go forward. Ms. Clare will send it to Alice Mine. She concluded by thanking Mr. Little for his help with this project.

Next, Ms. Clare presented another AO on mediators serving as notaries. Ms. Clare explained that the SDAO Committee had contacted the Secretary of State's (SOS) office to inquire whether it was appropriate for an attorney-mediator to notarize an agreement reached in mediation. The issue was whether a mediator, who is being paid to mediate a dispute and whose fees may be included as a term in the agreement, is a beneficiary of the underlying transaction. The SOS determined that the mediator's fee was independent of the underlying transaction, *i.e.*, the fee would be due and owing whether an agreement was reached and notarized or not and, as such, they saw no problem in the attorney serving as a notary. In addition, in light of the fact that the NC State Bar has determined that mediation is not the practice of law and given the analysis above, SOS staff further concluded that non-attorney mediators could also notarize mediated agreements. The AO, Ms. Clare explained, reflects the SOS analysis. The AO was unanimously adopted by the Commission. Lastly, Ms. Clare updated the Commission on complaint activity for the quarter and notified those present that additional Opinions on confidentiality and review of materials in preparation for mediation are in the works.

At this point, Judge Lee deviated from the agenda and the group received a special report from Lori Cole updating them on mediation caseload statistics for FY 2010-11. She also reported on significant changes to the Court-Ordered Arbitration Program Rules and presented an update on the work of the Court Programs and Management Services Division. Judge Curran noted that with regard to the Clerk Program statistics, she would like to see foreclosure cases deemed eligible for mediation. Mr. Little asked her if she thought other clerks would support such a rule change and she strongly believed they would. Judge Lee asked Ms. Cole about capturing data on the numbers of cases settling shortly after mediation. Ms. Cole responded that neither her office nor the court had the resources to do this. Judge Lee thanked Ms. Cole for her update.

Next, Mr. Hudspeth reported for the Mediator Certification and Training Committee. He began by directing attention to proposed changes to the Commission's Advertising Policy. The proposed revisions, he reported, were intended to prohibit mediators from posting information about degrees awarded by unaccredited institutions on the Commission's web site. The revisions also suggest that mediators not couple mention of such degrees with notice of their DRC certification. Revisions to the Policy were adopted.

Judge Lee adjourned the meeting at 5:00 so that the SDAO Committee could meet prior to dinner.

Saturday, 8:00 A.M

Mr. Hudspeth continued with his report calling attention to proposed changes in the Requirements for Observer Conduct. He first noted that a new #2 had been inserted asking observers to dress appropriately for mediation. In addition, #3 had been revised to instruct observers to turn off cell phones and similar devices and store them out of sight. The Commission voted to adopt the changes with the amendment to #2 revised to read, "Dress appropriately. This is a court ordered proceeding." Next, Mr. Hudspeth called attention to proposed revisions to the Policy on Waiver or Reduction of Fees. The proposed changes provide for fees to be waived in situations where an applicant for certification or certification renewal is temporarily or permanently disabled and claims financial hardship. The changes to the Policy were adopted.

Mr. Little next reported for the Program Oversight Committee. He reported that proposed rule changes adopted by the Commission had now passed the ADR Committee and State Judicial Council without changes and would soon be forwarded to the State Supreme Court. He noted that the Commission had approved a last minute change to program rules (by email) that would allow deadlines for completion to be extended upon the judge's own motion, upon stipulation of the parties or upon suggestion of the mediator.

Mr. Laney next reported for the Book Committee. He reported that this project has now entered the editing phase and the book has a tentative February or March release date. He added that the book will be available three ways: by e-book, by print on demand or by key code. Ms. Ratliff asked whether the Commission would make copies available for

certified mediators? Mr. Laney and Judge Lee responded that was something that should be considered.

Judge Lee and the members next selected a meeting date for the upcoming FY 2011/12 retreat, September 14-15, 2012. They agreed to again meet in Asheville at the Crowne Plaza. Next, Judge Lee called for liaison reports. Mr. Doyle reported for the Dispute Resolution Section. He noted that the Section's annual meeting is scheduled for February 24, 2012, at the Grandover. As the Section's new chair, he noted that jump starting the Clerk Mediation Program was high on his agenda and he reported that he had tapped Barney Barnhardt, Bill Wolcott and Mr. Little to lead that effort. He described them as busy setting up a pilot program and developing a bench book for Clerks. Lastly, he added that the Section's 20th Anniversary was coming up next year. Mr. Minor was not present for the Mediation Network, but Ms. Bryant reported that centers were having a tough time financially now. Not only were their appropriations cut but, in addition, a court recently imposed a stay on Medicaid appeals resulting in a loss of that income as well. She added that centers have now been authorized by the General Assembly to retain a portion of the dismissal fees paid in district criminal court mediations, but those monies do not compensate for the lost appropriations. Mr. Schafer next gave an extensive update on the Industrial Commission's (IC) Mediation Program. He first reported that the IC had a new Commissioner, Tammy Nance, who is also a certified mediator. He added that new IC mediation program rules had been adopted effective January 2, 2011. Those rules provide that IC mediators must be certified and adhere to the Standards of Professional Conduct for Mediators. Mr. Schaffer also reported that he has been given marching orders to expedite the IC mediation process. In keeping with that charge, program forms were revised, including their Designation Form, which now requires attorneys to not only identify the mediator selected, but also the date the conference is to be held within a 120-day period. His office, he added, is now granting far fewer extensions and most cases are completing the mediation process in six months. Mr. Schafer also noted that legislation was adopted this session which significantly impacted workers' comp law and the IC (HB 709). The new legislation, he suggested, provides for a narrower range of exposure and that settlement ranges would likely become narrower as well. The new legislation also brings the IC and its Commissioners, Department of Commerce positions, under the regulation of the Judicial Standards Commission and makes their rules subject to the Administrative Procedures Act. Judge Curran asked whether expediting the mediation process has affected settlement rates. Mr. Schafer does not believe there has been an affect yet, that rates have been and currently are over 70%. He noted that one unintended consequence of expediting the process is that the work is now being spread among more mediators as parties seek to avoid scheduling bottle necks. Lastly, Mr. Schafer noted that the IC's annual conference on workers' comp mediation is scheduled for October 19-21. Ms. Whitley reported for the JSSC that she was hearing many concerns about the \$20.00 motion filing fee and that parties have been charged when requesting the court to appoint a mediator. Ms. Clare has also heard of the fee being charged when Designation forms are filed. Mr. Little suggested that he thought the use of the word "motion" on that form was incorrect and asked Ms. Ratliff to modify the form.

The ex-officio reports complete, Judge Lee asked if there was other business. There being none, Judge Lee again thanked everyone for coming and adjourned the retreat.

Minutes

NC Dispute Resolution Commission

Friday May 6, 2011

North Carolina Judicial Center, Raleigh, NC

11:00 a.m.

(The Commission's business meeting was preceded by a hearing which began at 10:00 AM. Commission members present for the hearing were: Lee, Bryant, Clare, Conley, Farah, Hay, McKown and Turner.)

Present for the business meeting: Chairman Lee and Commission Members Bryant, Clare, Conley, Farah, Gullick, Hay, Hudspeth, Little, McKown, and Turner. Ex-Officio Members present: Cole, Laney, Schafer, Steelman, and Whitley. Guests and Staff present: Len Benade (by phone), Paul Boyd, George Doyle, Jessica Scott, and Leslie Ratliff. Ms. Ratliff noted every absent member or ex-officio member had reported the reason for his/her absence.

Judge Lee began the meeting by welcoming members and guests. He identified George Doyle who will replace Zeb Barnhart as the Dispute Resolution Section's Chair (and liaison to the Commission) in June; Jessica Scott, a mediator interested in healthcare issues; Paul Boyd, an applicant for mediator certification; and Len Benade, a mediator. He thanked everyone for coming and asked for approval of the January minutes. Judge Lee noted that he had one change – that the minutes reported only that the Commission had delegated authority to the Executive Committee to pursue the matter of reclassifications and pay adjustments for Commission staff. The Commission, he noted, had also expressly authorized the Committee to approve pay adjustments. With that change the minutes were approved.

Judge Lee called for the office report. Ms. Ratliff noted that the certification renewal period was fast approaching and that letters would go out on or about June 1. She added that while she would have a final budget report at the September meeting, 2010/11 had been a good year financially for the Commission with receipts (at the end of April) already exceeding the past year by over \$3,000. She noted that inquiries about certification were steady, especially from non-attorneys. She explained that the office was careful to advise all applicants that competition for work was stiff and that newcomers would have to find a way to network and market their practices effectively. Ms. Ratliff noted that the Committees had been busy this quarter, some meeting more than one, and that regulatory activity had been steady, though less intense than last quarter. She reported that she was concerned about the possibility of lay offs with AOC technology staff. She noted that the Program Oversight Committee was potentially looking at some changes relating to the renewal application and mediator list and she was concerned about her ability to get programming assistance if staffing was reduced. She will keep the Commission advised of the situation. Lastly, she noted that she had been a speaker at the NC Judicial Support Conference along with Ms. Whitley and Ms. Cole.

Judge Lee next reported for the Executive Committee. He noted that the Committee had been successful in procuring pay adjustments for Ms. Ratliff and Ms. Robinson. He thanked Committee members and AOC Director Smith for their assistance. Ms. Ratliff expressed her appreciation also. Judge Lee added that he was pleased to report that Ms. Laue had advised him that H.B. 200 continued to show DRC funds as non-reverting and to be used at the direction of the Commission. Next, he added that some questions had come up as to the Defense of State Employees Act and its application to both Commission and, most especially, ex-officio members. The Committee would, he added, consider these matters and the issue of mediator status under the Act. Mr. Little called attention to the “independent contractor” language in the Act.

Next, Mr. Hudspeth reported for the Mediator Certification and Training Committee. He began by introducing Mr. Paul Boyd, an applicant for superior court certification. Mr. Boyd’s application was denied by staff because he did not have a college degree and the Committee had upheld the denial. Mr. Boyd had asked to speak with the Commission about his situation. Mr. Hudspeth then turned the floor over to Mr. Boyd. Mr. Boyd described his extensive work experience and talked about his exposure to and interest in mediation. He also submitted a proposed amendment to MSC Rule 8.B.(2)(c)(ii) (attached). At the conclusion of his remarks, Judge Lee thanked him for attending and sharing his thoughts with the Commission.

At this point, Judge Lee noted that Judge Steelman had to leave the meeting early and he asked Mr. Hudspeth to hold the remainder of his report in abeyance so that Judge Steelman could give his liaison report from the Court of Appeals Mediation Program. Judge Steelman reported that the Program was having much success – that 10 judges were mediating and that mediation had been successful in 65% of the cases referred in which they knew the ultimate result. Mr. Farah asked whether there was a way to increase participation in the Program and suggested an automatic stay on the briefing period for cases referred to mediation. Mr. Laney suggested that parties be required to submit their case for mediation as a prerequisite to obtaining an extension of the deadline to file briefs. Judge Steelman will consider the suggestions. Judge Lee asked those present to look at their calendars to determine some future meeting dates before Judge Steelman departed. They agreed on the following: January 27 at the NCJC and May 11 at the NCJC. Judge Lee noted that the fall meeting was already set for September 9-10.

Mr. Hudspeth resumed his report at this point and asked for comments on Mr. Boyd’s presentation. There was general agreement that Mr. Boyd gave an excellent presentation, and was an accomplished individual. Mr. Hudspeth agreed that Mr. Boyd was impressive but noted that the Committee had repeatedly given careful consideration to the 4-year degree requirement in the past and that the members strongly favored retaining it. He explained that the Committee felt that a degree was important both for mediator and program credibility and that a degree was an important indicia of the relatively high level career experience also required for certification. He added that the Committee also had some concerns about Mr. Boyd’s proposal and particularly his suggestion that the Committee meet with applicants. He expressed concern that a lot of subjectivity could creep into what should be an objective process. Ms. Conley noted that this is a

competitive field. She is concerned about the certification criteria being too lax. If mediators can't find work, she suggests, such criteria could back fire on the Commission.

At that point, Judge Lee noted that he did not see any reason to put the matter back before the Committee given that there was a consensus on the part of both the Commission and Committee that it was important to retain the 4-year degree requirement. Mr. Hudspeth agreed. Ms. Ratliff was asked to write to Mr. Boyd. Several also suggested that the threshold requirements and, especially the 4-year degree requirement, be highlighted on the website so that viewers will be aware before they invest in training. Ms. Ratliff will modify the site.

Next, Mr. Hudspeth acknowledged the NCBA's assistance in helping the Committee establish a link to its Basics of Family Law course. The link will enable certification applicants to complete the course at a reduced fee (they will receive no CLE credit). Next, Mr. Hudspeth reported that his Committee was still struggling with the issue of degrees (often obtained on-line or largely on-line) from unaccredited institutions. In a recent situation, an applicant had a legitimate 4-year degree from an accredited institution, but other degrees from unaccredited institutions. Mr. Hudspeth reported that the applicant was advised that he could not post his degrees from unaccredited institutions on his Profile form on the Commission's website. In addition, he was asked not to couple his DRC certification with the unaccredited degrees on his letterhead, business cards or advertising materials. Mr. Hudspeth will have his Committee look at the Commission's Advertising Guidelines to determine whether it should incorporate this issue. Lastly, Mr. Hudspeth outlined the steps his Committee had taken to address the concerns of some mediators that they were getting too many requests for observations: 1) a letter to mediators asking them to collectively do more to help shoulder the load, 2) a letter to trainers asking them to do more to familiarize their students with the list of mediators on the Commission's website, and 3) materials incorporated in application packets encouraging applicants to look at the wider list. Ms. Clare believes that the situation has improved.

Ms. Clare reported for the Standards, Discipline and Advisory Opinions Committee. She first introduced proposed Advisory Opinion (AO) #11-18 which was approved without changes. Next, she introduced proposed AO #11-19 which was also approved without changes. Next, she introduced proposed changes to Standard III (Confidentiality) which incorporates revisions to Rule 8.3 of the State Bar Rules of Professional Conduct. Changes to Standards III were approved in substance and Ms. Clare was authorized to tweak the language slightly and forward her changes to Commission members for review before the packet went to the Supreme Court. Next, she proposed some changes to the Commission's Rule VIII as a whole. She described the changes as general clean-up and noted that some of the more substantive revisions were responses to concerns about the Rules that had been raised by complaining parties and respondent mediators. The changes were all approved as submitted, including a change to Rule VIII.D.2.b. giving the Commission authority to discipline for violations of other program rules, such as the Industrial Commission Mediation Rules. Ms. Clare, next updated those present on efforts to gain assistance from the State Bar in addressing issues such as whether an attorney not licensed in North Carolina may represent a party in mediation and whether a corporation

my be represented at mediation by a corporate officer who is not a lawyer. Lastly, she gave those present an update on complaint activity for the quarter and noted that she and the Committee had been busy.

Mr. Little reported for the Program Oversight Committee. He introduced and explained a number of proposed revisions to the following program rules all of which were unanimously adopted without change:

1. MSC Rule 1.C. (6) and FFS Rule 1.C. (6);
2. MSC Rule 6.A.(2) and (3) and 6.B.(4)(a) and (b) with the addition of new (c) and (d) and proposed revisions to MSC Rule 6.B.(5). Proposed revisions to FFS Rule 6.B.(4)(a) and(b) with the addition of new (c) and (d) and proposed revisions to FFS Rule 6.B.(5);
3. Proposed changes to MSC Rule 7.A. and 7.G. and proposed changes to FFS Rule 7.A. and 7.G.;
4. Proposed changes to Farm Nuisance Mediation Rules to bring them current to changes in MSC Rules.

Mr. Little also noted that his Committee was working on a possible solution to the problem of superior court staff feeling compelled to keep two lists of mediators -- the Commission's list and their own incorporating letters from mediators residing outside their district or a contiguous county.

Mr. Laney reported for the Green Book Committee. Mr. Laney noted that they are busy editing the updated chapters that have been submitted to date. He added that, so far, they are still holding the \$15,000 that the Commission had contributed to the project and had yet to spend any of those funds.

Judge Lee next called for liaison reports. George Doyle was introduced as the new upcoming Chair of the Section and Judge Lee noted that he would replace Zeb Barnhardt as liaison on the Commission. Judge Lee assured Mr. Doyle that the Commission looks forward to working with him. Mr. Doyle noted that the Section is currently focused on S.B. 741 which raises the jurisdiction of civil district court to \$20,000. He also noted the bill would affect the Non-Binding, Court Ordered Arbitration Program operating in district court, allowing parties to waive arbitration if they chose to do so. He added that during his tenure he wants to focus on the Clerk Mediation Program. He noted that the Section's meetings will be regional and he provided the following dates: July 29, October 14, January 6, and April 13. Mr. Minor was absent, but Ms. Bryant reported that community mediation centers were not funded in the budget so far. She thanked Judge Lee for the Commission's letter of support. Mr. Schafer reported that the Industrial Commission Mediation Program was busy implementing its new rules. He added that some 8,500 IC cases were projected for referral to mediation this year and that some 70% of them would likely settle in mediation. Lastly, he noted that the IC budget was also targeted for reductions and that the number of Commission members may be reduced. Judge Lee congratulated Mr. Schafer on winning the Section's 2010 Peace Award.

There being no further business, Judge Lee thanked everyone for coming and adjourned the meeting.

ADOPTED BY COMMISSION via Email

From: Ratliff, Leslie

Sent: Thursday, August 04, 2011 11:27 AM

To: Andy Little [REDACTED]; ann anderson; Dawn Bryant [REDACTED];
Edward Hay [REDACTED]; Gary Tash [REDACTED]; Jackie Clare
[REDACTED]; Jessie Conley [REDACTED] Judge Ann McKown
Jackson, Barbara A.; Lee, David; Turner, Joseph E.; Morgan, Michael
R.; Larry Hudspeth [REDACTED]; Lynn Gullick [REDACTED];
Curran, Martha H.; Victor Farah [REDACTED]

Cc: Robinson, Maureen M.

Subject: additional proposed rule changes

Importance: High

To: Members of the Dispute Resolution Commission

From: Judge W. David Lee

It has been my pleasure to work with Frank Laney and other of our Commission members on the newly-revived State Judicial Council Dispute Resolution Committee. Other Commission members also serving on this Committee include Jackie Clare, John Schafer and Andy Little. At the Committee's July 22 meeting, as we reviewed the Commission's proposed amendments, it was the consensus of those present that the Commission may wish to further amend and, hopefully, simplify MSC Rule 3.C. Andy Little and I have jointly authored the revision set forth below. We are anxious to get all of our amendments in proper form to present to the State Judicial Council, now scheduled to meet on September 2, one week before our meeting in Asheville. I am therefore asking that each of you consider my motion, as Commission Chair, and vote, VIA E-MAIL on whether we adopt the following further amendment to MSC Rule 3.C, replacing the existing Rule 3.C:

- C. EXTENDING DEADLINE FOR COMPLETION. The senior resident superior court judge may extend the deadline for completion of the mediated settlement conference upon the judge's own motion, upon stipulation of the parties, or upon suggestion of the mediator.

If any of you have questions or wish to discuss this further amendment with either Andy or me, please feel free to do so. I can be reached at William.D.Lee@nccourts.org. Andy can be reached at jandersonlittle@nccourts.org.

I ask that you cast your vote ("yes" or "no") directly with Leslie (Leslie.C.Ratliff@auc.nccourts.org) on or before Friday, August 12, 2011. If the motion passes we will add this to the package going forward for approval.

Thanks.

Judge Lee

P.S. from Leslie. We will strike the existing language in MSC Rule 3.C. and replace it with the two lines above. In addition, the same changes will need to be made to the FFS, Clerk, DCC and Farm Rules. I have attached a document showing those changes also.

Leslie

Leslie Ratliff
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Minutes

NC Dispute Resolution Commission

Friday, January 28, 2011
North Carolina Judicial Center, Raleigh, NC
11:00 a.m.

(This meeting was scheduled to be preceded by a hearing beginning at 10:00 AM. Due to a medical emergency, the appellant requested a continuance on January 27, 2011. He was advised by staff that he needed to provide documentation of the emergency. That information was received by staff the morning of the hearing. Judge Lee agreed to a continuance and rescheduled the hearing for the next regularly scheduled Commission meeting, May 6, 2011.)

Members present. Lee, Anderson, Bryant, Clare, Conley, Farah, Gullick, Hay, Hudspeth, Jackson, Little, McKown, Morgan, and Turner. Ex-Officio Members present: Barnhardt, Beason, Huffman, Laney, Schafer, Steelman and Whitley. Guests and Staff present: Benade, Baroff, Doyle, Hayes, Igou, Witty, Ratliff, and Robinson.

Judge Lee began the meeting by welcoming members and guests, including Rick Igou and George Doyle, members of the NCBA Dispute Resolution Section. He next administered the oath of office to new Commission members Ann Anderson and Lynn Gullick and to re-appointed member, Judge Morgan. He noted that both Ms. Anderson and Ms. Gullick had filed their Statements of Economic Interest with the State Ethics Commission. Both were reported as having a potential conflict of interest in that they are practicing mediators serving a body which regulates mediators. Judge Morgan reported that his SEI filings were current. Judge Lee noted that he was pleased to see Ms. Anderson and Ms. Gullick join the Commission and to have Judge Morgan return and looks forward to their contributions.

Judge Lee called for approval of the September, 2010, Minutes which were approved as submitted. Judge Lee then called for Ms. Ratliff's office report. She reported that Sharon Corey-Laue had her hip replaced earlier that month and was recovering. She noted that the office had been unusually busy over the holidays with the Standards, Discipline, and Advisory Opinions and Mediator Certification and Training Committees particularly active. She added that the office had also processed several public records requests filed by applicants, complaining parties and a reporter and that certification applications continued to come in at a steady pace. She attributed the higher than usual application activity to a sluggish economy with attorneys hoping to diversify and non-attorneys looking for career opportunities and also to the fact that the Industrial Commission was now requiring its mediators to be DRC certified. Ms. Ratliff also reported that the AOC had a new website manager and they had met to discuss some short and long term changes to the Commission's site. Lastly, she reported that she and Mr. Laney had met with three South Korean judges traveling in the US who were interested in mediation.

Judge Lee reported for the Executive/Program Operations Committee. He first noted that discussions with AOC Director Smith about re-classifications and pay adjustments for Commission staff were ongoing. He asked that the Commission delegate authority to the Committee to continue to pursue the matter and authority was granted. He added that the Governor's office and legislature were looking at Commissions with an eye toward budget cuts. He noted that Ms. Ratliff had prepared a working document for the Committee that summarized the Commission's history and role. He added that the Committee would meet at lunch to discuss the personnel issue and to explore ways to protect the Commission from cuts.

Mr. Hudspeth next reported for the Mediator Certification and Training Committee. He introduced Dr. Cathie Witty, Dr. Sherrill Hayes and Professor Roy Baroff from UNC-Greensboro's Master's in Conflict Resolution Program. They would give a presentation on on-line mediator training, focusing on how interactive the technology has become. Mr. Hudspeth added that UNC-G may want to submit their on-line program for certification at some point and the presentation today was intended to give members some exposure to the technology. Mr. Hudspeth added that after the presentation, Ms. Clare would report for the Standards, Discipline and Advisory Opinions Committee and his report would continue after lunch. During the presentation, Dr. Witty noted that UNC-G's training is fully accredited and that they focus on insuring that online and classroom offerings are as consistent as possible. Following the presentation, questions were taken and Judge Lee thanked the presenters.

Ms. Clare reported on Standards, Discipline and Advisory Committee activity. First, she noted that a letter discouraging mediators from declaring impasse after a telephone call and with no face-to-face meeting was circulated to mediators by Judge Lee. She noted this has been an ongoing problem and was addressed earlier by an AO (#99-01). Next, she reported that she and Mr. Little had spoken with State Bar personnel about mediators being interviewed by State Bar investigators regarding attorney conduct at mediation. The Committee has some concerns about this practice and, she added, Ms. Ratliff is now advising mediators not to speak with investigators. They also discussed a proposed AO addressing whether out-of-state attorneys could represent parties at mediation and whether a corporation can appear without an attorney at mediation. She said that the Bar would be helping the Commission with these issues. She noted next that certification applications and renewal materials had been revised, at the suggestion of Deputy AG Grady Balentine, to include questions about arrests and pending criminal charges.

Next, Ms. Clare reported on disciplinary activity. First, she reported that the Committee had issued a private written, admonishment after receiving its third complaint from court staff that a mediator was failing to perform his case management duties. Mr. Little noted that an AO should follow to make it clear to other mediators how important the Commission considered case management. Ms. Clare agreed. Next, Ms. Clare reported that the Committee considered and later certified or re-certified several applicants whose submissions had raised character concerns: 1) an MSC certification applicant whose professional privileges as a cleric had been revoked a few years earlier; 2) a DCC certification applicant who became a felon at a young age and who was monitored by the

Committee during his first year following certification; 3) an MSC mediator who reported an admonishment and censure on his renewal application; and 4) a. dual MSC/FFS certification applicant whose law license had been suspended with suspension stayed. The Committee, Ms. Clare reported, had also responded to inquiries from a District Court Judge regarding both mediator and attorney failure to comply with local FFS Program Rules. Ms. Clare also noted that four disciplinary matters were currently pending before the Committee, including three complaints and one renewal concern involving significant tax liens reported by the mediator. Lastly, Ms. Clare reported that since the State Bar had adopted the new Rule 8.3 exception for mediators, that Standard III would need some revisions and her Committee would be working on that next quarter.

Next, Mr. Hudspeth continued his report for the Mediator Certification and Training Committee noting that members had spent much time this quarter with an applicant for MSC certification who asked for a waiver of the 4-year degree requirement. When the Committee would not grant the waiver, he asked for the rule to be revised to eliminate the requirement. Mr. Hudspeth noted that the gentleman had now appealed to the Commission and the matter had been scheduled to be heard that morning. Mr. Hudspeth reported that the issue of requiring US citizenship for certification had also been raised with the Committee and after brief exploration, the members determined not to pursue the matter. He added that the Committee had also been looking at an issue raised by trainer Celia O'Briant, *i.e.*, whether once certified, a mediator must continue to maintain the professional license under which s/he had initially qualified. Ms. O'Briant noted that individuals were coming to NC to retire and did not necessarily want to incur the time and expense involved in keeping their licenses when they were no longer practicing. Mr. Hudspeth noted that this issue had some continuing mediator education implications. Next, he noted that his Committee had received a request for partial credit toward the 40-hour MSC mediator training requirement from a mediator who had completed Office of State Personnel mediator training conducted by Carolina Dispute Settlement Services. The Committee compared the OSP curriculum to the 40-hour course and agreed to grant partial credit and require the applicant to complete only a 16-hour supplemental course. Ms. Bryant of CDSS noted that she did not expect there would be too many such requests.

Next, Mr. Hudspeth noted the office had been loaning the NCBA's Basics of Family Law Course DVDs to FFS certification applicants who did not need CLE credit. After initially authorizing the practice, NCBA staff had, subsequently, raised concerns. Mr. Hudspeth reported that after working with the Committee, the NCBA had offered to set up a website where applicants could view the DVDs for a modest fee of \$50.00. His Committee, Mr. Hudspeth reported, would be asking that applicants be given two weeks to view the 12.75 hour course rather than the one week period the NCBA proposed. Mr. Hudspeth noted that the Committee appreciated the NCBA's help with this concern. Mr. Hudspeth next reported that some mediators had raised concerns about the numbers of certification applicants seeking their help with observations. The Committee, he said had approved three memos that staff had drafted to address the situation. One would go to trainers; one to mediators, encouraging all mediators to accept responsibility for working with observers; and one would be directed to applicants and inserted in the application packet. Mr. Little thought he remembered that Florida required mediators to work with observers and suggested the

Committee might benefit from looking at that State's approach. Ms. Ratliff agreed to contact Florida and report back. It was also suggested that the Committee consider generating a list of mediators willing to volunteer to work with observers.

Mr. Little reported that the Program Oversight Committee had not met this quarter, but would have a report for the May meeting.

Ms. Bryant then reported for the *Ad Hoc* Clerk Mediation Program Committee chaired by the Section's Bill Wolcott. She noted that the Committee had a good meeting in Greensboro with a number of Clerks attending. At the meeting, those present explored a number of issues, including why Clerks were not making more referrals to mediation and whether it might be helpful to establish pilot sites where the Program could be fostered, any problems addressed, and Clerks could become more comfortable with the mediation process. She reported that the Clerks present were supportive and willing to host pilot sites in their counties. As a prelude to establishing the sites, the Committee would now, she reported, begin to look at developing markers to help Clerks identify disputes suitable for referral, at creating an operation's manual, and at developing a training module for Clerk personnel.

Next, Mr. Laney reported for the *Ad Hoc* District Criminal Court Mediation Program Committee. He noted that this Program had been operating a while now with little oversight by the Commission. A community mediation center director, Terri Masiello, has suggested that it might be good to bring participating centers together to de-brief. Mr. Laney had suggested to Judge Lee that the Committee be activated for that purpose and he agreed. The Committee met in November in Statesville to review the Program with all participating centers attending. It was decided at the meeting that there were some areas that needed attention. In particular, the centers asked whether the certification criteria could be streamlined or made more flexible. Mr. Laney reported that the Committee would be working on this and other issues that were identified over the coming months. Lastly, Mr. Laney observed that, though the Commission charges no fee for DCC certification, that the process can still be expensive for Centers who must provide training, gather information and complete paperwork for their applicants. He asked that members give some thought to the possibility of the Commission helping to defray some of those costs by paying centers a small stipend, *e.g.*, \$25.00, per applicant certified. Some members expressed concerns about a subsidy approach.

Mr. Laney next reported for the *Ad Hoc* Green Book Committee. He reported that, as the Commission had requested, he had explored alternatives to the paper and printing costs involved in publishing a traditional hard cover book. He said they will be making an e-book version available and there will also be an author's master account set up to permit law schools and mediation trainers to buy in bulk at a reduced rate. Mr. Laney proposed that the Commission cut a check for its \$15,000 contribution to the project to the NCBA. He suggested that approach would obviate the need for Commission staff to be involved in paying individual vendors for editing, publishing, *etc.* The Commission agreed. He noted that he will continue to keep the Commission advised as to costs and expenditures.

There being no further Committee reports, Judge Lee called on the liaisons: Mr. Barnhardt reported that the Section will hold its annual meeting and a “Summit” for program providers in Greensboro on February 24 and 25th. He invited Commission members to attend. Mr. Laney reported that the federal courts had hired a new appellate mediator, Ed Smith, to be based in Greenville, South Carolina, and were currently looking for a Director for the Program. Mr. Schafer reported that the IC was implementing its new rule changes which take effect at the end of January. Ms. Whitley reported for the Judicial Support Staff that some concerns had been raised about caseload statistics now being reported for some FFS Programs. It was suggested that Judges Brady and Keever be contacted about the matter. Mr. Laney reported for the ADR Committee of the State Judicial Council that the Chief Justice would soon be appointing 15 new members to that Committee and that Ms. Huffman would be serving as staff.

There being no further business, Judge Lee thanked everyone for coming and reminded them that the next meeting was scheduled for May 6 in Raleigh.