

Dispute Resolution Commission

MINUTES

**Friday, November 14, 2014
NC Judicial Center, Raleigh, NC
10:00 AM**

Members present: Little, Cash, C. Anderson, Armeña, J. Clare, T. Clare, Dollar, Evans, Farah, Gullick, Hicks, Long, McCullough, Ponton, Seigle, and Spence. Ex-officio members, guests, and staff present: A. Anderson, Beason, Hayden, Henderson, Hopkins, Laney, Lee, Nesbitt, Ratliff, Robinson, Rose, Schafer, Steelman, Turner and West. Mr. Little noted that Judge Caldwell, Ms. Brown, Mr. Igou, Judge Vincent, and Ms. Woodward were unavailable.

Mr. Little welcomed everyone and had everyone introduce themselves. He indicated that his last duty as chair would be to introduce Judge Gary Cash whom the Chief Justice had appointed as the new chair. At that point, Judge Cash presented plaques to retiring members Ms. Clare and Mr. Farah and thanked them for their service. He next presented a plaque to Mr. Little and thanked him. Next, Judge Evans administered the oath of office to Judge Cash as the new chair. Thereafter, she administered oaths to new members Thomas Clare of Raleigh and W. Mark Spence of Manteo and to re-appointed members Hicks, McCullough and Seigle. Ms. Ratliff noted for the record that the State Ethics Commission (SEC) had found that neither Mr. Clare nor Mr. Spence had an actual conflict of interest, but that both had the potential for a conflict. However, that potential was not determined by the SEC to prohibit their service to the Commission. Judge Cash asked Mr. Clare and Mr. Spence to introduce themselves to the group. The next item on the agenda was the appointment of a Vice-Chair. Judge Cash suggested waiting until the next meeting to take a vote and suggested members be thinking about nominations over the next quarter.

Judge Cash next called for Committee reports and asked Mr. Little if he wished to make comments for the Executive Committee. Mr. Little noted that the Commission would need to begin monitoring legislation soon. He added that the Commission had one bill pending at the close of the last session which related primarily to unspent revenue. He also noted an additional pending bill that related to the establishment of a mediation program in civil district court. He noted the both bills had passed the House, but had stalled in the Senate and now must be reintroduced. Judge Cash then asked Ms. Ratliff to report on upcoming meeting dates. It was confirmed that the February 27, 2015, meeting would be held at the Grandover Hotel in Greensboro; the May 15 meeting will be Raleigh at the NCJC; the August 15-16 retreat will be scheduled for the Doubletree Biltmore in Asheville; and the final meeting of the year was set for November 6, location to be determined.

Ms. Gullick reported for the MSC and FFS Program Oversight Committees. She first called attention to proposed revisions to MSC Rule 2.E and FFS Rule 2.D, letters, and a form relating to mediator withdrawal. She noted that the first letter in the packet is intended to help mediators who need to withdraw from all their cases for an extended period. The second letter is intended to be used by mediators who need to withdraw from a specific case. Both letters would be used with form AOC-DRC-20. Mr. Laney noted that the mediator may have ethical, i.e., confidentiality, problems telling a judge why s/he is withdrawing from a particular case, e.g., a party has raised concerns about a mediator's neutrality. Ms. Clare suggested putting in a reference to Standard III so that court staff will understand why the mediator is not providing a reason. She noted that would also serve to remind mediators of their ethical obligations regarding confidentiality. Mr. Laney suggested that the following statement be inserted in parenthesis at the end of first paragraph of form 20: "This statement is to be consistent with the mediator's duty of confidentiality embodied in Standard III." Ms. Nesbitt suggested the following change to the option 2 letter (withdrawal in a specific case): "For reasons I may be ethically prohibited from disclosing...". The Commission was comfortable with these changes. Ms. Clare noted that form 20 required an order as the court would need to appoint a new mediator. Ms. Gullick noted that the form states that no administrative fee is due mediators who withdraw or are disqualified. There followed a discussion about the 21-day period set forth at the end of AOC-DRC-20 for the court to appoint a new mediator. It was noted that the mediation could not be set after the trial date. Ms. Gullick will remove the reference to 21 days and replace it with a blank. Ms. Clare noted that she had had to withdraw once during a mediation. There had been a session held and then there was a recess and information came to light during the period of recess which necessitated her withdrawal. She suggested that Rules 2.D(3) and 2.E(3) be revised to read that the mediator shall receive no fee unless the mediation has been commenced. The Commission agreed. Judge Cash called for adoption of the proposed rule changes, letters, and form with the changes noted above and they were approved. Thereafter, Judge Turner suggested leaving out the language in 20 regarding the fee. Judge Cash took a poll and the members favored leaving the fee language in the rules with a qualifier exempting cases where the mediation has commenced, but removing fee language from 20. Judge Cash asked for approval of this additional change and it was approved.

Mr. Long next reported for the Mediator Certification and Training Committee. He first reported on a matter the Committee had considered this quarter, i.e., an out-of-state mediator who had completed a 16-hour Commission approved training program and a 28-hour out-of-state program. The applicant requested approval to cobble these two programs together in satisfaction of the 40-hour course requirement. The Committee responded to him that MSC Rule 8.A required completion of a sustained, comprehensive 40-hour course. He next drew attention to documents in the packet relating to the Preapproval process. He briefly explained that staff issued preapprovals at the request of individuals interested in certification, but concerned about whether they met threshold qualifications for certification relating to education and work experience. In essence, they sought verification prior to spending their time and money on training. He added that the process had evolved over time to also include a background check. Mr. Long suggested adding a paragraph to the end of the process document clarifying that the

Commission had final authority to certify. Judge Turner noted that he felt the first paragraph in the Guidelines was too convoluted and needed editing. Thereafter, there followed considerable discussion about the term “Preapproval Process”. Several members believed that the term “Preapproval” could be misleading in that those who received a preapproval might be led to think it was a guarantee of certification. Several alternatives were proposed including the term “Provisional Pre-training Approval”. Following lunch, Mr. Long read Judge Turner’s suggested edits to the Guidelines and noted that the Committee had met over lunch and approved them. Thereafter, Judge Cash asked staff to revise the materials in the packet in accordance with the suggestions noted above and Judge Turner’s language and to redistribute the packet to the Committee for further discussion, and, once the Committee had approved, to the full Commission for an e-mail vote. Mr. Long also reported that during its meeting the Committee had discussed two applications. One was an initial application involving training that was a decade old and the other was an applicant seeking reinstatement whose application involved both dated training and a lengthy lapse in certification. He reported that both applicants would be required to complete 16-hour short courses.

Ms. Clare noted that there had been no comments during the comment period on the proposed revisions to Standard III and the two Advisory Opinions that had been posted and these documents were officially adopted. Mr. Laney reported that he and Ms. Clare were offering a January webinar through the NCBA on Standard III and AOs #29 and #30. Mr. Laney asked whether the Commission would be willing to distribute notice to certified mediators and the Commission agreed that staff would notify certified mediators of the webinar via email. Mr. Laney will provide a proposed announcement to the Commission staff.

Judge Anderson reported for the Grievance Committee. He first reported on a telephone call Commission staff received from court staff regarding a mediator who was failing to fulfill his case management duties. The TCC reported that her SRSCJ had pulled the mediator off their court appointed list and questioned whether he had inherent authority to also bar the mediator from party selection work in the district. After Chairman Little spoke with the SRSCJ, the matter was resolved. Judge Anderson reported that another applicant was denied certification due to serious conduct issues, including State Bar sanctions and misdemeanor criminal convictions. That applicant has appealed to the full Commission and the matter will be heard on December 19, 2014, in the NCJC boardroom. A second applicant with multiple, though less serious, conduct issues was approved, but staff was instructed to advise him that the Committee was concerned about his conduct and that he was to be very careful to abide by the Standards of Conduct during the period of his certification. Lastly, Judge Anderson reported that a preapproval had been sought by a gentleman who represented himself as “Dr. ____” when he, in fact, held no degrees. The applicant also had an extensive criminal history, including both felony and misdemeanor convictions. The Committee refused to issue the Preapproval.

Next, Judge Anderson reported for the *Ad hoc* Committee charged with considering the matter of court staff complaints regarding the failure of mediators to fulfill their case

management responsibilities. Judge Anderson asked for approval of a packet designed to standardize staff responses in such situations and it was approved.

Ms. Anderson reported for the Ad hoc Video Committee. The video, she noted, has been widely distributed to judges, district attorneys, and community mediation centers and the Committee is also considering distributing it to Legal Aid and Public Defender offices. Ms. Anderson noted that the Committee would like to produce a Spanish language version of the video and had gotten a quote for \$3697.00. She noted that the Committee had tentatively applied to the NCBA Endowment Fund for a grant to pay for ½ this amount. She explained that the Committee had moved forward with the grant application because the deadline for applying was October 31, 2014. She added that the application was intended to recognize the fact that the NCBA was already a co-sponsor of the project and she now seeks the other half needed for the project from the Commission. Ms. Anderson noted that the endowment will consider the application in December and make its announcement in January. There followed discussion about the Commission's finances and its ability to fund the project itself. It was also pointed out that there will likely be no shortage of grant applicants with significant needs and no other funding sources. Ms. Clare moved to fund the video in full and her motion was approved. Ms. Anderson will withdraw the application to the Endowment and thank them for their willingness to consider the request. Commission staff will proceed to work with the vendors to complete the dubbing process.

Judge Cash asked for liaison reports. Ms. Anderson reported for Ms. Woodward that the annual Dispute Resolution Section meeting would be held January 30, 2015, in Pinehurst. Ms. Robinson asked whether the Commission would be notifying certified mediators of the meeting as it had done last year. The Commission approved and Ms. Anderson will contact Ms. Woodward. Ms. Robinson also suggested a snow date for the meeting in the event it needed to be rescheduled and she asked for Section contact information that she could insert in the email to certified mediators announcing the meeting. As no one from the Mediation Network was in attendance, Ms. Ratliff will ask to contact Ms. Johnson (or Mr. Minor) to make sure that Ms. Johnson is receiving communications regarding Commission meetings. Ms. Nesbitt reported that 12% fewer FFS cases were ordered to mediation this year, but 10% more were completing the process. She indicated this meant that backlogs were being cleared up. She also reported that the MSC stats are holding pretty consistent and that that Clerk referrals were up. Barney Barnhardt will be assisting Ms. Nesbitt in drafting an article on the Clerk Mediation Program. Ms. Ratliff will get Mr. Barnhardt's contact information to her. Ms. Rose reported that matters have been quiet on the family court front. Mr. Schafer reported that things are rolling along at the Industrial Commission. He said there had been a change in the assessment of fees, that the IC would be assessing a \$200.00 fee at the time the mediator files his report. The fee is typically advanced by the defendants. Mr. Schafer noted that it had been difficult to implement the fee. Judge Steelman reported that things were settling down for the Court of Appeals Mediation Program now that the election was over.

Ms. Gullick asked about the Benchbook and Pro Se Portal. Mr. Little noted that he had some concerns about the Benchbook and he said that he would come by the office soon

and go over his concerns with staff. Ms. Hopkins noted that the pro se documents are now posted on the website.

The minutes were approved as submitted Minutes and Ms. Ratliff gave her office report. She reported on the wrap up of the 2014/15 renewal period and noted that the Commission had collected approximately \$4,700 more this period than the 2013/14 period. She added that staff had been busy with the video and Benchbooks projects and was working with State records retention and archives staff to develop a records retention schedule for Commission files. Following Ms. Ratliff's report, Ms. Robinson noted that Ms. Ratliff's laptop needed to be replaced and the Commission approved the purchase.

There being no further business Judge Cash concluded the meeting.

Dispute Resolution Commission

MINUTES

Fall Retreat

Friday-Saturday, August 8-9, 2014

Asheville, NC, Crown Plaza Hotel

10:00 AM

Members present: Little, Armeña, Caldwell, Cash, Clare, Evans, Farah, Gullick, Hicks, Long, McCullough, and Ponton. Ex-officio members, guests, and staff present: A. Anderson, Brown, Hayden, Hopkins, Laney, Marsh, Nesbitt, Ratliff, Rose, Schafer, Turner, and Woodward. Mr. Little noted that C. Anderson, Dollar, Seigle, Vincent, Beason, Lee, and Steelman had sent their regrets.

Mr. Little welcomed everyone. The minutes were approved as submitted. Mr. Little welcomed new ex-officio member and liaison from the Dispute Resolution Section, Danae Woodward. He next asked Ms. Ratliff for her office report.

Ms. Ratliff reported that the 2014/15 renewal period is drawing to a close. She added that, so far, the numbers look strong, and she will have a full report at the next meeting. Ms. Ratliff also discussed the budget report for the year ending June 30, 2014, noting that the carry forward had been reduced by some \$13,000 this year due to expenditures that exceeded annual collections for the fiscal year. The amount carried forward into 2014/15 is \$177,026. She added that office had been busy with the district criminal court video and the proposed Benchbook.

Mr. Little gave the Executive Committee report focusing on legislation. He said that none of the legislation the Commission had been following had passed and he did not expect that situation to change this session. He reported that the following proposed legislation remained pending: 1) a bill revising the Commission's enabling legislation to allow it to address situations where certification is being misrepresented and to further secure unspent Commission revenue, and 2) a bill adding mediated settlement conferences as an option in district court civil cases. Ms. Nesbitt noted there would be logistical problems in implementing the second bill. Mr. Little agreed and suggested Judge Cash's Committee develop rules to implement it. Mr. Little also noted that an amendment to a pending bill related to district criminal court mediations had been introduced to allow private attorney mediators to mediate district criminal court cases. Mr. Little reported that Mr. Laney spoke to the Center where the impetus for this legislation originated in an effort to address concerns and eliminate the need for the amendment. He reported that the legislator had ultimately withdrawn her amendment.

Ms. Clare reported for the Standards and Advisory Opinions Committee. Ms. Clare first called attention to a proposed AO on confidentiality and inadmissibility. The purpose of the AO, she stated, is to clarify that program enabling legislation does not protect mediators from being subpoenaed to testify in a criminal proceeding involving the same facts regarding what happened during a mediated settlement conference. In other words, inadmissibility protections apply only to the case being mediated or to other civil actions on the same claim. Judge Caldwell suggested that the Commission should work with the NCBA to get information to attorneys regarding issues of inadmissibility and mediator confidentiality. Several Commission members echoed Judge Caldwell's concern and said there was a lack of understanding in this area among both attorneys and mediators. Mr. Little agreed that there is confusion and that many attorneys do not understand that they may need to get a separate confidentiality agreement, if confidentiality is an issue for them. Mr. Ponton and Mr. Long agreed to work on an article for family attorneys. Judge Caldwell added that judges may need information also. Mr. Laney noted that, "What happens in Vegas, stays in Vegas", is the rule in federal court and he has great concerns with this blanket provision. After some additional discussion, the next to last paragraph of the AO was substantially revised, including: modifying the first sentence to substitute "define and describe" for "explain and strike "the notions of"; revising the second sentence to read, "Doing so in a correct, clear, succinct, and non-threatening manner can be a challenging task for mediators"; striking the third sentence in full, and redrafting the fourth sentence to read, "While mediators have the duty to define and describe these concepts, any legal interpretation is the responsibility of attorneys for the parties." Judge Cash suggested that the Commission contact the School of Government to get the inadmissibility/confidentiality matter on their training agenda. The AO was adopted with the changes noted above. Ms. Nesbitt asked about the creation of a safe harbor with the Commission providing proactive guidance to mediators regarding what they can and should say about confidentiality and inadmissibility. Mr. Little noted this was a project for another day and he would assign a committee to look at it.

Ms. Clare next called attention to proposed changes to Standard III, noting that the Standard conflicts with program enabling legislation in that Standard III does not allow an exception for the mediator to testify in criminal matters. Proposed changes to Standard III.D(2) are intended to reconcile the enabling statutes and Standard III. Judge Cash and Mr. Little noted that the enabling legislation for the FFS and Clerk Programs will also need to be added. Ms. Brown suggested that the language be revised to say, "If subpoenaed and ordered to testify..." Mr. Laney asked that the last paragraph of subsection (3) be renumbered as (4). The Commission approved the proposed revisions to Standard III with the modifications noted above. Thereafter, Mr. Laney asked for an additional change to the language approved above, "If subpoenaed and ordered to testify or produce evidence." This additional change was approved by the Commission. Mr. Little asked for a change in the numbering of the Advisory Opinions and said that would be discussed further on Saturday.

In the second AO dealing with mediator testimony, the Commission made the following changes to the third paragraph of the second page: in the second sentence, strike the word "compulsory" and after the words "attendance and" add "testimony and the production of

documents”. In the third sentence beginning with “However”, strike the word “testimony” and substitute “compliance”. In the fourth sentence beginning with “Even though”, strike the first part of the sentence through the word, “view”. With these changes the second AO was adopted.

Commission members next watched a video on district criminal court mediation directed by Bryan Miller of the NCBA and produced by Commission staff and the Ad Hoc Video Committee. The Commission reacted very positively to the video and a discussion followed on how to best distribute the video. Commission staff will post the video on the Commission’s website and Ms. Anderson suggested that the Video Committee meet to discuss distribution. Mr. Miller said he was certain that the NCBA would be willing to provide some assistance to the Commission in developing copies for distribution. Mr. Miller also suggested that the video be posted on YouTube. Mr. Armeña will work with staff to establish a YouTube account.

Mr. Long next reported for the Certification and Training Standards Committee. He noted that his Committee is continuing to look at whether it should add licensed, registered nurses or certain advanced subspecialties of that profession to the list of professions eligible to be certified under FFS Rule 8.A(2). He also reported that he made an executive decision as chair to decline a request to set a lower certification renewal fee for mediators who are retired professionals or who mediate infrequently. Lastly, he noted that the Advertising Guidelines had been posted for comment and there had been no comments. As such, he asked for and the Commission gave final approval to the Advertising Guidelines.

Judge McCullough reported for the Grievance Committee. He noted that the Committee had been busy this quarter. He noted there had been three situations in which the Committee had considered certification applications that raised ethics concerns. Two of the applicants had been approved and one denied. Judge McCullough noted that the individual denied certification had appealed. He explained that in considering applications that raised ethics concerns, the Committee looked at the severity of the problems disclosed or discovered by staff, the number of issues or concerns raised and how recent they were, whether the applicant had been straightforward in disclosing concerns, and how a party who had been assigned the mediator might view him or her, if aware of the concerns. Judge McCullough also noted that the Committee had received two complaints this quarter from court staff regarding mediators who were not fulfilling their case management duties. Mr. Little added that he intended to establish an *ad hoc* committee to look at drafting a warning letter when court staff has raised such concerns. Judge McCullough also noted that the COA had affirmed a State Bar determination that a mediator’s failure to report a Grievance on his/her certification renewal application was a violation of State Bar Rules 8.4(c) (conduct involving dishonesty, deceit or misrepresentation) and 8.4(d) (conduct prejudicial to the administration of justice). The mediator in question had lost his mediator certification in part due to his failure, over two renewal cycles, to report to the Commission a serious Grievance. The Grievance eventually led to his suspension. The State Bar had considered the mediator’s failure to report to the Commission in making its determination. Lastly, Judge McCullough noted

that the Committee has also considered two instances of a Commission member filing a complaint relative to a mediator breaching confidentiality. These mediators had provided an affidavit or given testimony without first making any effort to alert the court to program enabling legislation and Standards prohibiting mediator testimony. Judge McCullough noted that the first mediator had been issued a private warning and the second matter was still under consideration. He added the second AO mentioned above was an outgrowth of this misconduct.

Ms. Gullick and Judge Cash jointly reported for the MSC and FFS Program Oversight Committees. They first called attention to AOC-DRC-19 and AOC-CV-835 (this form can be used by *pro se* parties or parties with attorneys). Ms. Hicks noted there should be no motion fee charge on this form since no hearing is required. Ms. Rose offered to work with staff to draft a memo to convey that information. Mr. Little asked Ms. Hayden if she thought support staff would be confused by a mediator using DRC-19 to seek an extension. Judge Turner reported he had used 19 twice in two different districts and had no problems. The mediator does not use 835. Ms. Hayden thought everything would be fine as long as a clear explanation was provided at the time the forms were distributed. Ms. Gullick and Judge Cash reported that the Certificate of Observation forms were also revised to reflect rule changes. It was noted that the correct name of the FFS Program was “Family Financial Settlement Procedures Program” and the title of the forms will be revised to reflect that. The Commission approved the forms as submitted. Judge Cash described the *Pro Se Parties Guide* and a proposed new portal intended for the use of *pro se* parties. He noted that the number of *pro se* litigants is substantially increasing. Mr. Little noted there would be more discussion of this topic on Saturday morning.

Saturday, August 9
8:30 AM

Liaison reports followed. Ms Woodward reported that the Dispute Resolution Section of the NCBA has two new committees, a Collaborative Law Committee and a Social Media Committee. She also noted that the annual meeting of the Section has been set for January 29 in Pinehurst. Mr. Little suggested that ethics issues and the new AOs would make a good topic. Ms. Hayden reported that the NC JSS newsletter featured the new forms and she said that she hoped that the Commission would get the forms out quickly. Ms. Hopkins reported that she had been in touch with court staff to discuss conferences with them. Judge Turner suggested also that the *Pro Se Parties Guide* be included in any presentation to court staff. Judge Cash added that inadmissibility and confidentiality also need to be highlighted. Mr. Laney reported that the federal courts are experiencing a money crunch right now. Mr. Little added that there had also been rule rewrites in the federal trial district courts as a follow-up to some research the Section had done. Ms. Nesbitt reported for the AOC and distributed copies of caseload statistics for the MSC and FFS Programs. Ms. Nesbitt reported a 12% caseload decline in superior court and there was also a drop in the cases completing the process. The FFS caseload increased by 15%, but the cases completing the process declined by 19%. There are still a few FFS districts that are not reporting, but Ms. Nesbitt noted there has been improvement. Ms.

Nesbitt added that one big problem in the FFS Program is that the mediators are not reporting. Mr. Little noted that this may be a reflection of the fact that FFS mediators are not required to be certified and may not be aware of reporting requirements. Judge Turner noted that the FFS Program works better in districts where judges actively manage and ensure that all cases are referred and reports are filed. Judge Cash noted that the Commission needs to find out quickly when new chief district court judges take office so that the importance of statistical reporting can be discussed with them. Judge Cash noted that Districts 1 and 13 will have new judges soon. Mr. Little suggested that a quarterly tickler could be useful. Judge Caldwell asked whether the programs received any credit for cases that settle post-mediation. Mr. Little agreed there is an effect, but believed there would be problems in trying to get information post-mediation. Ms. Rose agreed that it would be difficult to get the caseload report modified, and noted that AOC Technology has been further cut. Ms. Rose reported for the Trial Court Administrators Conference that family court had not been cut, though cuts had been anticipated. Mr. Schafer reported for the Industrial Commission. He noted that the IC now has new rules effective July 1, 2014. He noted there had been an effort to change the rule requiring defendants to advance the mediation fee for the injured worker, but it had been unsuccessful. The legislature wants the IC to generate more fees to fund its programs and provide for more sharing of the fees between employers and injured workers. Mr. Schafer also reported that the new rules provide for the implementation of a staggered “phase out” of the IC’s 22 deputy commissioners by 2016. Deputy commissioners will be appointed for six year terms, and will be eligible to serve two, six year terms. Ms. Gullick noted that the DRC is very fortunate that the Commission operates with a party pay system and she praised the foresight of those who wrote the enabling legislation. Judge McCullough reported that the Court of Appeals’ voluntary mediation program is perking along. He thinks that 8-12 of their judges are mediating and that COA judges mediate about 90% of the cases that are voluntarily submitted to mediation.

Mr. Little suggests changing the title of the AOs to the following format: DRC AO Number/No./#) (numbered sequentially) followed by the year adopted in parenthesis. After a brief discussion staff was asked to renumber AOs according and to update any cites in the text.

Mr. Little next introduced the MSC and FFS *Guides for Pro Se Parties*. Commission members reviewed the *Guides* and made substantive modifications in the sections addressing the concluding of the session, fine-tuned some of the other sections, and corrected some typos. Staff will make the revisions noted, flag minor AOC legal staff changes and get the *Guides* to Ms. Gullick and Judge Cash for final approval. Staff will also prepare a letter to court staff transmitting the *Guides* and noting they were prepared at the request of court staff. Mr. Little requested that the new forms be transmitted to mediators as well accompanied by a one page summary.

The next Commission meeting is scheduled for November 14, 2014 in Raleigh; the next retreat was tentatively set for August.14-15, 2015; at the Crowne Plaza beginning at 11:00 AM. A meeting was also set for May 15, 2015, location to be determined. The

February meeting will be scheduled for either February 20. Mr. Little suggests the appeal be heard in October if possible. Staff will contact Mr. Balentine about his schedule.

Dispute Resolution Commission

MINUTES

Friday, May 16, 2014
NC Judicial Center, Raleigh, NC
9:30 AM

Members present: Little, Anderson, Armeña, Caldwell, Cash, Clare, Dollar, Evans, Farah, Gullick, Hicks, Long, Seigle, and Vincent. Ex-officio members, guests, and staff present: Hayden, Henderson, Hopkins, LaMotte, Laney, Marsh, Marvin, Ratliff, Rose, Schafer, Smith, Steelman, and Turner. Mr. Little noted that Beason, Brown, Ellis, Lee, McCullough, Nesbitt, and Ponton had sent their regrets. Judge Ralph Walker was a special visitor.

Mr. Little welcomed everyone. He introduced new Commission member Judge Yvonne Mims Evans of Charlotte, appointed by the Chief Justice, and asked Judge Caldwell to administer the oath. Judge Caldwell noted that Judge Evans is a highly respected jurist and that he was honored to administer her oath. Mr. Little noted that Judge Evans was found by the SEC to have no actual or potential conflicts of interest. Mr. Little added that former Commission member Ann Anderson had agreed to serve as an ex officio member. Mr. Little next noted that he had asked AOC staff Mia LaMotte, Stephanie Smith, and Kari Marvin to update Commission members on the Custody and Visitation Mediation, Permanency Mediation and Court Ordered Arbitration Programs. Ms. Smith reported that her office had just completed a training program for custody mediators and had applied for grants to update the custody video that was shown to some 19,000 parents last year. She added that parties with children are required to go to an orientation and one mediation session. Judge Cash asked whether the program was now statewide and she reported that it was. Judge Cash praised the custody mediators for their dedication and professionalism. Ms. LaMotte reported that the program has been very successful and the AOC believes that, even in instances where there is an impasse in mediation, that the parties often go on to settle without the need for a trial. Judge Vincent suggested that more needs to be done to ensure security of custody mediators and parties. Ms. Smith that she believes work is being done in that regard. Judge Caldwell asked whether children were ever included in the mediation sessions. Ms. Smith responded that they typically discourage parties from bringing their children. Mr. Long asked about court support for the program. He said he had heard about parties failing to appear at mediation sessions with no consequences. Ms. Smith admitted that in some districts there is not as much follow-up as she might like. Mr. Laney asked about staffing. Ms. Smith responded that they need more staff. She noted also that CaseWise has begun to facilitate and improve their record keeping.

Ms. Smith also reported that the Permanency Mediation Program is strong in Charlotte and beginning to grow in other areas of the state. She explained that this Program comes into play when a child is removed from his/her home. The mediator works with

professionals, biological family, and foster family involved in the case. She noted that Permanency mediators are contractors. Judge Evans noted that the Program is mandatory in Charlotte and Ms. Smith added it is approved for statewide expansion.

Ms. LaMotte spoke about the Court-Ordered Arbitration Program and asked Mr. Laney to provide a short program history. Mr. Laney explained there was originally an Arbitration Committee operating through the NCBA. When the program's pilot phase was completed, the AOC largely assumed the role of statewide administrator. He added that Tammy Smith of the AOC had spearheaded the last re-write of the rules. He thinks that was about five years ago. He said the ADR Committee of the State Judicial Council does not receive regular reports regarding arbitration, but is available to assist the AOC with the Program. Mr. Little noted that the jurisdictional limit of civil cases filed in district court has been increased to \$25,000, and he thinks there should be a mediation option for cases in which the amount in controversy is between \$10,000 and \$25,000. Mr. Little next called attention to proposed legislation pending in the General Assembly that provides for mediated settlement in civil cases filed in district court in which the amount in controversy is \$10,000 to \$25,000. He said he was not sure where this legislation originated and he noted some concerns with it, including inclusion of the use of the word, "shall", apparent abandonment of the arbitration option, and the exclusion of MSC mediators from those eligible to provide services. Mr. Farah noted that he has asked the legislature to notify him of any proposed legislation with mentions, "workers' compensation". He suggested that the Commission may need to see whether it can receive such notifications for legislation involving, "mediation". Mr. Little noted that he will do some scouting to learn who is behind this proposed legislation. Mr. Little thanked AOC staff for their presentations.

Ms. Hayden had to leave early, so Mr. Little next called for her report. She said that staff was working to improve statistical reporting. She said the TCC/TCAs will meet in the fall. Mr. Little suggested that the Commission may want to be on their agenda.

Mr. Little next called for committee reports and asked Ms. Gullick to report for the MSC Program Oversight Committee. She directed attention to a number of proposed forms replacing the ones circulated to the Commission in the meeting packet. Ms. Gullick noted that Ms. Robinson and Ms. Hopkins had been very helpful to the Committee in developing the packet. She added that these forms were an outgrowth of the motions fee which is now no longer in place. Ms. Gullick explained that the first page of their handout shows how the forms will be posted on the DRC website. Proposed AOC-DRC-19, she added, is mediator driven and thus a Commission (DRC) form. It can be used by the mediator or the parties when there is agreement that an extension is needed or it can be used by the court on its own motion to extend. If used by a mediator, the form will be accompanied by the template letter. She added that the final form in the packet is a revised version of AOC-CV-835, a motion and order, to be used when parties disagree about the need for an extension. Ms. Gullick admitted that AOC-DRC-19 is long and users will need to be careful completing it. Mr. Laney asked why there wasn't a space for a suggested completion date on AOC-DRC-19? Ms. Gullick responded that is a good idea and she will add it. Judge Cash thinks that AOC-CV-835 is particularly important

for *pro se* parties whose numbers are growing. Judge Caldwell suggested that the mediator be copied on AOC-CV-835. Instructions for filing it will be added. Ms. Hicks agreed to try and expedite approval of these changes through the AOC Forms Committee. Mr. Little noted that use of these forms will have to come with an education process. It was observed that some folks may try to use AOC-CV-835 when everyone agrees. Ms. Hayden said she thinks that is likely to happen. Judge Evans noted that both parties will need to sign or it is not a stipulation. Lastly, Ms. Gullick mentioned a Marquette Law School study on gender differences in dispute resolution and commended it to the group.

Judge Cash next reported for the District Court Program Oversight Committee. He first asked Ms. LaMotte for a report on caseload statistics. She noted that she believes some districts are still not offering the FFS program. She added that she and Ms. Nesbitt have been going out into the field to work one-on-one with staff needing assistance. Judge Vincent mentioned that her district has a number of attorneys who mediate prior to the order and asked if that explained her district's big "Disposed Without Attending" number. Ms. LaMotte agreed that could explain it if mediator reports are not being filed. Judge Cash thanked Ms. LaMotte. He added that the Commission's office had recently gotten a call from Judge Brewer reporting that one of his district's best court-appointed mediators was refusing to take cases involving *pro se* parties. He wanted to know if that was acceptable. Judge Cash spoke with him and explained that the mediator could not refuse these cases.

Ms. Clare next reported for the Standards and Advisory Opinions Committee. She thanked Ms. Hopkins for her memo on comment policy and called attention to a proposed policy. Judge Vincent asked whether the Commission will present the rationale behind matters posted for comment? Others also thought that would be a good idea. The Comment Policy was unanimously adopted with a minor change. Lastly, Ms. Clare called attention to a minor amendment to the Advisory Opinion Policy which was also adopted.

Judge Anderson next reported for the Grievance Committee noting they had tackled five issues this quarter. He submitted a two-page summary to the group. He first noted that a mediator who had testified regarding a mediation he conducted had been issued a letter of warning. Judge Caldwell suggested that the Commission may need to do more to educate judges about confidentiality, noting that there are at least 14 new superior court judges. Mr. Little asked Ms. Clare's Committee to consider an Advisory Opinion as an outgrowth of this matter. In another matter, an attorney was censured by the State Bar for aiding in the unauthorized practice of law. Mr. Little asked the Standards and Advisory Opinions Committee to consider whether an advisory opinion on the matter would be useful to mediators.

Mr. Little reported that he had contacted Representative Glazer during lunch and been told the proposed legislation on civil district court mediation was moving forward quickly, but he would be amenable to receiving amendments by this coming Monday. Mr. Little asked Judge Cash, Mr. Laney, Ms. Gullick, and Judge Turner to meet with him

after the meeting to hammer out some language revising the current legislation. The Commission authorized this ad hoc group to act on its behalf.

Mr. Long next reported for the Mediator Certification and Training Committee. He first reported that an applicant had requested that the Committee accept several shorter basic mediation courses cobbled together in lieu of a full 40-hour course. The Committee declined, affirming its historic commitment to a sustained, comprehensive 40-hour program. He also reported that two nurses had approached the Committee on different issues. Both their requests will be denied, but the Committee is considering the inclusion of nurses as a professional group under FFS Rule 8. Mr. Long next called attention to proposed revisions to the Advertising Guidelines. The Guidelines were adopted with revisions to the last paragraph. Staff was asked to post the Guidelines for comment.

The minutes from the February meeting were approved with changes suggested by Mr. Schafer. Ms. Ratliff next gave her office report. She noted that the renewal period would begin June 1 and changes were being made to the renewal application. She added that in April a group of court administrators working in dispute resolution in 10 southern and southeastern states had gathered in Raleigh at the Commission's invitation to discuss issues relating to the administration of dispute resolution programs. She also added that staff had met with a delegation of Belorussians later that same month to discuss dispute resolution in North Carolina. Lastly, she reported that staff was working on the new Benchbook for Judges and Court Staff. Thereafter, Ms. Hopkins reported on efforts to review and update all the documents posted on the Commission's website.

Mr. Little next called for reports from ex-officio members. Mr. Laney reported that Ann Anderson had received the Section's Peace award for 2014. Mr. Schafer reported that IC rules are still proceeding forward and that he had also met with the Belorussians. Judge Steelman reported that the settlement rate with the Appellate Mediation Program is around 50%.

There being no further business, Mr. Little noted that the next meeting is the retreat scheduled for August 8-9 in Asheville. Mr. Little thanked everyone for coming and adjourned the meeting.

Dispute Resolution Commission

MINUTES

Friday, February 21, 2014
NC Judicial Center, Raleigh, NC
9:30 AM

Members present: Little, Armeña, Anderson, Caldwell, Cash, Clare, Dollar, Gullick, Hicks, Long, Ponton, Seigle, and Vincent. Ex-officio members, guests, and staff present: Hayden, Hopkins, Laney, Marsh, Nesbitt, Ratliff, Robinson, Rose, Schafer and Turner. Mr. Little noted that Mr. Beason, Ms. Ellis, Mr. Farah, Ms Henderson, Judge McCullough, and Judge Steelman had sent their regrets.

Mr. Little welcomed everyone. He first called for approval of the December 6, 2013, minutes which were approved as submitted. He next recognized new appointee to the Commission, Lucas Armeña. Mr. Armeña introduced himself, noting that he was appointed by Governor McCrory and had experience both as a paralegal and in the medical field. Judge Caldwell administered the oath to Mr. Armeña. Mr. Little added that the State Ethics Commission had determined that Mr. Armeña had no actual or potential conflicts of interest. Mr. Little noted that Judge Yvonne Mims Evans of Charlotte was appointed to replace Judge Morgan. Lastly, he added that he will be presenting a plaque to Ann Anderson marking her service.

Mr. Little next called on Ms. Nesbitt to deliver a report on MSC and FFS caseload statistics. She said she had now been able to identify districts with CaseWise reporting problems, so AOC staff can begin scheduling site visits. She reviewed MSC and FFS caseload reports with Commission members. She noted that some of the data and particularly the case pending numbers, are inaccurate, but that she will be working with staff over time to make corrections. She believes she will be able to get most districts on board eventually. There followed considerable discussion about the reports and problems with reporting. Judge Cash noted this may be a long-term effort involving work with new staff. Ms. Nesbitt asked Commission members to continue to support her in her efforts and she was thanked for her diligence.

Mr. Little then asked for Ms. Ratliff's report. Ms. Ratliff first reported that Ms. Robinson and Ms. Hopkins had been busy distributing the recently revised program rules to judges, court staff, and mediators. She reported the office would be hosting a group of dispute resolution administrators from around the Southeast at a conference to be held in Raleigh in April. The group, she explained, would be exploring issues of concern to their respective offices and the programs they support. Next, she reported that she and Ms. Hopkins have begun work on a nuts and bolts Benchbook on mediation for judges and court staff. She suggested this project had particular relevance given the numbers of judges and staff retiring over the next decade. Given these numbers, she suggested a mentoring program for new court staff on operating a mediated settlement conference program might be another project for the Commission to consider. Members were receptive to the idea. Lastly, she reported that a new edition of *The Intermediary* would be out soon and that the office was undertaking a review of the Commission's website and that Ms. Hopkins had recently added program specific key word lists for mediator searches.

Mr. Little next brought up the issue of meeting dates. He noted that the fall retreat had been tentatively scheduled for August 8-9, 2014, and that date was approved. Thereafter the tentative November 7 meeting was moved to November 14, 2014, location to be determined.

Mr. Little next reported that a mediator had contacted the Commission and registered concerns about the Commission's process for adopting rule changes and Advisory Opinions, specifically noting the lack of a comment period. Ms. Clare said that she believes a comment period is a great idea and having input from the larger mediator community would be very helpful. Ms. Nesbitt likes the idea, but noted it can lead to a need for screening and additional administrative work. Mr. Little referred the matter to the Standards and Advisory Opinions Committee and suggested that Ms. Clare have a proposal for the May meeting.

Mr. Little next asked for a report from the Program Oversight Committee. Ms. Gullick called attention to the proposed agreement and summary forms in the meeting packet. She noted these are not AOC forms nor is their use mandatory. She added that the agreement forms are not recommended for use in cases involving *pro se* parties and the summary form should be used when *pro se* parties are involved. Mr. Little suggested reviewing each form individually and Ms. Gullick suggested starting with the Instructions Sheet. Judge Turner believes it would be helpful if the State Bar's Opinion on drafting were cited on the Instructions Sheet and Ms. Hopkins suggested a hyperlink. The group next looked at the Summary form. Judge Turner suggested that the word "agree" in the last all caps sentence, be replaced with the word, "intend". Ms. Gullick suggested that if there are two *pro se* parties, they could draft the summary as opposed to the mediator drafting. Mr. Little noted that the Summary form will also be used in situations where the parties, whether represented or not, cannot reach a full agreement at mediation or during the session at hand. In such situations, the form can be used to memorialize what has been agreed to up to that point. Mr. Long suggested noting on the form that an agreement should be finalized by the date set for completion. Judge Vincent suggested a note at the bottom of the Summary form indicating that it is the parties' responsibility to return to court to finalize their agreement by the completion date or to request an extension of the completion date. Mr. Little and Ms. Gullick liked that proposal. Mr. Long likes that suggestion, too, as he is concerned that parties will leave mediation with the impression they are done just because they have a completed Summary document in hand. Ms. Nesbitt wonders whether there should be a note on the Report of Mediator indicating that there was a summary and the matter needs to be calendared. Mr. Little thought that idea was worth exploring and suggested working on that language outside the meeting. Ms. Gullick asked whether she and Judge Cash's Committees could consider the changes noted above and email revised versions to the Commission for comment and/or approval? She stressed she would like these forms up on the website as soon as possible so that mediators have some guidance. The group agreed that Ms. Gullick and Judge Cash will email the revised forms.

Mr. Little noted that he is more concerned about situations involving a single *pro se* party as opposed to situations where no one is represented. Mr. Laney is concerned that a represented party and his/her attorney will be angry that they can't come to mediation and settle the matter with a binding contract. Mr. Little suggested he would call a recess in such situations so the *pro se* party can seek legal advice before signing. Mr. Little noted that none of these forms prescribe a right way to do things, but he wants mediators to think about drafting concerns when *pro se* parties are involved. He believes the summary document is much needed.

Ms. Gullick next pointed out the Agreement form with check boxes which, she explained, would typically be used in cases involving money owned. The alternate form which calls for narrative, is for situations necessitating terms beyond the simple payment of money. She, again, stressed that the agreement forms are not recommended for use where *pro se* parties are involved. Ms. Gullick next turned to Judge Cash who called attention to the FFS Agreement form. Mr. Laney said that he understands that ED agreements are now numbering 15-20 pages. He asked whether this form is long enough? Judge Cash responded that lawyers may bring their laptops, use their own template, or add a note referencing additional pages. Judge Caldwell and Mr. Laney thanked the Committee for their work on this project. Ms. Gullick noted that the Committee will be proposing forms for extensions of the completion date at the May meeting and distributed drafts. Both she and Judge Cash's Committees, she added, will also be looking at the issue of mediator fee collection.

Judge Cash noted for the FFS Oversight Committee that he is encouraged things are moving forward with CaseWise reporting, *i.e.*, that the vast majority of districts are getting on board and only about ten are not complying. Judge Vincent suggests talking with the Chief Justice and suggesting that she mention reporting requirements to new Chief District Court Judges.

Ms. Clare reported for the Standards and Advisory Opinions Committee that her Committee is contemplating a new Advisory Opinion on confidentiality.

Mr. Little next noted the Court of Appeal's Opinion distributed to attendees. It involved mediator testimony before the superior court. Ms. Hopkins indicated that she spoke with the mediator and he did not raise confidentiality/inadmissibility concerns relative to either the subpoena or his testimony. Ms. Clare noted this testimony was concerning. Mr. Little asked the Grievance Committee to look into the matter to determine whether a complaint should be filed against the mediator. Judge Caldwell suggested that perhaps the Commission should speak with attendees at the Judges' Conferences on the issue of mediator confidentiality. Mr. Little suggested that it might be best for Judge Caldwell to make the request.

Ms. Marsh reported for the Video Committee. She noted that judges, a DA, and mediators have been selected to be interviewed.

Mr. Little next called for liaison reports. Ms. Hayden asked whether she should take the extension form to the court staff for comment and Ms. Gullick asked her to hold off. Mr. Laney reported he had no report for the federal courts. Ms. Nesbitt and Ms. Rose had no further reports. Mr. Schafer noted that the IC Rules are being revised and the public comment period is underway through February 26. He noted that there has been a push to require injured workers to advance their share of the mediator fee, but that, so far, the current payment provision had not changed. Judge Vincent noted that she would like the Commission to speak to the Fall District Court Judges Conference.

There being no further business, Mr. Little adjourned the meeting after reminding everyone that the next meeting is scheduled for May 16th in Raleigh.