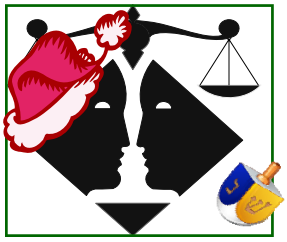
The Intermediary

A Bridge between the Dispute Resolution Commission and North Carolina's Certified Mediators



December 2009

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Commission Members

From the Chair

by

Judge W. David Lee

The Commission has been very busy the past two years considering revisions to program rules, the Standards of Professional Conduct for Mediators and the Supreme Court's Rules for the Dispute Resolution Commission. We have now finished that work and we expect our recommendations to be before the Supreme Court early next year.

One change that we are recommending will, I believe, be of particular interest to mediators -- the Commission is asking the Supreme Court to increase the hourly fee for court-appointed mediator services from $125.00 to $150.00. We are also asking that the one time, per case administrative fee be increased to $150.00. The Commission appreciates that our citizens are facing an uncertain and difficult economic climate and that this is not the best of times to ask them to pay more to participate in court-ordered mediation. However, the Commission also appreciates that court-appointed mediators have seen only one fee increase in nearly a twenty year period. Court staff has told the Commission that mediators are beginning to leave court appointed lists, saying they can no longer afford to serve. If the situation is not addressed, they anticipate that, over time, they will lose their most experienced and effective mediators. Mediators have also asked the Commission to address this situation and have been very patient while they waited for action. The Commission trusts that the Court will understand and also appreciate the need for an increase. In the meantime, I want to thank those of you who have been willing to serve our court system by accepting court appointments to mediate. I know how hard you work. Commission staff tells me that nearly all the calls the office receives concerning scheduling and fee collection problems come from mediators who were court-appointed. The Commission appreciates your dedication and understands that this proposed increase is overdue.

The Commission also spent considerable time reviewing both the Standards of Conduct and the Commission's Rules. Over the past decade, there have been a number of piece meal revisions to the Standards. Until now, though, there had been no effort to take a comprehensive look at the Standards.

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In This Issue

The Commission invites its readers to comment on any articles or any of the information presented in The Intermediary or to write articles for inclusion. Send your thoughts to the editor, Leslie Ratliff, at Leslie.ratliff@aoc.nccourts.org. We look forward to hearing from you!

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Over the last couple of years, several mediators and others had contacted the Commission and offered real life scenarios which raised questions that the Standards did not address or did not address as well as they should have. The Commission's recommendations seek to make the Standards more responsive to the realities of practice.

The Commission is also recommending to the North Carolina State Bar that it create an exception to the mandatory reporting requirement of Rule 8.3. in an effort to resolve the conflict between the mediator's duties of confidentiality and neutrality under the Standards promulgated by the Supreme Court and the reporting requirement under the Bar rule for attorneys. Exceptions currently exist for attorneys who wish to utilize the confidential reporting available under the PALS program and attorneys who learn of violations while representing another attorney. The recommendation is to exempt attorney mediators from the obligation to report Rules violations that they learn about while conducting a mediation. The Commission debated this issue and solicited comment for three years before settling on this approach. The Commission's recommendation comes down on the side of protecting confidentiality and neutrality and of keeping mediators focused on the mediation process rather than on investigating and reporting activities. This recommendation represents one of the first efforts by any State to address the issue of what happens when a mediator's ethical obligations butt up against those of another profession to which he or she belongs.

As we were addressing the Standards, Professor Mark Morris, who chairs the Commission's Standards, Discipline and Advisory Opinion Committee, suggested that perhaps we should also take a look at the Commission's Rules enforcing those Standards. Those Rules were, he believed, too confining. When a complaint is filed against a mediator, the current structure provides only for a formal investigation and a hearing, if deemed appropriate. In keeping with the notion of dispute resolution, Professor Morris suggested that some less formal means of addressing complaints should also be incorporated in the Rules and the Commission agreed. If the Commission's recommendations for revising its Rules are adopted by the Court, in the future a disgruntled mediation participant and his or her mediator, may, for example, be asked by Commission staff to participate in conciliation.

To learn more about the Commission's proposals, you may read our Executive Secretary's article on page 3 of this newsletter. Lastly, I want to add here that many of the changes we are now proposing were initially suggested by mediators or were an outgrowth of mediator questions or comments. The Commission could not do its job without the information and insight that mediators provide. We are grateful for your interest, your questions and even your criticisms. Together, we will continue to work to make our programs stronger and to advance the field of mediation.

On behalf of the Commission, I want to wish your and your families a safe, peaceful and happy holiday season. I hope you will return from your holiday festivities and vacations refreshed and ready to mediate in 2010! ♦

Commission Proposes Rule Changes

The Dispute Resolution Commission is making recommendations for revisions to the Mediated Settlement Conference, Family Financial Settlement and Clerk Mediation Program Rules. In addition, the Commission is recommending changes to the Standards of Professional Conduct for Mediators and to the Rules for the Dispute Resolution Commission. The Commission's recommendations have already been approved by the Dispute Resolution Committee of the State Judicial Council and, on December 4, 2009, the State Judicial Council (SJC). The SJC has now, in turn, forwarded them to the NC Supreme Court which has ultimate authority over rules for court based mediated settlement conference programs. It is anticipated that the Court will consider the changes sometime this winter.

Proposed MSC, FFS, and Clerk Rule Changes

Likely to be of most interest to certified mediators is a proposed increase in the rate that court appointed mediators may charge for their professional services. Mediated Settlement Conference, Family Financial Settlement Conference, and Clerk Rule 7.B. all currently provide for a $125.00 cap on the hourly rate which court appointed mediators may charge for their professional services. The rules also provide for a $125.00 one time, per case administrative (case scheduling) fee. (Court appointed mediators may not charge for mileage, windshield time, or lodging.) Proposed revisions to these program rules would increase both the hourly rate and the one time, per case administrative fee to $150.00.

Given the current economic situation in North Carolina, the Commission appreciates that this is a difficult time to raise fees on parties who are ordered to participate in a court ordered mediated settlement conference. However, the Commission also recognizes that if this proposal is adopted, it will represent only the second increase in mediator fees to occur since the inception of the superior court's Mediated Settlement Conference Program in October of 1991, nearly twenty years ago.

The original 1991 MSC program rules authorized Senior Resident Superior Court Judges, in consultation with the Administrative Office of the Courts, to set an hourly compensation rate for court appointed mediators working in their districts. In 1995, the MSC program rules were amended to establish a standardized fee for court appointed mediator services. The new rule set the fee at $100.00 per hour and established a $100.00 one time, per case administrative fee. In June of 1999, the Court increased both the hourly rate and the one time, per case administrative fee to $125.00. That $125.00 cap has remained in place over a decade.

In commenting on the proposed increase in the rate, the Commission's Chair, Senior Resident Superior Court Judge W. David Lee, noted that, "Our court-appointed mediators work hard. Very often the cases they mediate involve *pro se* parties or attorneys who are not communicating or who are, at best, disinterested in mediating the matter. Scheduling often poses a challenge and parties are more likely to fail to appear. Often fee collection becomes an issue. These mediators have been patient and are long over due for an increase." Judge Lee also noted that over the past few years, court staff have expressed concern to the Commission that some of our State's more talented and respected mediators have been leaving court appointed mediator lists because they could no longer afford to serve. It is imperative, he believes, that experienced and successful mediators be available for court appointment in all judicial districts.

In addition to recommending an increase in the hourly rate and one time, per case administrative fee, the Commission is also asking that MSC, FFS and Clerk Rule 5 be revised to address situations where parties refuse to pay mediator fees. Proposed revisions provide that any person required to pay a portion of a mediator's fee who fails to do so without good cause, shall be subject to the contempt powers of the court. Following notice and a hearing, monetary sanctions including, payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference, may be imposed in a written order which states findings of fact and conclusions of law. These rule changes are intended to reflect and reinforce amendments to program enabling legislation which occurred last year. Those statutory revisions authorized a court to impose sanctions on a party who fails to pay in the same way that the court was already authorized to impose sanctions for a failure to attend.

Relying on their inherent authority, some judges already find parties in contempt for willful failure to pay. Responding to requests from mediators in such districts, the Commission has developed forms to assist with fee collection.

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See Motion and Order for Show Cause Hearing, AOC-CV-815, and Order of Contempt For Non-Payment Of Mediator's Fees, AOC-CV-816 (MSC and FFS mediations) and Motion and Order for Show Cause Hearing, AOC-G-305T and Order of Contempt for Non-Payment of Mediator's Fees, AOC –G-307T (Clerk Program mediations).

Proposed Revisions to the Standards of Conduct

The Standards of Professional Conduct for Mediators were first adopted by the Supreme Court in 1998. Since their initial adoption, there has been piece meal revision of individual standards, but no comprehensive review of these rules as a whole or of their impact on practicing mediators, *i.e.*, a review of how well the Standards were holding up to real life situations. Since the Standards have been in place now for more than a decade and several mediators had recently expressed concerns about some aspects of the Standards and their impact on mediator practice, the Commission determined that it was time for a comprehensive review. Judge Sanford Steelman, then Chair of the Commission, established an *ad hoc* Committee to undertake this assignment and chaired the effort himself. The Commission adopted the Committee's recommendations earlier this year and, as with the program rules, the proposed revisions will soon be before the Supreme Court.

Many of the changes being recommended are in the nature of fine-tuning only, but others were more substantial. Proposed revisions to Standard II.C., for example, clarify that when a party objects to a mediator's serving on the grounds of lack of impartiality, the mediator need not step aside immediately, but may discuss the matter with the party(ies). However, if the party continues to object following discussion, the mediator should decline to serve or withdraw.

Proposed changes to Standard III clarify that mediators can tender copies of agreements reached in mediation to referring entities in instances where a statute mandates such tender. This change was largely intended to address referrals from Clerks that involve guardianship or estate matters. Clerks are, by law, required to review such agreements. Proposed revisions to Standard IV.C. provide additional guidance to mediators in determining whether a party has consented to mediation such that the mediation may proceed. It provides that in making the determination, the mediator may consider the issues in dispute and whether any modifications or adjustments could be made to facilitate the party's participation. Such circumstances as whether the party has been accompanied by a supporting individual, such as a spouse or child, and whether he or she is represented by counsel may also be considered. This new language is intended in part to address situations that are likely to arise in guardianship mediations where a frail, ill or medicated individual may be a participant.

Proposed revisions to Standard VII.C., which addresses conflicts of interest, clarify that not only a mediator, but his or her professional partners or co-shareholders are prohibited from advising, counseling or representing mediation parties in future matters concerning the subject of the dispute, an action closely related to the dispute or an out growth of the dispute. Conversely, a mediator who is a lawyer, therapist or other professional is prohibited from mediating a dispute in instances where the mediator or his/her professional partners or co-shareholders has advised, counseled or represented the parties in any matter concerning the subject of the dispute, an action closely related to the dispute, a preceding issue in the dispute or an out growth of the dispute. It was also clarified that such conflicts arise only in situations where the mediator, his partner, co-shareholder, or staff has engaged in substantive conversations with any party to the dispute. The proposed revisions define the term "substantive conversations" as conversations that go beyond the discussion of general or administrative issues and include conversations in which a party has disclosed information that he or she might expect to remain confidential. Changes to Sections E. and H. of that same Standard are also being recommended. Proposed revisions to Standard VII.E. would prohibit mediators from using not only information gained, but also relationships formed during a mediation for their own personal gain or advantage. This particular revision was a response to a situation brought to the Commission's attention by a Clerk. The Clerk had ordered a mediation of an estate matter where the parties were arguing over who should serve as the estate's Administrator. During the course of the mediation, the mediator agreed to serve as the Administrator. The Commission was principally concerned about how the public might perceive such an arrangement, *i.e.*, that the mediator could be viewed as having manipulated the mediation process for his/her own financial gain. In response, the Commission has recommended the change in Standard VII.E. and issued

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an Advisory Opinion (#08-15) discouraging such conduct. In addition to the conduct noted above, a similar situation was brought to Commission's attention involving a certified family financial mediator who agreed to serve as the parties' Parenting Coordinator, a position for which he would have been compensated and that might involve making decisions for the parties. Although it was not addressed in the advisory opinion, some Commission members also noted that this conduct raised potential confidentiality concerns. Revisions to Section H. clarify that a mediator is not to give or receive any commission, rebate, or other monetary or non-monetary form of consideration from a party or representative of a party in the expectation of a referral.

At the same time the *ad hoc* committee, under Judge Steelman's direction, reviewed the Standards, the Commission's Standards, Discipline and Advisory Opinion Committee tackled an additional ethics issue brought to its attention by the NC State Bar. The State Bar had asked the Commission to comment on a conflict between Standard III, which addresses confidentiality, and Rule 8.3 of the State Bar's Rules of Professional Conduct. Rule 8.3 requires attorneys to report a colleague whom they know has committed a Rule 8.3 violation, *i.e.*, a serious ethical violation that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness to practice. Rule 8.3 would require a report even if the attorney was acting as a mediator when he learned about the conduct in question. Standard III, on the other hand, requires mediators to protect the confidentiality of all information communicated to them during a mediation. The only exceptions to that mandate involve situations where public safety is an issue, *e.g.*, a credible threat by one mediation participant to maim or kill another or a statute requires the report, *e.g.*, G.S. 7A-301 which mandates the reporting of child abuse or neglect. After debating the issue for more than three years, the Committee recommended to the Commission that it ask the State Bar to consider creating an exception to exempt attorney-mediators from reporting Rule 8.3. violations when they become aware of the violations during the course of conducting a mediation. The Commission accepted the Committee's recommendation and agreed to bring the matter before the State Bar. In requesting the exemption, the Commission affirms the importance of confidentiality and neutrality to the integrity and success of the mediation process as well as the importance of having mediators focused on the mediation process as opposed to policing the conduct of participating attorneys. The matter is now before the State Bar.

As noted above, the Commission devoted significant time and attention to the conflict between Standard III and the State Bar's Rule 8.3 and to how that conflict could best be resolved. The Commission recognizes that this particular conflict, as well as the larger issue of what happens when a mediator's ethical responsibilities bump up against the ethical requirements of some other group or profession to which he or she also belongs, has significant ramifications for the practice of mediation and is largely unexplored territory. The Commission felt it was extremely important to look very carefully at the issue and make a thoughtful recommendation to the State Bar.

Commission Rules

Given that the Commission devoted a good deal of time this past year to conducting a comprehensive review of the Standards of Professional Conduct for Mediators, it only made sense to also undertake a review of the Rules for the Dispute Resolution Commission. Those Rules not only provide for the Commission's operations but also establish procedures for enforcing the Standards and for addressing ethical issues that arise in the context of certification and certification renewal applications. Former Commission Chair Judge Steelman charged the Standards, Discipline and Advisory Opinions Committee with undertaking this task. In particular, that Committee's Chair, Professor Mark Morris, wanted to explore whether the formal investigative and hearing procedures set forth in Rule VIII of the current Commission Rules should be supplemented with some more informal alternatives.

Most of the proposed changes to the bulk of the Rules are in the nature of fine-tuning. Only Rule VIII was substantially re-written. Rule VIII provides a framework for addressing issues relating to ethics or conduct that come before the Commission either in the form of complaints filed by the public regarding mediator conduct or in the context of applications for certification or certification renewal. While the Commission proposes to preserve the current formal investigative and hearing procedures, it is recommending that Rule VIII be revised to also incorporate some less formal and less adversarial options for addressing complaints and issues raised in applications. These options are, the Commission believes, more in keeping with the ideals of conflict resolution.

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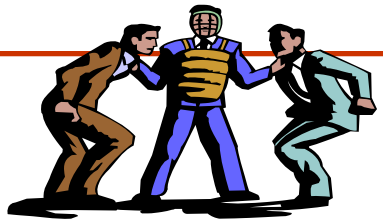
The proposed revisions will allow Commission staff to first offer the option of conciliation to a party who complains about the conduct of his or her mediator. This option would be available in instances where staff believes that the complaint involves a misunderstanding between the mediator and the complaining party, raises best practices concerns rather than rule violations, or involves technical or minor violations of the rules or Standards. While staff cannot require a mediator or a party to participate in conciliation, if they are willing, an opportunity is created for the mediator and the party to discuss their concerns and, hopefully, resolve them. If conciliation is successful, a mediator will avoid having a formal complaint filed against him or her and the party may gain a deeper understanding of the mediation process and feel better about his or her participation in that process. Theoretically, conciliation could work in many of the complaints heard by Commission staff. One of the more common complaints, for example, involves the notion of pressure applied to parties to settle: A party may mistake a mediator's efforts to get him or her to think realistically with an effort to force a settlement. Conversely, a mediator may not understand that an elderly party or one on medication, who is physically and emotionally taxed by a marathon mediation session, may feel pressured into signing.

Staff refers complaints that appear to have merit to the members of the Commission's Standards, Discipline and Advisory Opinion Committee. Under the current rules, that Committee may either dismiss a complaint or impose sanctions. Under the proposed new rules, the Committee, like staff, will have some new tools at its disposal. If the complaint involves professionalism or best practices issues, the Committee may, if it elects to do so, send one or more of its members out into the field to counsel with the mediator and to offer suggestions to help him or her avoid similar complaints in the future. The Committee may also elect to refer the matter to the Chief Justice's Commission on Professionalism which has agreed to assist the Commission. In instances where the Committee is concerned that a mediator's conduct or the conduct of an applicant for certification or certification renewal reflects significant concerns about his or her mental stability or mental health, suggests a lack of mental acuity or the presence of dementia, or suggests problems with alcohol or substance abuse, the Committee may, if the proposed changes are adopted, refer the matter to the North Carolina State Bar's Lawyer Assistance Program for evaluation and possible treatment. In the event that the applicant or mediator is a non-attorney, the proposed rules provide for the Commission to refer him or her to an appropriate physician or mental heath practitioner.

In redrafting Rule VIII to put these options at the Standards, Discipline and Advisory Opinion Committee's disposal, the Committee was, in essence, codifying at least one practice that had evolved informally. Committee members have on at least two occasions met informally with mediators, and in one case a trainer, to discuss best practices concerns with them. In both situations, the Committee felt the issues raised should not simply be ignored, but acknowledged that they did not rise to the level of rule violations.

Assuming the proposed revisions are adopted by the Supreme Court, the Commission will provide certified mediators with copies of the revised program rules and Standards of Conduct. Copies will also be posted on the Commission's web site at www.ncdrc.org. Copies of the revised Commission Rules will be posted on the web site. Commission staff will be available to answer any questions that certified mediators or others have about the changes. Mediators should be on the lookout for the changes sometime this winter. ♦



Welcome Back!

The Commission thanks all certified mediators who renewed their mediator certification(s) for Fiscal Year 2009/10. The Commission deeply appreciates your dedication to the courts and citizens of this State. Judge Lee and the members of the Commission look forward to working with you in the coming year as you continue to promote the peaceful and constructive resolution of disputes filed in our courts.

The Commission thanks certified superior court mediator Len Benade for submitting the following update on FINRA arbitration and mediation. To learn more about FINRA and its Dispute Resolution Forum, please read the accompanying article on page 7 or visit: www.finra.org/ArbitrationMediation/index.htm.

FINRA Arbitration/Mediation Update

by

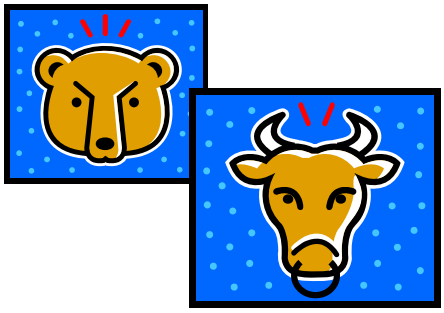
Len Benade*

Recently the NCBA presented the excellent CLE program "Representing Investors: An Introduction to Securities Arbitration". This is certainly an area that anyone with an interest in dispute resolution should be aware of, and I'd like to take this opportunity to discuss recent development and trends in FINRA Arbitration/Mediation.

New securities arbitration case filings have nearly doubled through July compared to 2008 according to the latest FINRA statistics. Through July there have been 4,481 new case filings. There were 2,614 claims filed through July, 2008 and 1,878 through July, 2007. Given the extent of the market's precipitous decline, it is likely that this trend will continue next year. Within a year of the market's last decline claims increased sharply, peaking in 2003 at nearly 9000. In 2007 the number dropped to 3128. In recent years just over 20% of these cases have been decided by arbitrators and about 10% settle through mediation. However, thus far in 2009, 25% have been decided by arbitrators and only 5% have been resolved through mediation. Nearly half of all claims are resolved by direct settlement between the parties. Two significant factors that will be at work in the coming wave of litigation are the continued decline in investor confidence in the light of recent scandals and the overall weakness in the economy beyond the troubled markets. Worthy of note is that the number of cases in which customers have been awarded damages has steadily increased from a low of 37% in 2007 to 45% this year. The most common claims are the following: misrepresentation, unsuitability, breach of fiduciary duty, breach of contract, omission of facts, negligence, and failure to supervise. Of interest is that mutual funds have far surpassed common stocks as the prevalent type of security involved in arbitration cases.

With respect to its mediation program, FINRA has recently announced that beginning this month, there will be a $200 annual fee to stay on its roster of certified mediators. In addition, FINRA has simplified its fee structure. FINRA has always assumed responsibility for collecting the mediator's fee and then paid the mediator directly minus a fee per hour depending on the mediator's hourly rate. From now on FINRA will deduct a flat rate of $150 per case. The new annual fee may prompt a significant number of mediators to withdraw from the list. ♦

* *Len Benade is the managing partner of Benade & Huggins LLP in Hickory, North Carolina. He has been a securities arbitrator (NASD, NYSE, NFA, FINRA) for twenty years and is a certified FINRA mediator.*



FINRA

Many mediators have heard about FINRA mediations and arbitrations, but don't know much about FINRA. This article is intended to complement Len Benade's FINRA update which appears on the previous page and to explain a little about FINRA, its mission and how it uses mediation and arbitration.

The Financial Industry Regulatory Authority (FINRA) is a private corporation that serves as a self-regulatory organization for the financial industry, *i.e.*, FINRA performs its market regulation functions under contract with the brokerage firms (registered firms) and trading markets that it regulates. FINRA is the successor to the National Association of Securities Dealers, Inc. (NASD). FINRA was formed with NASD merged with the enforcement arm of the New York Stock Exchange, NYSE Regulation, Inc., on July 26, 2007. Though often mistaken for a governmental agency, FINRA is not part of the United States government. Though not a government agency, FINRA is often called upon to provide advice to the U.S. Securities and Exchanges Commission.

FINRA's principal mission is to protect investors and insure the integrity of our nation's financial markets. As the largest independent regulator of securities firms doing business in the United States, FINRA oversees nearly 4,800 brokerage firms, 171,400 branch offices associated with those firms and approximately 644,000 registered securities representatives. The organization is involved in nearly every aspect of the securities business, including: examining securities firms, licensing securities professionals, enforcing federal rules and securities laws, educating the public, providing trade reporting, and administering a large dispute resolution forum to assist investors and registered firms in resolving disputes.

FINRA has some 2,800 employees. Its main offices are located in Washington, D.C., and New York. In addition, FINRA operates fifteen district offices which are located across the United States. North Carolina is part of FINRA District 7 which also includes South Carolina and Georgia. The District 7 office is located in Atlanta.

FINRA strongly believes in educating and empowering investors. The organization utilizes the internet, media, and public forums to help investors develop the financial acumen they need to understand markets and the basic principles behind saving and investing. For example, FINRA has created an online service known as "BrokerCheck," which provides information about current and former FINRA-registered firms and individual brokers. The service allows investors to learn, among other things, whether a broker is licensed in the investor's state to conduct business or whether the broker has been sanctioned by securities regulators for violations of investment-related regulations or statutes. FINRA's Investor Education Foundation is the largest foundation in the United States devoted to investor education and as of April, 2009, had dedicated some $46 million to that end. When disputes arise, FINRA encourages investors and firms to consider dispute resolution as an alternative to litigation. The organization's web site provides extensive information explaining the benefits of mediation and arbitration and describing how those processes work.

FINRA operates the largest dispute resolution forum in the securities industry. That forum is designed to assist in the resolution of monetary and/or business disputes between and among individual and institutional investors, securities firms and individual registered representatives. The forum encourages investors to first try and work out their disputes with an individual broker by contacting his or her firm's management and working through whatever internal processes the firm has in place to address complaints. Due to contractual provisions in most investor account agreements, if an investor is unable to work matters out amicably with management, then he or she is generally required to utilize FINRA arbitration to resolve securities disputes with brokerage firms and/or their financial advisors. Securities mediations are often initiated after the filing of FINRA arbitration proceedings or court proceedings if an investor is not required to arbitrate.

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In instances where an investor is not required to arbitrate through an account agreement, FINRA recommends mediation and arbitration as alternatives to litigation in state or federal court. FINRA suggests to investors that these alternatives are generally more cost effective than litigation and lead to a quicker resolutions.

Whether an investor is required to participate in mediation or arbitration or chooses these processes over litigation, he or she may file an on-line request for mediation or arbitration with FINRA. If the investor has already hired a lawyer, the lawyer may accompany the investor to the mediation and/or arbitration. Some lawyers, in fact, specialize in representing parties in FINRA mediation and arbitration proceedings. Both mediation and arbitration will be conducted pursuant to FINRA's own rules and procedures. In instances where mediation is not successful, FINRA encourages parties to consider arbitration.

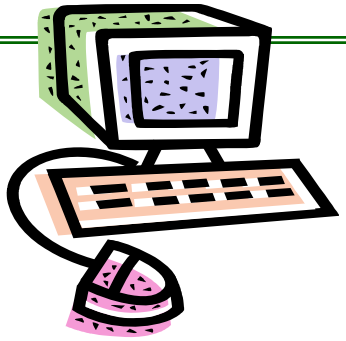
Examples of the types of claims commonly associated with mediation and arbitration of securities disputes include: breach of fiduciary duty, misrepresentation and/or omission of material facts, providing false information, over concentration of investments, stockbroker negligence, Ponzi schemes, stockbroker misconduct, stock manipulation, stockbroker fraud, unauthorized trading and undisclosed conflicts of interest.

Parties are given an opportunity to select their neutral from lists of FINRA approved mediators and arbitrators. FINRA has qualified nearly 1,000 mediators who have met the organization's experience and training requirements. More than 7,500 arbitrators have been qualified by FINRA. Many of the FINRA neutrals are accountants, lawyers, business experts, securities professionals and others who are knowledgeable about securities issues. FINRA arbitrations and mediations are held in 72 locations around the country and in London and Puerto Rico. The parties pay to use the services of FINRA neutrals.

If an arbitration has been requested, cases involving $25,000 or less will be heard by a single arbitrator. If between $25,000 and $100,000 is at issue, a single arbitrator will hear the matter unless a party requests a panel of three. If more than $100,000 is in dispute, a panel of three arbitrators will serve. FINRA arbitration decisions are final. Arbitrators cannot reconsider their decisions, once issued, even if new evidence later surfaces.

As with many other American financial institutions, FINRA has recently come under severe criticism both for its failure to more effectively regulate the industry it is charged with policing and for the high salaries it pays to its officers and staff. To learn more about FINRA, its mediation and arbitration processes and the qualifications required of its neutrals, visit the organization's comprehensive web site at www.finra.org. ♦

Commission Adopts Policy on Providing Certified Mediator Contact Information



At its meeting held September 25, 2009, the Commission tackled the issue of how to respond to requests from individuals and organizations seeking information to enable them to contact certified mediators. Most such requests come from reputable mediation trainers seeking to offer continuing mediator education courses or from established professional associations who wish to promote membership in their organization and/or offer professional development opportunities to mediators. The Commission's enabling legislation and rules provide that information in Commission files pertaining to certification, *e.g.*, applications and background checks, is confidential. Information in disciplinary files, *i.e.*, complaint files, is also confidential, at least until there has been a finding of probable cause. While the Commission is concerned about mediator privacy, it is a governmental entity and arguably all other information in Commission files is, by law, public information and must be shared upon request. In an effort to balance privacy and accessibility concerns, the Commission has adopted a policy which provides that staff shall respond to requests for contact information by providing only names and U.S. mailing addresses for certified mediators. Those seeking other information, such as email addresses, will be referred to the Commission's web site at www.ncdrc.org. (Such information is already posted there and the Commission is not required to facilitate access to it by providing a list of email addresses in electronic format.) All mediators may be assured that at no time will the Commission ever sell any mediator contact or other information to any person or entity. Commission staff have created "dummy" mediator email addresses in their own names to enable the Commission's office to monitor the quantity and content of mass mailings and other solicitations sent to certified mediators. ♦

Upcoming Mediator Certification Training

SUPERIOR COURT TRAINING

Beason & Ellis Conflict Resolution, LLC: 40-hour superior court mediator training course, January 20 - -24, 2010, in Chapel Hill, NC. For more information or to register, call (919) 419-9979 or (866) 517-0145 or visit their web site: www.beasonellis.com.
Carolina Dispute Settlement Services: 40-hour superior court mediator training course, January 6-10, 2010, in Durham. For more information or to register, contact Dawn Bryant at (919) 755-4646 or visit their web site: www.notrials.com.
Mediation, Inc: 40-hour superior court mediator training course, January 26-30, in Charlotte, NC, April 28-May 2, 2010 in Raleigh, NC. For more information or to register, call (888) 842-6157 or (919) 967-6611 or visit their web site: www.mediationincnc.com.

FAMILY FINANCIAL TRAINING

Atlanta Divorce Mediators, Inc: 40-hour family mediation training course, January 7-11, 2010, in Atlanta, GA; March 22-26, 2010, in Atlanta, GA; and May 13-17 2010, in Atlanta, GA. For more information, contact Melissa Heard at (707) 778-7618. Web site: www.mediationtraining.net.
Carolina Dispute Settlement Services: 16-hour family mediation training course, December 16-17, 2010 in Raleigh. See above for contact information.
Mediation, Inc: 40-hour family mediation training course, March 2-6, 2010 in Chapel Hill. 16-hour family mediation course, January 28-30, in Charlotte, NC. See above for contact information.

6-HOUR FFS/MSC COURSE

(Covers North Carolina legal terminology, court structure, and civil procedure)

Professor Mark W. Morris: 6-hour course. To pre-register online, go to www.nccourts.homestead.com.
The ADR Center (Wilmington): 6-hour course. For more information or to register, contact John J. Murphy at (910) 362-8000 or e-mail at johnm@theADRcenter.org. Web site: www.theADRcenter.org.
Judge H. William Constangy (Charlotte): For more information, contact Judge Constangy at (704) 807-8164.
Mediation, Inc: 6 hour course TBA. See above for contact information.

CLERK MEDIATION TRAINING

Mediation, Inc., offers training on DVDs**:** For more information or to order a copy, call (888) 842-6157 or (919) 967-6611 or visit their web site: www.mediationincnc.com.

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CME and Training Opportunities

Atlanta Divorce Mediators, Inc. is presenting Advanced Training: Domestic Violence Issues in Mediation on May 3-4, 2010 and November 8-9, 2010, in Atlanta, GA. Advanced Divorce Practicum Training on April 19-20, 2010 and August 4-5, 2010 in Atlanta, GA. For additional information, call (707) 778-7618 or visit www.mediationtraining.net.

North Carolina Bar Association's Family Matters: 2008 Basics of Family Law DVD. Contact Carroll Herndon at the NCBA to purchase the DVD set, (919) 659-1440 or (800) 228-3402. You may also contact the Commission's office at (919) 890-1415 . The Commission has a set of DVDs available to loan on a first-come, first-serve basis.

Announcements of Interest to Court Staff & Mediators

Mediation Forms Revised

A number of changes to mediation program forms have now been approved by the Administrative Office of the Court's Forms Committee. The revised forms will soon be posted on the Commission and AOC web sites. Once they are posted, court staff and mediators may access the revised forms by going to the Commission's web site at www.ncdrc.org and clicking on the "Forms" button that appears at the top of the page. Once the search screen appears, click on the drop down box from the "Category" field and select "Mediated Settlement/DRC". The following forms have been revised:

- Report of Mediator in Superior Court Civil Action (AOC-CV-813)
- Report of Mediator in Family Financial Case (AOC-CV-827)
- Report of Mediator in Clerk Program Mediation (AOC-G-303)
- Designation of Mediator in Superior Court Civil Action (AOC-CV-812)
- Designation of Mediator in Family Financial Case (AOC-CV-825)
- Designation of Mediator in Matter Before Clerk of Superior Court (AOC-CV-302)
- Consent Order for Substitution of Mediator (AOC-CV-836)

The principal change to the Designation forms involves revisions to the Certificate of Service that appears at the end of each of these forms. **The format of the certificate was significantly modified and the signature line now provides for a party, and not court staff, to certify that the form has been served.** Changes to the Reports of Mediator were relatively minor and technical in nature: The MSC Report of Mediator was revised to remove the "agreement on some issues" box in line 3. All three Reports of Mediator noted above were revised to add a note clarifying that when a case settles, a mediator needs to obtain the actual signature of the party/attorney who agreed to file a consent judgment or dismissal in the case only in instances where that party/attorney is actually present at the mediation and available to sign the form. If a case is settled prior to mediation or during a recess following mediation, the mediator need not obtain the actual signature on his/her Report, but need only indicate the name, address and telephone number of the party/attorney who agreed to file the consent judgment or dismissal.

Only the Consent Order for Substitution of Mediator was significantly revised. Formerly titled, "Motion and Order for Substitution of Mediator", this form was modified to permit the parties to substitute a new party selected mediator for the one originally selected by them. This change is intended to facilitate removal and substitution in instances where the parties' original selection can no longer serve due to illness, scheduling conflicts or some other impediment. Prior to the revisions, this form addressed only the situation where the parties wished to substitute a party selected mediator for one appointed by the court.

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Commission Web Site to be Re-Vamped

The Commission is in the process of re-vamping its web site at www.ncdrc.org to make it more user friendly. The work should be completed in January or early February. Included among the changes will be a re-arrangement of the home page menu to include a separate, stand alone section on certification and applying for certification. In addition, all the program material will be aggregated under a single "Program Information" menu option. The changes are being made in response to applicant callers who reported having difficulty finding certain certification information on the site. In addition, several mediators had reported having difficulty navigating the long, home page menu. The changes noted above and others will result in a shorter, tighter home page menu. Any mediators who have suggestions for improving the website are invited to call the Commission's office and share their ideas with staff.

Statistics Posted

The Administrative Office of the Courts (AOC) has now published FY 2008/09 caseload statistics for the superior court Mediated Settlement Conference and district court Family Financial Settlement Programs and those statistics have now been posted on the Commission's web site at www.ncdrc.org. (To view the statistics click on a program name and then click on "Program Statistics" from the menu that next appears.)

The AOC reports that 11,303 cases were ordered to superior court mediation during FY 2008/09. 6,089 cases were mediated that same year. (Many cases ordered during a year are still pending at the end of the fiscal year and some cases mediated during a year were ordered in the previous fiscal year.) Of the cases actually mediated during the year, 3,382 or 55% were settled or partially settled in mediation. An additional 3,678 cases were disposed of without a mediation session. These are cases which the Commission believes settle early because mediation acts as a catalyst to bring the parties to the table even before a session can be held. The AOC also reports that during the fiscal year 107 additional cases were submitted to some other type of dispute resolution permitted under program or local rules, e.g., neutral evaluation.

Unfortunately, the Family Financial Settlement Conference Program statistics still remain incomplete with a number of districts either not operating a program or failing to report their numbers to the AOC. The districts that are reporting to the AOC ordered 2,598 cases to mediation. An additional 440 were ordered to a judicial settlement conference and parties in 22 other cases were ordered to participate in some other form of dispute resolution. Of the cases actually mediated this fiscal year, 809 were either fully or partially resolved in mediation (66% of those actually mediated) with an additional 1,007 disposed of without a session.

The Commission's Chair, Judge W. David Lee, has appointed an *ad hoc* committee of Commission and ex-officio members to study the statistics and to brainstorm ways of encouraging and refining reporting. That Committee will be chaired by Alisa Huffman of the AOC.

2009/10 Certification Renewal Period Closed

The Commission has now wrapped up its certification renewal period for Fiscal Year 2009/2010. There was a significant drop in the number of mediators certified at the end of this renewal period compared with the number certified at the end of FY 2008/09. This is the first year that the Commission has seen a drop in the number of mediators certified from one fiscal year to the next and the Commission assumes that the dip is most likely related to the ailing economy. There was a 7.7% drop in the number of certified superior court mediators from the close of the FY 2008/09 renewal period to the close of the FY 2009/10 renewal period, a 1.7% drop in the number of family financial mediators and a 2.1% drop in the number of mediators who held both MSC and FFS certifications. Only the numbers of Clerk certified mediators rose — up 9.3% from the previous fiscal year. Total certifications at the end of FY2009/10 stood as follows:

MSC -- 1,123 active certifications
FFS -- 275 active certifications

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Dual -- 182 active certifications
Clerk -- 150 active certifications

The Commission received very positive feedback from mediators on its revamped on-line certification renewal process. As such, the Commission anticipates no major changes in the renewal process for purposes of the 2010/11 renewal period, with the exception of the installation of a credit card payment function. All mediators are asked to remember that it is possible to update contact and other information appearing in your profile listing at any time of the day or night by going to the Commission's website at www.ncdrc.org and clicking on the Commission's royal blue logo. Upon entering the portal, you must be prepared to enter you current email address and to supply the password that you created during the FY 2009/10 renewal period. If you have not yet provided biographical information for your on-line listing, please do so. The Commission thanks all who renewed their mediator certification(s) for FY 2009/10 and appreciates your ongoing service to our courts and citizens. ♦

Ethics Log Entries

The Commission had adopted an Advisory Opinions Policy which sets out a mechanism for mediators to get advice from the Commission on ethical dilemmas they may face or on rule interpretation questions they may have. Mediators can seek either a formal written opinion from the Commission or informal advice from the Commission's Executive Secretary. Formal Advisory Opinions may be fully relied upon. The Advisory Opinion Policy and Opinions adopted to date are posted on the Commission's web site (Click on the "Mediator Ethics" bullet.) In response to callers seeking informal advice, the Executive Secretary keeps a log wherein the call and the guidance provided are noted. This new *Intermediary* column will explore some of the recent calls the office has received:

Caller #1

A mediator contacted the Commission to ask whether her business card could read, "Jane Doe, NCDRC Certified Mediator"?

The caller was referred to the Commission's Advertising Guidelines (adopted in 2003) which provide that, "… it could be misleading to the public and the bar for a mediator simply to offer him/herself as "certified" without specifying the program or the type of mediation to which the certification pertains. Thus, a mediator shall also identify that s/he is certified to conduct mediated settlement conferences for superior court, district court or both…"

Caller #2

Mediator mediated a dispute which impassed. Shortly, thereafter, he was contacted by an attorney who informed him that one of the lawyers who participated in the mediation had withdrawn and the party had now hired the caller to represent him. The new lawyer asks to see the mediator's notes from the conference. Can he provide the notes?

It was suggested that the caller might first want to obtain some verification, *e.g.*, speaking directly with the party, to insure that s/he had, in fact, hired the new lawyer. If that was, in fact, the case, then mediator could speak with the new lawyer about what occurred at mediation provided that no confidential information conveyed by the other side was revealed. It was strongly suggested that the mediator not forward his notes to the attorney since they could theoretically be used for some purpose other than updating the attorney. For example, the lawyer could seek to have the notes introduced in court.

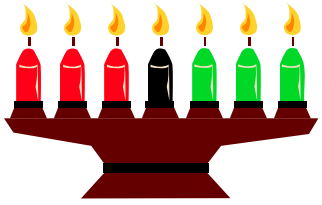
Caller #3

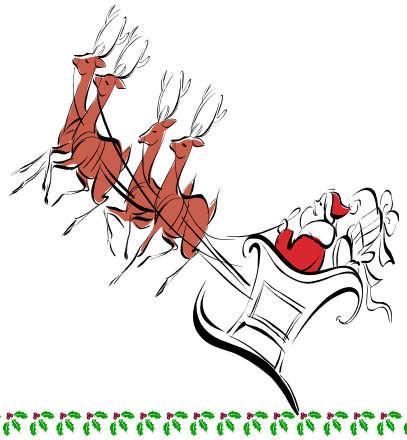
A mediator contacted this office and explained that one of the parties wanted to record the mediation. She has tried to find the rule that prohibits this and has been unable to do so. She asks where that rule is?

There is no statute or rule that expressly prohibits recording or videotaping. However, since mediation is a confidential process, it is not a good idea to permit taping. The mediator is in control of the mediation process and has the authority to make that call. The Commission's Program Oversight Committee is looking at the issue of audio and videotaping now and considering a possible rule revision to address this issue. Please stay tuned! ♦

The next meeting of the Dispute Resolution Commission is scheduled for Friday, February 5, 2010, with the location to be announced. An agenda for the February meeting will be posted at www.ncdrc.org at least two weeks prior to the meeting. All mediators are welcome to attend, but the Commission asks that you contact its office and let staff know you will be present, so that seating is assured. Minutes from previous meetings are also posted.

The Members, Ex-Officio Members and Staff of the NC Dispute Resolution Commission Wish You and Yours a Safe and Joyous Holiday Season!





Thanks for reading The Intermediary. If you have any ideas for articles or columns or any other suggestions, please contact Leslie Ratliff at (919) 890-1415.