

MINUTES

NC Dispute Resolution Commission

February 22, 2002

Duke Law School, Durham, NC

Members present: Judge Ralph Walker, Judge Michael Morgan, Andy Little, Joey Ray, Judge Judson DeRamus, George Cunningham, Judge Kimberly Taylor, Barbara Davis, Lewis Sauls, and Randall Isenhower. Ex-officio members present: Bob Beason, Frank Laney, John Schafer, Roy Baroff, and Mark Van Der Puy. Staff and guests: Professor Tom Metzloff, Ken McCotter, Paul Ross, Renee Ellis, Sharon Laue and Leslie Ratliff. Merritt White and Ella Wrenn's absence was excused. Messrs. Beason and Bradley's seats are still vacant.

Judge Walker began by thanking Tom Metzloff and Duke Law School for hosting the meeting. Next, the November minutes were approved. Judge Walker recognized the newest Commission member, Superior Court Judge Kimberly S. Taylor of District 22 and administered the oath of office. He then reported this would be his last meeting as the Commission's Chair. Judge Walker then delivered remarks describing how much he enjoyed his service as Chair and noting that he was proud of the Commission's accomplishments. He thanked Commission members for their hard work and faithful attendance at full Commission and committee meetings and he acknowledged the efforts of staff. Judge Walker indicated he would remain on the Commission until his term expired in September, 2002. George Cunningham requested the remarks be attached in full to the Commission's minutes.

Judge Walker next asked for Ms. Ratliff's **office report**. Ms. Ratliff reported that the office is wrapping up work with programmers to post the lists of certified mediators on the web site. She described some delays on the project and the need to replace the original contractor, ITS, with Counterpoint Designs, Inc. Work, she anticipates, will be completed by the end of February. Ms. Ratliff noted she would like to see a second phase of the project where Mediator Profile Forms would be incorporated on the site. She also noted that Judge Eagles had suggested she investigate communicating *en masse* with mediators by e-mail. Both projects, she noted, will be discussed with Counterpoint Designs programmers. Next, she reported that narrative describing the FFS and MSC Programs was now posted on the court's new web site. Next, Ms. Ratliff spoke about the FFS Program's expansion and noted that District 10 was referring cases and that District 17A was in the process of establishing its program. Next, she reported that the office was beginning to gear up for the re-certification period. Lastly, she noted she had erred in a memo on scheduling of the spring retreat. The retreat is, in fact, scheduled for May 31-June 1. She gave members a choice between the Green Park Inn in Blowing Rock and the Quality Inn in Boone. Members opted for the Green Park Inn. In response to her comments, Mr. Laney suggested that Ms. Ratliff consider establishing a list serve like that of the Dispute Resolution Section.

Judge Walker next reported for the **Executive Committee**. He noted that the Committee had recommended modest salary adjustments for Commission staff totaling less than \$1,400. The AOC declined to approve the adjustments at this time citing the budget crisis.

John Schafer reported for the **MSC Program Committee**. He noted that the Committee did not have a chair and had not held a meeting for several months. He reported that the Committee had been and was continuing to work on some language revising scheduling and postponement rules.

Judge DeRamus distributed a new version of some proposed rule changes. Next, Judge Walker was asked whether he intended to appoint a new chair for this Committee and he responded "no". There followed some brief discussion about whether there was a Vice-Chair and Judge Walker responded negatively noting that Judge Eagles had resigned.

Next, Mr. Little reported for the **Family Financial Settlement Committee**. He observed that new programs were not coming on line as fast as expected. He wondered what steps the AOC was taking to encourage expansion. He noted the AOC had not contacted either him or Mr. Baroff about mobilizing volunteer mediators to assist with expansion. Mr. Little also reported that certified superior court mediators were balking at attending a full 40-hour family training program. The Family Committee, he said, would be looking at this concern with an eye to streamlining training in such instances to two or three days. Judge DeRamus reported that he was still hearing about problems with observations. Mr. Van Der Puy offered his assistance.

At this point Judge Walker asked Mr. Van Der Puy, Mr. Little and others present if they would update members on the work of the **Dispute Resolution Committee of the State Judicial Council**. It was reported that the Committee was working to develop a superior court menu. Mr. Little noted that what was being proposed was similar to what had been originally proposed by the Commission some years back. He added that the Committee had not been able to reach an agreement on the jurisdiction of the district court arbitration program.

Mr. Sauls next reported for the **Fees Committee**. First, Mr. Sauls recommended adoption of the proposed Motion to Show Cause and Order for Sanctions for Failure to Pay Mediator's Fee. The forms were adopted. Ms. Ratliff said that they would now go before AOC forms committees. Mr. Sauls next noted that his Committee recommended that certification fees be increased in the coming fiscal year to: \$140.00 for superior court certification, \$140.00 for family financial certification and \$200 for dual certification. The increase, he suggested, was necessary given the loss of much of the Commission's appropriation and the potential for more loss. Expenses, he added, most notably printing, were also rising. He suggested that the proposed increase would likely bring in revenue in the neighborhood for \$158,500. He noted that expenditures last year were just under \$140,000 though staff projected higher expenses this fiscal year. This modest increase he suggested, would help the Commission remain solvent.

There followed some considerable discussion. Mr. Little voiced concern that increasing fees might drive some mediators off the list. The matter of the family financial certification criteria came up again. Mr. Little said that his Committee would also look at revising the rule requiring FFS mediators to accept court appointments in at least one district in favor of a less stringent requirement, perhaps agreeing to accept one or two such appointments per year. Judge Walker noted that how the Commission justifies the increase to mediators is crucial. Judge Walker also pledged to do all he could to avoid loss of the remaining appropriation. Ms. Davis wondered whether there was more the Commission could do to encourage Chief District Court Judges to offer FFS Programs in their districts. Judge Walker said that he would personally contact some. Mr. Beason observed that since expenses are rising, a larger increase might be in order, up to \$150, to avoid another in the near future. Mr. Baroff stated that he believes that \$125 per hour is already a significant fee especially given the economic slump. Mr. Sauls moved for adoption of his recommendation, *i.e.*, \$140, \$140 and \$200. It was approved.

At this time, the AOC's Jane Clare arrived and briefly discussed AOC efforts to expand the FFS Program. In essence, she explained that the AOC had notified CDCJs of the opportunity by letter and were waiting to hear from them. Judge Taylor suggested that direct contact with the Judges would likely spur more interest.

Mr. Ray reported for the **Mediator Conduct and Ethical Standards Committee**. He began with a problem discussed at the last meeting-- a mediator who had let her certification lapse, but, who continued to advertise herself as certified. He noted a letter had been sent and she had re-certified. Mr. Ray suggested the Commission might consider adopting advertising guidelines. Next, he recommended the Commission adopt the proposed CME Report Form. He noted the Committee and Commission's long struggle with CME and characterized the report as the least of all evils. Following discussion, the reporting requirement was unanimously adopted.

Next, Judge Walker asked for **Liaison Reports**. Mr. Baroff reported for the Dispute Resolution Section noting he was glad the meetings could be combined. Judge Walker thanked the Section for picking up the cost of lunch for Commission members. Mr. Baroff thanked Judge Walker for his leadership of the Commission and called attention to the Section's upcoming Annual Meeting. Ms. Ellis gave a brief update on activities at PAC-Duke. She said the organization had a new director, Daniel Bowling.

George Cunningham next asked about appointments to the Commission, particularly the Chair. Mr. Ray asked whether the Executive Committee should elect an Acting Chair. Judge De Ramus nominated Mr. Little as Vice-Chair and he was unanimously elected. Judge Walker said that the Executive Committee would meet and elect an Acting Chair. There being no further business, the meeting was adjourned.

MINUTES

NC Dispute Resolution Commission

May 31-June 1, 2002

Green Park Inn, Blowing Rock, NC

Friday Afternoon

Members present: J. Anderson Little; Ralph Walker; Kimberly Taylor; J. Merritt White, III; George Cunningham; W. Lewis Sauls; Judson DeRamus, Jr.; C. Randall Isenhower; Kenneth Gumbiner; and Joseph Ray. Ex-officio members present: Roy Baroff, Ella Wrenn, Carmon Stuart, Frank Laney, and John Schaffer. Guests and staff present: Dianne Seigle, Pamela Glean, Celia O'Briant, Leslie Ratliff and Yvette Hohenberger. Commission members Barbara Ann Davis, Michael Morgan, Dorothy Bernholz, and Danny Davis were excused.

Mr. Little began by thanking Ms. Wrenn, a co-owner, for helping secure the Green Park Inn for the meeting. He also welcomed Ms. Seigle and Professor Glean to the meeting to share information on the ADR Clinic operated by North Carolina Central University School of Law and Carolina Dispute Settlement Services. He also acknowledged Mr. White's re-appointment to the Commission. He next introduced a new member, Kenneth J. Gumbiner, a Greensboro attorney and long time mediator and arbitrator appointed by the Chief Justice. Mr. Little noted that Mr. Gumbiner is a past chair of the NC Dispute Resolution Section. Judge Walker administered the oath of office to Mr. Gumbiner. Mr. Little next noted the Governor's appointment to the Commission of Dorothy C. Bernholz, a Chapel Hill attorney and long-time mediator.

Next, Mr. Little called Judge Walker to the front to receive a plaque marking his service as Chair of the Commission from 1995-2002. Mr. Little noted that the Commission was deeply grateful for Judge Walker's dedication and leadership. Judge Walker thanked the Commission.

Mr. Little next called for adoption of the minutes from the February meeting. They were adopted without change. Next, he introduced Ms. Seigle and Professor Glean and turned the floor over to them. They described how Professor Mark Morris had received a grant to start a dispute resolution clinic at UNC Central School of Law. In 1999, the Law School entered into a partnership with CDSS to implement a clinic course in alternative dispute resolution. CDSS was able, through its in-court mediation program in Wake County to provide a consistent source of suitable cases. The law school provided the student mediators. Ms. Seigle and Professor Glean noted that the Clinic has an 89% settlement rate and is responsible for the total accumulation of \$22,700 for purposes of restitution. Ms. Seigle reported that the Clinic had received considerable acclaim.

Ms. Ratliff next gave her office report. Mr. Little asked that discussion be folded into the report. She first reported that the renewal period was going well and that the numbers were holding with total collections to date of \$94,420. She also reported on the budget situation for this year and walked Commission members through the current monthly budget report. Next, she reported that the lists of certified mediators were now posted on the web and that feedback had been good. A number of mediators had difficulty pulling up the lists and the office had been very busy responding to calls. Ms. Ratliff next reported that she was exploring with the AOC the possibility of establishing a list serve to facilitate communication between the Commission and mediators and among mediators. Mr. Little asked the Commission whether it should consider establishing a Task Force on Web Development. There was support for the establishment of such a Task Force.

It was suggested that perhaps the Commission should consider hosts other than the AOC. Mr. Little asked Mr. Baroff to explore such an arrangement with the Bar. There was also a suggestion that the Commission obtain a URL and operate its own site. Next, Ms. Ratliff noted that the DMV was going to start a mediation program aimed at resolving disputes between auto manufacturers and dealers. She reported that she had also been contacted by the State Building Commission which is establishing a mediation program to resolve disputes with subcontractors working on State capital improvement projects. Lastly, Ms. Ratliff reported that she had turned over collection of MSC caseload data to the AOC and that AOC had advised her that they would not try to collect it this year. Mr. Little reported that the AOC told him that its efforts were hampered by its computer system. Both Ms. Ratliff and Ms. Wrenn stated that the AOC computer system had absolutely nothing to do with the situation.

The next issue for discussion was the proposed dispute resolution menu for Superior Court. Mr. Shafer reported that the revisions creating a menu had now been adopted for recommendation to the State Judicial Council. Mr. Schafer gave a brief history of the menu going back to Judge Hyatt's term on the Commission. He explained that initial efforts to establish a menu had failed due to concerns expressed by the AOC that attorneys might have difficulty distinguishing between superior court and district court rules for arbitration. He noted that in the new proposal that summary jury trials were not included as a menu option. Mr. Schafer added that revisions to the District Court Arbitration Rules will also be proposed to the Council. Those changes will limit the program to district court cases. Lastly, Mr. Shafer noted that the Council did not meet in May due to the budget crisis and is not scheduled to meet again until November.

Mr. Schafer also spoke briefly about the Industrial Commission. He noted that the agency is facing cuts which may impact staffing. He noted also that the Commission provides for neutral evaluation in its Rules and that the process has not been used too much.

Mr. Laney mentioned a case, In Re Anonymous, which discusses when a mediator may be required to testify. Mr. Baroff reported for the Section that Mr. Stuart had been awarded the Section's first ever Peace award for his work in the dispute resolution arena. Mr. Baroff also suggested that perhaps a working task force should be established to look at the new Uniform Mediation Act. He suggested the task force should include representation from the Commission, the Dispute Settlement Centers, and the State Judicial Council.

Judge Walker reported for the Executive Committee. He reported that Mr. Little had been elected Vice-Chair of the Commission, but that there was some question as to whether that vote also made him Interim Chair. The Committee had met, he reported and officially elected him Interim Chair. Judge Walker next announced the Court of Appeals' establishment of a pilot mediation program. He noted that no funding was available and the parties were not to incur additional costs, so the judges were serving as the mediators and they are looking for volunteer attorney mediators as well. Judge Walker reported that the only cases excepted from mediation are criminal, juvenile and termination of parental rights actions. He reported that the pilot would run for 18 months.

Mr. Little then reported for the Disciplinary Screening Committee. He noted that the Committee had acted to approve a number of mediators this quarter that reported disciplinary actions on their renewal materials. He added that there was one renewal application that they had not approved. Ms. Ratliff explained that one mediator had notified the office that she had pled guilty to four counts of tax evasion. The State Bar had now filed a Grievance and was reviewing the matter. Ms. Ratliff added that the mediator had not supplied the office with a copy of her written Response to the Grievance as required on the renewal form. Moreover, the mediator had not

responded to Ms. Ratliff's oral and written requests for the information. Mr. Little reported the Committee felt that it had no choice but to stay the application since the mediators had not responded. There followed some considerable discussion about this matter. Judge Taylor had information about the mediator's situation and expressed her belief that there were mitigating circumstances and that the mediator had a good reputation in her community. Mr. Cunningham asked whether the mediator was, in fact, a convicted felon? Ms. Ratliff said that she did not know. Mr. Little suggested that perhaps the Ethics and Standards Committee ought to be asked to consider whether convicted felons should ever be eligible for certification or re-certification. There followed considerably more discussion, with some Commission members expressing real concern about tying hands with such a policy or rule. At the end of the discussion, Ms. Ratliff said that she would try one more time to obtain information from the mediator. The Commission determined that if she did not respond, the application would be stayed.

Saturday Morning

Next, Mr. Stuart reported for the Book Committee. He began by reporting on the status of the \$25,000 grant the Committee received from the Commission. He noted that Ms. Clare has been paid for editing services and that she had begun to work with a book designer. Next, Mr. Stuart announced that the Committee had received a \$40,000 grant from an anonymous grantor to publish the book. He thanked Frank Laney for his help in obtaining the grant. He added that tentatively the Committee plans to distribute free copies to judges, mediators, legislators, and various repositories. The book will be about 200 pages in length and some 3,000 copies will be printed.

Next, Mr. Little reported on some correspondence that he had received. He noted a mediator who had asked to substitute his pro bono service for his obligation to be available for court appointment in a district. He noted that a superior court mediator had complained of a district wherein the judge was refusing to appoint non-attorney mediators. Mr. Little asked Ms. Ratliff to write the judges and obtain all their written protocols for appointment. Mr. Little raised the issue again of what the Commission should do when a judge adopts a local rule contrary to the Supreme Court Rules.

Next, Mr. Little raised the issue of reorganizing the Commission and re-working the Committee structure. He called attention to the memos written by Judge Eagles and Ms. Ratliff. Mr. Laney suggested that work was not evenly distributed among the Committees and that the Superior Court Committee had carried the lion's share. Mr. Little suggested that the Commission does not need a separate Fees Committee. Mr. Laney suggested that the Commission should continue to comment on Rule revisions. Ms. Ratliff suggested there should be more streamlining and fewer committees, that often there were insufficient members available for a vote at subcommittee meetings. Considerably more discussion followed. Mr. Little concluded the discussion by stating that he would take all the comments under advisement and have a draft of a new committee structure for the next meeting.

Next, Mr. Little announced upcoming meeting dates and locations. He asked for feedback on the start time of meetings. He also asked about the possibility of combining Commission and Section meetings and starting earlier. Some folks raised travel time issues and Mr. Cunningham noted that committees often meet prior to the full Commission meetings. Mr. Little concluded by saying that he would consider the comments and come to the next meeting with proposed dates for the next year.

Their being no further business the meeting was adjourned.

MINUTES

NC Dispute Resolution Commission

August 23, 2002

Trial Lawyers' Academy Building, Raleigh

Members present: J. Anderson Little; Ralph Walker; Kimberly Taylor; J. Merritt White, III; George Cunningham; W. Lewis Sauls; Judson DeRamus, Jr.; C. Randall Isenhower; Kenneth Gumbiner; Dorothy Bernholz, Danny Davis, Barbara Davis, and Joseph Ray. Ex-officio members present: Jacqueline Clare, Ella Wrenn, Mark Morris, Mark VanDerPuy, Don McKee, Carmon Stuart, Frank Laney, and John Schaffer. Guests and staff present: Roy Baroff, Leslie Ratliff and Yvette Hohenberger.

Mr. Little welcomed everyone. He next recognized new Commission member, Dorothy "Dottie" Bernholz and asked Judge Walker to administer an oath of office to her. Mr. Little next introduced new ex-officio members: Jackie Clare, Don McKee and Mark Morris. He asked Ms. Clare about upcoming NCBA Council meetings and she responded: September 27, December 6, February 28, and May 16-17. Mr. Little then asked for approval of the minutes for the May meeting and they were approved as submitted.

Mr. Little then asked for Ms. Ratliff's report. First, Ms. Ratliff noted that the renewal process for FY 2002/03 was now drawing to a close and that things looked good. 903 mediators were left on the superior court list (the office is still waiting on a few stragglers) and 163 family mediators. \$129,940 was collected for the MSC Program to date and \$21,185 for the FFS Program (with dual certifications credited to Family). She observed that these two figures totaled were more than expenditures for last year (\$122,900.08). She reported only one complaint about the increased certification fees. Next, Ms. Ratliff noted that the FFS Program was expanding and distributed a map showing expansion. She also reported on the packet that the Commission forwards to staff in all new districts. Next, she updated those present on web site changes. She noted that the DRC is in the process of purchasing its own URL and of migrating its old site to the AOC's new LAN and site. Lastly, she closed on a positive note reporting that Sharon Laue had gotten a wonderful new computer.

Mr. Little next asked Mr. VanDerPuy for information about the court's budget situation. He reported that there would be cuts in the arbitration program. Mr. McKee noted that the Dispute Settlement Centers would also absorb cuts. Mr. Little asked Ms. Ratliff about the appropriation for the Family Financial Settlement Program and she responded that she had heard nothing.

Next, Mr. Little asked those present to turn their attention to the proposed changes in the MSC Rules, changes that would create a dispute resolution menu in superior court. He began to walk those present through the proposed changes emphasizing what he thought would be the most controversial provisions. Discussion began with Rule 2.C. New language in 2.C. provides that, "The Court shall make its appointment [of a mediator] without considering whether or not the mediator is an attorney." Mr. Little explained that during the pilot phase of the MSC Program that questions had been raised about the impact of cronyism on the making of mediator appointments. Specifically, female mediators suggested that they were being denied an opportunity to participate. As such, judges had been encouraged to simply rotate down the list of

those eligible for court appointments in a district. He noted that non-attorney mediators are now complaining that judges are discriminating against them. Judge Taylor responded that judges should not discriminate on the basis of gender, race, etc., but this is more a matter of qualifications. If a judge does not believe non-attorney mediators are qualified, that is his/her call to make. Mr. Little responded that historically non-attorney mediators were excluded from participation in the MSC Program. Their protests, he added, nearly resulted in the legislature's derailing the Program. He is concerned about another backlash, this time against the FFS Program. Mr. Schafer observed that the Supreme Court establishes the qualifications and that if a mediator has met those qualifications, it does not seem fair to limit his/her participation. Judge Taylor responded that judges have to look at who settles cases; who gets the job done. Mr. Schafer responded that he thinks that is too subjective a criteria.

Mr. Gumbiner expressed his concern about language that was struck in 2.C. that allowed parties who could not agree on their selection to express a preference for either an attorney or non-attorney mediator. He believes that parties should be allowed to state any preferences they have about anything relative to the qualifications of their mediator. He is concerned that the Commission is trying to take away both the parties and the judges right to have input on qualifications. Judge Davis observed that from a practical matter, if judges do not want to appoint non-attorneys, they will not. Judge Taylor agreed. Mr. Little argued that staying with a rotation is the best way of encouraging party selection. If parties know they may be saddled with an appointed mediator that they won't like, they will return their Designation forms timely. Mr. Laney voiced Mr. Little's concern. Non-attorneys, he noted, have restored to the legislature before, the proposed revision will show them the Commission is acting in good faith, though it cannot force judges to appoint non-attorneys. Mr. Baroff suggested that perhaps the Commission needs to do more to educate attorneys about non-attorney mediators. He suggested some alternate language, "Judges shall make appointments based on qualifications set by the Commission." Judge Taylor asked who enforced Rule 2. Mr. Schafer responded, "the Supreme Court".

Mr. Little suggested the Commission move on and come back to Rule 2.C. since there was no consensus on the non-attorney issue. He moved the group on to revised Rules 4.C. and Rule 6.B.(4) New language requires the attorney who is to file the consent judgment or dismissal to sign the Report of Mediator. Also, it requires the mediator to keep a copy of the signed agreement and to attach a dismissal or consent judgment to the Report at the time it is forwarded to the Court. Judge Davis asked who will draft the dismissals and consent judgments for *pro se* parties? Mr. Cunningham asked how long the mediator needs to keep the agreement in his files? Ms. Clare and Mr. Sauls expressed serious concerns about these requirements. They noted that the mediator is to file his/her Report within ten days of mediation. An attorney they noted, will not sign a dismissal until s/he has received a check from the insurance company which might be much later. Mr. Baroff asked why these requirements were being inserted. Judge DeRamus responded that such requirements would ensure that the case was, in fact, settled in mediation. There were comments made about increasing the administrative fee if mediators are now going to have to hold documents and to collect post-mediation paperwork from lawyers. Ms. Wrenn observed that she also has concerns about the revisions. She believes that mediators may have trouble getting attorneys to forward copies of signed dismissals and consent judgments and that reporting could get bogged down. She noted that what judicial assistants would like to have is: 1) what will be filed, 2) who will file it, 3) the date it will be filed by, and 4) a phone number for the filing attorney/pro se party. There being no consensus here, Mr. Little suggested the group press on.

Ms. Davis suggested that the ex parte language in Rule 6.A.(2) be reconciled with the parallel family provision in order to authorize such conferences in family mediation. Mr. Little explained that family attorney were totally opposed to such communications.

Mr. Little next directed the groups' attention to MSC Rule 8. He explained that many applicants and would be applicants for dual certification were complaining that it was burdensome for them to take two 40-hour courses since much of the material on the mediation process was duplicative. He notes that the revised Rule requires a full 40-hour training program for the first certification and a 16-hour supplemental course for the second. Mr. Little noted that he hopes this change will result in increased dual certifications. The group was very supportive of this change.

Next, Mr. Little explained that the Alternative Dispute Resolution Committee of the State Judicial Council had approved the menu in the new Rules, but had eliminated a summary jury trial option (SJT). He noted that there had now been some additional changes to the summary jury trial provision and it had been reinserted. He asked the Commission to consider it in Rules 10 and 13. The new provisions, he noted, provided for no state paid judges or jurors to be involved in the process as this had been the principle objection of the Committee. Mr. Laney noted that he was not in favor of the parties having to find their own jurors. Previous summary jury trial legislation/rules, he added, had allowed for jurors to be drawn from the jury pool and that was the way it had been done in the districts where SJT's had been held. Judge Taylor observed that there is no way that the judges will allow jurors to be siphoned off for summary jury trials. Judge Taylor also noted that she did not favor the use of the terms "judge" or "presiding judge" in the proposed Rule. She explained that judges are elected officials and that the use of these terms could be very confusing to litigants and the public. Mr. Little noted that it looked like there were three issues for debate here: 1) what to call the presiding official, 2) payment of jurors, and 3) payment of the presiding official. There followed considerable discussion about this matter. Eventually, the group reached a non-unanimous consensus that jurors and presiding officials should be privately recruited and paid. In addition, they determined that the terms "judge" and "presiding judge" would be replaced with the term "presiding official". Moreover, they struck specific language in Rule 10.C.(4) which provided for the trial to be conducted in the courthouse and replaced it with, "a place agreed to by the parties".

After a break for lunch, Judge Walker gave a brief update on the Court of Appeals Mediation Program and said that it was working well. Next, Mr. Little recognized those members of the Commission whose terms were expiring – Messrs. Isenhower, Ray and Sauls and Ms. Davis. He noted that all of them had agreed to remain on the Commission until a replacement had been named.

Next, Messrs. Cunningham and Suals expressed their objections to the evaluation form required by MSC Rule 6.B.(6). They believe the Rule leads to more paperwork and that it is unnecessary in that the market will weed out unsuccessful mediators. Those favoring the Rule noted that it is not burdensome, that all the mediator has to do is hand it out and that parties/attorneys do not have to complete it; and that a mediator could get some very constructive feedback. After some discussion Mr. Cunningham moved to delete the Rule. Four voted against, everyone else in favor of retaining the Rule.

At this time, Mr. Little went back through the entire MSC package. Because there was no consensus on the non-attorney appointment language in Rule 2.C., it was struck. Likewise, the proposed revisions to Rule 4.C. and Rule 6.B.(4) were dropped. Mr. Little noted that the Report of Mediator issue would be re-assigned to one of the new committees. Judge Taylor suggested that because there were several changes to Rule 13, that Mr. Little edit Rule 13 (and the

Minutes

NC Dispute Resolution Commission

**November 15, 2002, Meeting
Smith, Moore, Greensboro**

Members present: Andy Little, Judge Judson DeRamus, Randy Isenhower, Barbara Davis, Ken Gumbiner, Dorothy Bernholz, George Cunningham, Judge Kimberly Taylor, and Judge Ralph Walker. Ex-officio members present: Don McKee, John Schafer, Jackie Clare, Frank Laney, Ella Wrenn, and Carmon Stuart. Staff Present: Leslie Ratliff. Excused absences: Judge Michael Morgan, Judge Danny Davis, Merritt White, and Joey Ray.

Mr. Little began the meeting by requesting a report on the ADR Book from Mr. Schafer. Mr. Schafer reported that the book was expected to be available mid to late July. The total project cost was projected at around \$70,000. Mr. Little complimented Ms. Clare on her work as editor. Mr. Little next announced that the proposed dispute resolution menu for superior court had been forwarded from the ADR Committee to the Supreme Court along with proposed revisions to the FFS Rules. He expects the Court to consider the proposed revisions early in December.

Next, Mr. Little called for approval of the minutes. They were approved with one change -- on page 2, second paragraph, "restored" changed to "resorted". Next, Mr. Little called for Ms. Ratliff's office report. First, Ms. Ratliff reported that the Commission's office would stay in its present location as a new lease had been signed. She reported total office revenue to date of \$148,425. She also noted that there were a number of inquiries coming in about the proposed 16-hour dual certification course. Ms. Ratliff called Commission members' attention to copies of new forms facilitating collections when a mediator's fee goes willfully unpaid. She next reported that the Family Financial Settlement Program had expanded into District 19B. Ms. Ratliff also reported staff had received raises that had been delayed for a number of months (1.5% for Ms. Ratliff and 2% for Ms. Laue and Ms. Hohenberger). Lastly, she reported that AOC web site designer Susan Hardaway would be coming to the Commission's next meeting to talk about the Commission's web site. Ms. Ratliff praised Ms. Hardaway's work on the site. It was suggested that Mr. Little write a letter commending Ms. Hardaway's performance.

Mr. Little noted that the next Commission meeting was not scheduled until March. He suggested that if the Commission needed an additional meeting, that it could be scheduled prior to the March meeting. He next proceeded to describe the Commission's new Committee structure -- Executive/Operations Committee, Program Oversight Committee, Mediator Certification and Training Committee, and Standards and Discipline Committee and to confirm assignments to them. He asked the group to do some brainstorming about issues that they thought should be before these Committees. He asked them to begin by considering his November 15, 2002, memo which the group then discussed. Next, Mr. Little broke for lunch and asked each of the Committees to meet over lunch and to come up with their list of issues they intended to tackle and how they would prioritize them. Committee Chairs would report back after the lunch period.

He also told members that if they wished to move to another committee that was acceptable.

Following lunch, Mr. Little reported for the **Executive Committee**. The first issue the Committee addressed was the development of a file retention policy for the Commission. He reported that the Committee believed that closed certification files should be retained at least five years – five years from the date the mediator either forfeits or otherwise loses his/her certification. Ms. Ratliff, he noted, would be drafting up a written policy. The next priority discussed was collection of caseload statistics for both the MSC and FFS Programs. Mr. Little said that he intended to make a call about this and to try and determine what action the AOC was taking to collect data. Ms. Ratliff noted that so far this fiscal year, she had received no information from the AOC regarding caseload statistics for either program. Ms. Wrenn indicated that she had not been contacted about her district's statistics. Next, Mr. Little noted that this Committee had agreed that Commission membership should be limited to two consecutive terms. Next, he reported that the Committee had considered Ms. Ratliff's request for new computer equipment favorably and that she would prepare a requisition. Mr. Little suggested to Ms. Ratliff that the Commission printer he had recently used was very slow and that perhaps she should consider ordering a new printer also. He next observed that the AOC had been expressing concerns about overseeing Dispute Settlement Center funds and Center reporting. He noted that this committee would be looking at this issue and brainstorming with other groups about what body was best suited to work with the Centers. Mr. Little added that there were other dispute resolution governance issues that the Committee believed ought to be addressed. For example, it was observed that there is still considerable overlap between the DRC and ADR Committee. Moving on, Mr. Little noted that this Committee favored posting the Commission's newsletter on-line. It would save staff time and expense. He reported that Ms. Ratliff and Ms. Clare would continue to explore this possibility. He added that the Commission's office will need to obtain e-mail addresses for all mediators, keep them current and use them to notify mediators each time a new edition is posted on the web. Lastly, he added that this Committee agreed that the Commission should do more to communicate with lawyers and he reported that the Commission would explore posting a regular column in the newsletters published by the Family Law and Litigation Sections and the Trial Lawyer's Academy.

George Cunningham spoke for the **Standards and Discipline Committee**. He reported the Committee had considered issues of mediator file retention and would probably be addressing the matter with an Advisory Opinion. He also reported that the Committee would be looking at the issue of mediator advertising and whether the Commission should develop guidelines to provide guidance in this area. Lastly, he reported that this Committee would be reviewing the Commission's application and renewal process as it relates to the reporting of pending complaints, disciplinary actions and convictions. Ms. Bernholz noted that she was very concerned about delays in the State Bar's addressing of pending complaints and she did not want to see mediator's penalized.

Ms. Davis reported for the **Mediator Training and Certification Committee**. She reported that this Committee would first be working on developing a curriculum for the new 16-hour course designed to facilitate dual certification. The Committee recognized

that requests for such training would likely be coming soon. Next, she reported they would tackle the issue of amplifying the new CME Reporting Requirement. Next, they would look at whether the Commission should revise FFS Rule 8 in order to broaden opportunities for certification of non-attorney mediators. Lastly, they would look at what should be done about mediators who fail to file their Reports of Mediator timely or to observe other deadlines. Ms. Davis noted that one of the issues her Committee had looked at was whether dually certified mediators needed to complete only 6-hours of CME or 12-hours for both certifications. She reported that the Committee believed that it should be 6-hours per mediator whether they held dual certification or not. They also discussed whether non-attorneys should be able to get credit for CLE courses designed only to update the attendee on case law and decided "no". They also discussed to what extent the Commission's office should seek to verify attendance at reported CME programs or activities, *e.g.*, by requesting agendas or other verification of attendance. The Committee determined that mediators would be on their honor in reporting and not required to supply documentation. Ms. Ratliff was asked to revise the CME Reporting Form to reflect their consensus. Ms. Davis concluded by noting that the Committee had already tentatively agreed to hold a telephone conference call on December 20th.

Lastly, Judge DeRamus reported for the **Program Oversight Committee**. He stated that this Committee had first looked at the issue of whether will caveat cases were eligible for mediation under the current MSC Rules. They concluded that such cases were in fact superior court cases and were eligible. They did not believe that there was any reason to revise the Rules. Next, he reported that the Committee believed that information about the web site should be added to the Designation of Mediator form such that attorneys and parties could be made more aware of the pool of mediators. Next, the Committee agreed that it would look at the Report of Mediator to determine whether it should be revised along with MSC Rules 4 and 6. These issues are tied to another issue -- whether a court could or should order mediators to attach a copy of the agreement to their Report of Mediator. Judge DeRamus reported that this Committee also intended to look at the postponement fee language in an effort to reconcile the "shall" language with the DRC Comment which implies that there can be good cause for postponing a mediation and not imposing a postponement fee. Judge DeRamus reported that later on this Committee will look at other issues, including 1) reconciling the differing *ex parte* language in the MSC and FFS Rules, 2) whether the Commission should make any recommendation relating to conflicts between the scheduling of conferences and district court hearings, 3) local rules which are inconsistent with the Supreme Court's Rules, *e.g.*, meaningful participation requirements, the appointment of uncertified mediators to cases, 4) whether the Commission should adopt a model appointment policy relating to appointment of mediators, and 5) whether a mediator can testify voluntarily about what occurred in mediation. Judge DeRamus noted that there are some issues that need to be discussed in the context of #4 including, the use of "short lists", exclusion of non-attorneys, the use of geographic restrictions, and districts that are still making tentative appointments of mediators.

The Reports concluded and there being no further business, Mr. Little encouraged the Committee Chairs to hold Committee meeting prior to the next Commission meeting. The meeting was adjourned.