

# MINUTES

## NC Dispute Resolution Commission

Friday, February 11, 2005

10:00 a.m.

Nelson Mullins Riley & Scarborough Law Offices  
Raleigh, NC

Commission members present: Steelman, Bernholz, Conley, Gumbiner, Hudspeth, Isenhower, Lee, Seigle, and Taylor. Ex-officio members present: Beason, Laney, Little, Schafer, and Wrenn. Staff present: Ratliff.

Judge Steelman called the meeting to order. He thanked Nelson Mullins for hosting the meeting and called for approval of the minutes for the December 3<sup>rd</sup> meeting. It was noted by Judge Lee that the minutes did not reflect that Judge Steelman was sworn in as Commission's Chair. The minutes were approved with that addition. Next, Judge Steelman administered the oath of office to Judge Taylor and Mr. Isenhower.

Ms. Ratliff presented the report on the activities of the Commission's office. She thanked Ms. Seigle for allowing Commission staff member Sharon Laue to attend a 3-day mediation training at Carolina Dispute Settlement Services. Next, Ms. Ratliff reported that she was advised by AOC web technology staff that the project to post mediator profiles on [www.ncdrc.org](http://www.ncdrc.org) had been reactivated. The project is scheduled to be completed in June, 2005. She added that AOC staff also advised her that the DRC home page alone was receiving some 2,600 "hits" per month, up from six months ago. Ms. Ratliff reported that this was considered substantial traffic. Next, she reported that a newsletter was mailed in January. It contained an article on the revised Standards of Conduct by Mr. Little. She added that Professor Kate Mewhinny of Wake Forest Law School had submitted an article on adult guardianship mediation for the upcoming edition. She also noted that she had received four new applications from two out-of-state trainers, one from Texas and one from Colorado. She added that she had sought to explain to the Colorado trainer, who had contacted her pre-filing, that the market was very tight. Next, Ms. Ratliff reported that things had been calmer this quarter in terms of disciplinary issues. She noted that the Commission's office was beginning to gear up for the spring renewal period. Renewal packets, she added, will go out in mid-May this year as opposed to the first part of April when they have historically been mailed. She explained that the change was intended to accommodate mediators who wanted to report last minute CME efforts and also to reflect the Commission's history with invoices and payment. That history, she suggested, did not support the need for an early spring mailing. Lastly, she reported that she planned to re-design the MSC and FFS brochures as tri-folds.

Judge Steelman next called for Committee Reports and began by reporting for the **Executive Committee**. He first directed the group's attention to pages 2 and 4 of the Commission's Rules and noted that these relatively minor changes were needed to reconcile the current rules with new rules VIII and IX adopted at the December meeting. Ms. Bernholz moved to adopt the additional changes, Ms. Seigle seconded, and the motion passed unanimously. Next, Judge Steelman reported that AOC staff had expressed concerns about the Commission's proposed revisions to N. C. Gen. Stat. § 7A-38.2(a). The concern expressed was whether it

was the intent of the amendments to alter the relationship between the DRC and AOC, particularly as to reversion of excess funds generated by the DRC, and in personnel matters. Judge Steelman suggested that he could either send the section back to Committee or he could write a letter to the AOC Director reassuring him that there is no intention on the Commission's part to alter in any manner the relationship between the Commission and AOC. The members determined that the latter approach would be the most effective.

Next Judge Lee reported for the **Program Oversight Committee**. He noted that a couple of matters were pending before his Committee. First, some complaints had been registered regarding the new time frames for finalizing agreements and reporting the results of conferences (revised MSC and FFS Rules 4 and 6). He reported that he had spoken with mediator Lewis Sauls and with Deputy Attorney General Richard Moore regarding their concerns that the fourteen-day time frame for filing consent judgments and voluntary dismissals was too tight. Mr. Moore, who handles condemnation cases, suggested exempting the State from the fourteen-day requirement. Judge Lee noted that he felt that a longer time period might be in order, but he had reservations about a blanket exemption. Mr. Little noted that he and others had been concerned that the revised rules placed time constraints for finalizing settlements on attorneys. He suggested the rules should focus on what mediators do and not attorneys. Ms. Wrenn noted that she and other judicial assistants like being given a date when dismissals or consent judgments will be filed, even if that date is outside the deadline set for completion of the conference. Judge Steelman observed that he favors having a time frame for filing dispositive documents because otherwise matters drag on. Judge Taylor noted that she thinks the key is flexibility, that sometimes attorneys need more time to finalize matters. Judge Lee suggested that perhaps sixty days might be a more realistic term than fourteen days. He noted that he would appreciate any comments Commission members wished to share. Judge Taylor suggested that perhaps he should poll the judicial assistants.

Judge Lee also noted that his Committee would consider whether to look into claims that local mediator appointment policies were exclusionary. He asked Ms. Ratliff about any calls the office had received. Ms. Ratliff reported that there had been a spate of calls some months back, mostly coming from non-attorney mediators.

Mr. Laney reported for the **Mediator Certification and Training Committee**. (Judge Steelman reported that the Committee's Chair, Mr. Criner, was absent due to illness and hospitalization.) Mr. Laney noted this Committee had a number of matters to report on today and he began with proposed language to be posted on the Commission's web site to alert readers that the Commission does not routinely verify biographical information provided by mediators and that the parties should satisfy themselves as to a mediator's qualifications. Judge Taylor moved for adoption and Mr. Hudspeth seconded. The motion passed unanimously. Next, Mr. Laney called the members' attention to proposed language to be inserted in application and renewal materials that would alert mediators to the fact that some districts have local rules setting additional requirements for inclusion on lists to receive court appointments. Mr. Laney called on Ms. Ratliff to elaborate on the need for this language and she noted that some mediators felt the Commission's application and renewal materials were misleading in that they gave the impression that mediators were being listed in districts where they were not, in fact, eligible to serve. Judge Taylor moved to adopt the proposed language, Ms. Conley seconded, and it passed unanimously. Next, Mr. Laney called members' attention

to proposed new advertising sections to be added to the MSC and FFS Guidelines for Trainers. After a short discussion, Judge Lee moved for adoption, Ms. Wrenn seconded, and the new sections were approved unanimously.

Next, Mr. Laney called the members' attention to concerns that had been raised regarding the "preferred city" designation that Ms. Ratliff had incorporated in the city search option. Ms. Ratliff explained that when the list of certified mediators had been posted, she had arranged for the public to search the list by name of mediator, by judicial district, and by city of mediator residence. The city option was intended to assist members of the public who were not familiar with judicial districts. Later, a mediator living in Black Mountain complained that since he did nearly all his work in Asheville, he should be included as a resident of that city as well for purposes of the search function. Later, Ms. Ratliff noted that concerns were raised by members of the Commission who mediated full time in a number of cities and felt that they should be able to designate all those cities for purposes of the list. There followed some considerable discussion. Ms. Ratliff noted that a map was posted with the list which showed which counties were encompassed in individual judicial districts. However, that map, she noted, was not very readable if the user had older computer equipment. Following further discussion, Mr. Hudspeth moved that the city search field be deleted from the list and that the list be searchable only by name of mediator and by judicial district, Ms. Conley seconded, and the motion passed unanimously.

Mr. Laney next brought forward proposed revisions to the Commission's inactive status policy. Mr. Laney began by noting that the Commission had four statuses: active, inactive, revoked, and lapsed. The Committee had been struggling, he noted, to more clearly define the difference between lapsed and inactive. Unlike the current policy, he reported that the Committee felt that a mediator should be able to elect to be inactive relative to one certification while remaining active in others. Mr. Laney added that while addressing this issue, members of the Committee had considered whether certification should be mandatory for those mediating in the courts. The Committee, at least preliminarily, was favorably disposed toward mandatory certification. The Committee, he reported, also favored mandatory CME, but found it problematic to require CME when a mediator could avoid compliance by simply not certifying. Judge Taylor asked what the CME requirement would be. Mr. Laney noted that the Committee did not get that far. Currently, he responded, mediators are asked to voluntarily complete six hours every two years. Mr. Little noted that he had concerns about mandatory CME, fearing that mediators would drop off the lists. He noted also that it is difficult to craft a rule, that he thinks the best education is actually mediating cases. Ms. Seigle suggested that more would stay certified and complete CME if non-certified folks were unable to siphon off business. Mr. Laney asked for guidance from the Commission and the Commission agreed that the Committee should further consider: whether certification should be mandatory to serve the courts, whether CME should be mandatory, and what inactive and lapsed statuses should look like depending on responses to the former. Ms. Wrenn noted that some judges had asked non-certified mediators to work in their districts and that such a policy change could bring some local rules into question. Ms. Conley added that she thought such a rule change might result in some excellent mediators no longer serving. Others noted that they had concerns about the skill level of some of the non-certified folks who were sometimes also not trained. Mr. Little added that there is also the large question of whether referral of cases to the MSC Program should be mandatory as with

the FFS Program. He thinks that perhaps it is time to revisit this issue also. Lastly, the Commission reviewed the Committee's proposed lapsed status policy and suggested a few revisions in order to make its provisions more concrete.

Ms. Bernholz reported for the **Standards and Discipline Committee**. She began by asking Ms. Ratliff to give a status report on the three matters before the Committee this quarter. Ms. Ratliff reported that two of the matters were now resolved and the third placed on hold pending action taken by another disciplinary body. One complaint, she explained, was dismissed with a letter to the mediator cautioning him to distribute evaluation forms at the conclusion of mediation. A second complaint was resolved with a letter of warning to the mediator cautioning him that scheduling was the mediator's responsibility.

Next, Ms. Bernholz called the members' attention to proposed Advisory Opinion #08-05, which seeks to clarify that it is the mediator's responsibility, and not that of the parties, to schedule the conference. After a short discussion, Mr. Gumbiner moved for adoption of the Opinion, Judge Taylor seconded, and it was unanimously approved. Next, Ms. Bernholz called attention to a proposed change to the Mediator Evaluation Form (AOC-DRC-9). The revisions, she noted, reflected recent changes to the Standards of Conduct which permit mediators to give opinions at the parties' request and as a last resort. Judge Taylor moved for adoption of the revised form, Ms. Conley seconded, and the motion passed unanimously.

Next, Ms. Bernholz introduced a draft protocol for the handling of complaints by the Commission's office. She explained that she was not a fan of bureaucracy, but thought a protocol was necessary to standardize procedures and to insure institutional memory. There followed some considerable discussion of the draft. Mr. Little suggested that with regard to #1, the draft should clarify that the Commission may use an anonymous tip as the basis of a complaint if the tip can be independently verified. With regard to #12, Mr. Isenhower asked what would constitute a quorum for purposes of a Committee vote to recommend that sanctions be imposed? Ms. Bernholz agreed that matter should be addressed. It was also suggested that letters of warning provided for in #12 (b)(ii) could not remain confidential consistent with proposed § 7A-38.2 (f). Ms. Bernholz responded that the Committee needed to clarify the distinction between the letters of warning in #12 and Rule VIII.B.10.(a) and (b). Lastly, Ms. Bernholz agreed that the Committee would make a recommendation to the Commission regarding the retention and treatment of complaints where no sanctions resulted, especially in situations where additional complaints are later filed. The discussion having concluded, Ms. Bernholz noted her Committee would take the comments under consideration.

The reports of the standing Committees having concluded, Judge Steelman asked Mr. Little for the report of the *Ad Hoc Committee* to design a program for mediation of matters filed before Clerks. Mr. Little began by noting that drafting had been difficult because they were not able to track the MSC and FFS legislation too closely because Clerks operated differently than the courts. As an example, Mr. Little noted how difficult it had been to draft the attendance provision. It was necessary, he explained, to provide for others beyond the parties to attend, including interested persons and such others as the Clerk deemed necessary. Judge Taylor asked what happens when those ordered to attend fail to appear? Mr. Little responded that the statute provides for the Clerk to sanction any person ordered to attend who fails to appear without good cause. Mr. Gumbiner asked what happens when someone is ordered to

appear and feels that s/he has no relevant information to share. Mr. Gumbiner also wondered whether the Clerk can order someone who is not a named party to appear? There followed some considerable discussion and Mr. Little suggested that the individual should file a Motion to Quash with the Clerk. Judge Taylor asked what happens when a doctor, surveyor, or other professional is required to appear – how does that person get his/her fee paid? Mr. Little thinks that the Clerk would just review the matter and award fees in the same way that attorney's fees are awarded. At this point, Mr. Little began to review the proposed statute section by section as adopted by the *Ad Hoc* Committee. With regard to section (h), Mr. Little noted that some agreements reached in mediation may be finalized by the parties as a matter of law. Others, including guardianship and estate matters, must be approved by the Clerk.

Next, Mr. Little briefly brought members' attention to the proposed Rules for the Clerk Program which he indicated were not yet in final form as was the statute. He focused particularly on draft rules 8 and 9. He noted that tentatively the thinking was that anyone already certified as an MSC or FFS mediator would be eligible to receive court appointments in matters ordered to mediation by the Clerk, except that to receive court appointments in estate or guardianship matters, a mediator would need to complete an additional eight hours of training in either estate law and procedure or guardianship law and procedure.

At this point, the members returned to the earlier discussion initiated by Mr. Gumbiner regarding what a person who is ordered to attend but who feels s/he has nothing to share should do. Mr. Little wondered whether it needed to be written in rules or a statute that a person could be excused for a valid reason. Judge Lee noted that he thought a procedure could be written in and noted 4.A.(1) which provides for modification of the requirement to physically attend. Judge Steelman suggested that he thought the issue could be addressed with a Motion to Quash. Mr. Little suggested that it might clarify things to set forth a procedure in the rules. Ms. Wrenn asked about indigent parties. Mr. Little responded that Rule 7.E. addresses indigency and that the Clerk would hear any such motions. The discussion about the statute having concluded, Mr. Little asked the Commission to adopt it and to recommend it to the General Assembly for adoption. Judge Lee moved for adoption, Ms. Conley seconded, and the motion was unanimously approved.

Next, Judge Steelman and Mr. Little raised the issue of Mr. Little's attendance at the NCBA Dispute Resolution Section's Annual Meeting to be held this April in Los Angeles. Mr. Little, they explained, had been invited to serve on a panel where the ADR book, the Commission's efforts, and the dispute resolution work of North Carolina's courts would be discussed. A copy of a resolution authorizing Mr. Little's attendance was distributed and it was pointed out that the Resolution also provided for the Commission to assist Mr. Little with his travel and lodging expenses. Mr. Little noted that Judge Ralph Walker, the AOC's Director, and John Schafer would also be serving on the panel and that he felt it was appropriate to suggest that resolutions also be prepared authorizing their attendance on behalf of the Commission and assisting them with travel expenses. Mr. Schafer declined the offer noting that he had already applied elsewhere for assistance. A motion was made approving the attendance of Judge Walker and Mr. Little and providing for the Commission to assist with their expenses. The motion was unanimously approved. Judge Steelman indicated that

he would contact the AOC about the matter since the AOC would need to approve the expenditure.

Next, Judge Steelman called for **liaison reports**. Mr. Laney reported for the Dispute Resolution Section noting that the Section's Annual Meeting will be held on March 18 in Greensboro. He also noted that the NCBA's Board of Governors has already voted to approve the statute for the Clerk Program. Lastly, Mr. Laney updated everyone on the Section's efforts to provide for mediation of disputes involving escrowed funds. Mr. Schafer next reported for the Industrial Commission noting that over 9,000 cases were ordered to mediation last year and for the ninth year in a row settlements were over 70 percent. Lastly, he noted that the IC would be holding its annual conference for mediators in October. Ms. Seigle reported for the Network that they were moving forward with efforts to agree on a formula and to secure Center funding in the legislature and she noted that the Network was still searching for an Executive Director. Ms. Wrenn reported that the Judicial Support Staff Conference would be held in April in Charlotte.

Next, Judge Steelman turned the members' attention to upcoming meeting dates: May 13 in Greensboro, tentatively at the UNC-G campus; August 19 in Raleigh at Nelson Mullins, if available; and November 4. Judge Taylor asked if the Commission would hold a retreat this year as it has done in past years? Judge Steelman said that he would consider this suggestion for the November 4 meeting. There being no further business, the meeting was adjourned.

# NC Dispute Resolution Commission

## Minutes

May 13, 2005

### Smith Moore Law Offices, Greensboro, NC

Members present: Steelman, Bernholz, Conley, Criner, Foil, Hudspeth, Isenhower, Lee, Seigle, and Taylor. Ex-Officio members present: Laney, Little, and Minor. Staff present: Ratliff. Guests present: Deborah Isenhour, Pamela Simon, and Maggie Sloane.

Judge Steelman began the meeting by welcoming everyone and noting that there were a number of guests present. He also noted that a new ex-officio member was present, Jody Minor. Mr. Minor, he explained, is the new Executive Director of the Mediation Network of North Carolina. He next administered the oath of office to Commission member N. Joanne Foil. Next, he called for approval of the minutes which were adopted unanimously.

Next, he asked Ms. Ratliff for the office report. Ms. Ratliff noted that the office was now mailing certification renewal packets for fiscal year 2005/06. Next, she noted that judicial assistants had suggested to Ms. Wrenn that it could be helpful for the Commission to post local dispute resolution rules on its website. Mediators would then be able to go to the web to learn about local rules regarding appointments to mediate in lieu of contacting court staff. Ms. Ratliff stated that she was collecting material, but did not think she could get it posted in time for the 2005/06 renewal. Ms. Ratliff next noted that AOC web staff had advised her that the profile project was scheduled to be ready to test June 13.

Next, Ms. Ratliff noted that the new tri-fold brochures had been distributed and the office had received numerous requests for additional copies. Ms. Ratliff reported she was working on the newsletter and that the next edition would be prepared soon. Next, she reported that three new trainers had agreed to provide the 6-hour training required for certification of non-attorneys: The Cape Fear Mediation Center, John Motsinger with UNCG, and District Court Judge Bill Constangy of Charlotte. Ms. Ratliff added that for years Professor Morris had shouldered this responsibility largely alone and she was pleased to see others getting involved. Next, Ms. Ratliff reported that the Commission's lease on the Navaho Drive property was expiring and that, with the Commission's blessing, she would look for larger quarters for the office. Staff was, she suggested, in need of additional room and particularly storage space. Judge Steelman echoed her concerns. Lastly, Ms. Ratliff reported that she had attended the Judicial Support Staff Conference held in April and that she and Ms. Wrenn had spoken to a standing room only crowd and heard many positive comments about mediation. She also noted that she had met individually with a number of district court staff regarding family financial mediation and had concluded that the program is not operating in some districts because of support staff concerns over the amount of time they will have to devote to launching and maintaining the program.

There being no questions of Ms. Ratliff, Judge Steelman turned the group's attention to its first guest, Statesville attorney and mediator Pamela Simon. By way of introduction, he noted that Ms. Simon was very active in promoting collaborative law in North Carolina and was now training in that arena. He noted that she had come today to update the Commission on efforts to establish collaborative law in this State. Ms. Simon first noted that she practiced family law for

some twenty years and had become very concerned about the damage that divorce inflicted. She began to look at alternatives, including mediation, family arbitration, and collaborative law. She noted that NC is one of only two states with a collaborative law statute and she explained the concept of collaborative law (four-way discussions and the agreement of the attorneys involved not to represent the couple in court if they cannot help them reach an agreement). She also reported that the NCBA's Dispute Resolution Section had recently established a Collaborative Law Committee, which she and Mark Springfield co-chaired. She listed some goals this Committee would work toward: establishing a collaborative law web site, developing a list of practitioners and posting their names with biographical information, and developing a model code of conduct for practitioners. She also noted that qualification of practitioners was an issue. Judge Steelman thanked Ms. Simon for updating the Commission on collaborative law.

Next, Judge Steelman called on mediator and trainer Deborah Isenhour to tell members about the NC Chapter of the Association for Conflict Resolution that she had recently been involved in founding. Ms. Isenhour began by describing ACR as an international organization of arbitrators and mediators. She added that the membership is diverse and there are both attorney and non-attorney members. The NC Chapter, she stated, has been meeting across the State and would meet next in Asheville and then Wilmington. She told Commission members that there is typically a training component with each meeting and that the organization will provide opportunities for certified mediators to obtain CME credits. She concluded by inviting Commission members to attend meetings and to participate in ACR-NC. Judge Steelman thanked her and asked her to keep the Commission updated.

Next, Judge Steelman called for committee reports and began by reporting for the **Executive Committee**. He noted first that the statute establishing mediation for matters before Clerks of Court was proceeding through the legislature and had been favorably received in committee. Judge Steelman said that he fully expected it to be enacted. He also noted that proposed amendments to § 7A-38.2, 38.1, and 38.4A were moving forward. Judge Steelman next called attention to the Commission's proposed travel and reimbursement policy. It was, he explained, in part intended to address member and staff travel to conferences such as the recent ABA Dispute Resolution Section meeting held in Los Angeles. The policy would need to be approved by the AOC. Mr. Laney asked whether approval to attend conferences would come from staff, the Chair, the Executive Committee, or the full Commission. Judge Steelman responded that the expectation was that the Commission approves travel. Ms. Seigle moved for adoption, Mr. Hudspeth seconded, and the policy was adopted unanimously as written. Ms. Ratliff was asked to prepare the policy for submission to Judge Walker, Director of AOC.

Ms. Bernholz next reported for the **Standards and Discipline Committee**. She began by calling members' attention to the proposed office protocol for processing complaints. She asked for comments. Mr. Criner suggested ending section 12.(b)(ii) at the word "rules" and not elaborating further. Ms. Bernholz noted that she preferred to keep in the language about file retention. Mr. Isenhour suggested amending section 13 by inserting the word "Committee" to clarify that decisions shall be made by the majority of "Committee" members present and voting. It was determined that this change would be treated as a friendly amendment and the protocol was adopted unanimously with that change. Next, Ms. Bernholz called attention to the proposed change to Rule 2.c. of the Commission's Rules. This change was intended to clarify that the Commission would investigate only complaints arising in the context of mediation, *e.g.*, the Commission would not investigate a complaint involving moral turpitude if the conduct had nothing to do with mediation. Mr. Little objected to this change, suggesting that the Bar has and exercises much broader authority to investigate matters of moral turpitude. It was also pointed out that the Standards apply to more than "mediated settlement conferences" and, as such, the



term "mediation" might be more appropriate in the rule. Mr. Little expressed further concern that the proposed amendment to 2.c. was too narrow. Ms. Bernholz agreed that this matter needed to return to Committee. Lastly, Ms. Bernholz drew attention to a proposed amendment to Standard III, E. that addresses a concern raised by certified mediator, Renee Ellis. Ms. Ellis had asked the Commission to address a mediator's responsibility to protect confidentiality when a complaint has been filed against the mediator, but not all the parties are involved in the complaint. The proposed amendment to III.E. clarifies that the mediator may defend him/herself, but provides that the mediator shall make an effort whenever possible to protect confidential information relating to non-complaining parties and participants. The Commission voted unanimously to adopt the revision.

Next, Ms. Bernholz asked Ms. Ratliff to update members on two ethical matters pending before her Committee. In the first, involving a lawyer applicant for MSC certification, Ms. Ratliff noted that the applicant's license to practice law had been suspended for five years because of a conviction for tax evasion. The Bar had stayed the suspension within weeks of imposing it. The Committee, Ms. Ratliff reported, had determined that the applicant would not be eligible for certification until the entire suspension period had run, the stay notwithstanding. She added that she had advised the applicant of the Committee's decision and she had not heard further from him. Ms. Ratliff noted the second applicant was a judge whom the Judicial Standards Commission has recommended be censured. She added that the Committee had determined to table this application until the Supreme Court took action on the JSC's recommendation.

Next, Judge Lee reported for the **Program Oversight Committee**. Judge Lee first reported that his Committee had considered concerns expressed by lawyers, mediators, and the Attorney General's Office that the 14-day time frame in MSC Rule 4 for attorneys to file consent judgments or voluntary dismissals following a settlement was too short. Judge Lee reported that the Committee was recommending to the Commission that the time frame be extended to 30 days or to 90 days if the State is a party. Mr. Hudspeth asked if the term "State" encompassed lesser political subdivisions? Judge Lee noted that was a good point and that he thought that was the intention, though the Committee had not specifically discussed that issue. He then proposed amending MSC Rules 4.C.(2) and (3) to read "thirty (30) days or within ninety (90) days if the State or a political subdivision thereof is a party to the action". Mr. Criner suggested a 90-day time frame period. Judge Lee responded by noting that it should be possible to wrap things up in 30 days and that he was concerned that allowing more time would just result in delay. Ms. Ratliff noted that support staff had told Ms. Wrenn that they felt strongly about maintaining a meaningful deadline. The Commission adopted the proposed change unanimously with the revision proposed by Judge Lee to include lesser political subdivisions. Judge Lee next reported that the Commission had decided to table its discussion of "short lists" until they learned whether further complaints would be registered following this renewal period. Next, Judge Lee pointed members to the proposed addition of a comment to MSC Rule 7.B. which addresses payment of the mediator's scheduling fee when two or more cases are mediated collectively. This change was adopted unanimously.

Next, Judge Steelman called on Mr. Criner for the report of the **Mediator Certification and Training Committee**. Mr. Criner yielded to Mr. Little. Mr. Little noted that three major issues are now proposed for the Commission's consideration: mandatory referral to mediated settlement, mandatory certification of MSC and FFS mediators, and mandatory random appointment of mediators. He next discussed each of the three issues in more detail:

**Mandatory Certification:** Historically, he noted that the designation rule had been crafted at a time when the program was in its infancy and there was a shortage of mediators. Now, there are

some 1,200 certified mediators available. Next, he noted some of the concerns that have arisen around the designations -- mediators advertising their services in an effort to obtain court-connected work without going through the court's established certification process and mediators handling court-connected cases when they are, from a practical standpoint, not subject to the Standards and disciplinary procedures established by the courts to protect the public. Mr. Little added that the main objection he had heard to mandatory certification was that it would limit choice in instances where the parties might want to use a non-certified mediator who possessed expertise not available in the pool of certified individuals.

**Mandatory Referral:** Mr. Little noted that there is a lack of uniformity around the State relative to referrals. In some districts there is, in effect, mandatory referral, in others that is not the case. He added that Stevens Clarke's research indicated that the program was more effective in pilot districts where referral rates were higher. Mr. Little also noted that the issue of referral had been debated back in 1990 when the MSC program was a pilot. He noted that judges had opposed mandatory referral since they considered the program experimental and had concerns whether mediation would be effective. Those concerns, he suggested, were no longer valid.

**Random Court Appointments:** Mr. Little noted that some districts have established short lists for purposes of court appointments. Those lists, he noted, often exclude certified mediators because they are non-attorneys or do not reside within the district or some other prescribed area. He added that he understands that judges are often acting from a noble purpose, *i.e.*, trying to protect litigants in their districts, but, nevertheless, there is a fairness issue in that certified mediators who are being excluded have met the Supreme Court's qualifications for service.

Mr. Little then opened discussion to the floor saying that he wanted to get some sense of where members stood on these issues in order to determine whether they should be tackled. Mr. Laney noted that he had spoken with a couple of ex-officio members who were not present today - Professor Morris and Ms. Wrenn. He noted that Ms. Wrenn had suggested that sometimes a way of doing something evolves in a district because it represents the most efficient path for court staff. Sometimes, she suggested to Mr. Laney, the best way to correct situations is to spend some time working with judicial assistants rather than crafting more rules. Both Ms. Wrenn and Professor Morris questioned how widespread the problems were.

With regard to mandatory certification, Mr. Criner stated that the threshold question is, "Do we think it is a good idea for people to be trained and certified?" He added that he favors moving forward. He observed that those who are certified are asked to shoulder the burden of paying certification fees, voluntarily completing CME, and adhering to the Standards. A non-certified mediator, he suggested, can simply use the free market system to skirt these responsibilities. Mr. Criner also suggested that those who are not certified and are not ethical have the potential to taint the profession. Lastly, Mr. Criner noted that he has experienced being both "on" and "off" a short list and that while he is currently "on", he agrees there is an element of unfairness involved. In addition, he notes that while the market ultimately controls, appointments serve a very important function in helping new mediators get in the door. When that door is closed, he thinks it can be an insurmountable hurdle. Ms. Foil noted that she has concerns about non-certified mediators siphoning income from those who have made the effort to be trained and become certified. However, she also added that she has some concerns about closing the door on designations in that there may be someone out there who can bring some very specific expertise or insight to a complex ED case that is not available in the certified pool of mediators. Ms. Bernholz agreed, saying that she can foresee similar problems in other types of very specialized, complex litigation, such as condemnation cases. Ms. Conley wondered whether a rule could be crafted which would still allow exceptions, but not make it so easy for non-certified individuals to

serve. Ms. Seigle noted that she strongly believes that certification should be mandatory for court mediators and mediators in general. She noted that she is very concerned about the dubious qualifications of some individuals who are holding themselves to the public as mediators. Mr. Little suggested that there may be political problems in seeking mandatory certification. Judge Lee noted that it is difficult for those who have not taken training to appreciate what is taught in the classes. Mr. Criner suggested the Commission is very vulnerable the way things stand now. Say, for example, the Commission takes an unpopular position on something, mediators can, he suggests, just drop off the list and mediate under designations. Mr. Little noted that he believes he can draft around all the reservations mentioned. Judge Steelman then asked the group whether it was ready to move forward on these issues. The Commission asked Mr. Little to proceed. A committee was next assembled to begin considering the issues. The members volunteering to serve were Ms. Conley, Mr. Laney, Judge Lee, Mr. Little, and Judge Steelman.

Next, Mr. Little reported on the Task Force he is chairing to determine the future of the ADR Committee of the State Judicial Council. He reported that the Task Force will be recommending that the ADR Committee continue, but be reconstituted as a streamlined body with five members that would act to review proposed rule changes with notice to all constituent groups.

Next, Mr. Little spoke briefly about the proposed Clerk Program. He indicated that the Task Force will soon start working on rules. He added that, at least for now, it appears there will be a separate certification for mediators conducting estate and adult guardianship mediations. For the other matters before the Clerks, MSC certification will suffice. Lastly, Mr. Little noted that he will likely bring proposed rules to the next Commission meeting.

Next, Judge Steelman called on Mr. Little and Ms. Seigle to talk about their attendance at the ABA Dispute Resolution Section Annual Meeting held in Los Angeles. Mr. Little noted that he had attended as many sessions as possible relating to court-connected programs. He noted it was often difficult to compare what was happening in NC with other states because so many of the other programs used volunteer mediators which created a whole separate set of problems than we face here. Mr. Little added that he would rather face the issues we are tackling here than the ones they face -- how to recruit volunteers, how to keep volunteers motivated. Ms. Seigle reported that the NC contingent distributed some 180 ADR Books to attendees from as far away as Italy and the Czech Republic. Mr. Little, Judge Walker, and Mr. Schafer participated in a panel discussion on the Book and dispute resolution in NC. Ms. Seigle participated in a panel on mediating domestic violence cases, which showcased work that CDSS had been doing in NC. Judge Steelman thanked them for so ably sharing North Carolina's efforts with the wider world.

Next, Judge Steelman called for liaison reports. Mr. Minor shared that dispute settlement centers were facing an across the board 10% cut in their funding. He noted that the Centers have had a difficult time at the General Assembly in the recent past and they were working hard to turn things around. Mr. Laney reported for the NCBA's Dispute Resolution Section, noting that his term as Chair was concluding and that Jon Harkavy would be the new chair. He said that the Section is currently looking at the issue of arbitration clauses in consumer contracts.

Next, Judge Steelman read a resolution honoring the service of former AOC employee and ex-officio Commission member, Mark Van Der Puy. The Resolution was unanimously adopted. Judge Steelman asked Ms. Ratliff to incorporate it in the minutes and forward a copy to Mr. Van Der Puy. Next, Mr. Steelman noted that there had been a request to move the August meeting date to September 9 in Raleigh. There being no objection it was done. The final meeting date of the calendar year was set for November 4, 2005. There being no further business, the meeting was adjourned.

# Resolution of the North Carolina Dispute Resolution Commission

## Recognizing Mark Van Der Puy's Service

May 13, 2005

**Whereas**, Mark Van Der Puy was employed by Wake County as a Custody Mediator and then, later, by the Administrative Office of the Courts as Custody and Visitation Program Administrator;

**Whereas**, beginning in 1999, Mark Van Der Puy served as the liaison for the Administrative Office of the Courts to the North Carolina Dispute Resolution Commission;

**Whereas**, Mark Van Der Puy has faithfully fulfilled his role as liaison;

**Whereas**, Mark Van Der Puy has worked diligently to promote the use and development of dispute resolution processes and programs in the courts of North Carolina;

**Whereas**, Mark Van Der Puy has personified the spirit of dispute resolution by virtue of his dedication to principles of collaborative problem solving and his unceasing efforts to build bridges of understanding between the Administrative Office of the Courts and others in the dispute resolution community, including the Dispute Resolution Commission; and

**Whereas**, Mark Van Der Puy has now left the Administrative Office of the Courts and the service of the North Carolina Dispute Resolution Commission to pursue other endeavors;

**Now, therefore**, be it unanimously resolved that the North Carolina Dispute Resolution Commission expresses its deep gratitude to Mark Van Der Puy for his many years of exemplary service as liaison to the North Carolina Dispute Resolution Commission and for his outstanding contributions to the advancement of dispute resolution in North Carolina.

**Be it further resolved**, that the original of this resolution be placed in the permanent minutes of the Dispute Resolution Commission, and a copy delivered to Mark Van Der Puy.

Done this the 13<sup>th</sup> day of May, 2005, in Greensboro, North Carolina.

NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

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By: **Sanford L. Steelman, Jr., Chair**

# NC Dispute Resolution Commission

## Minutes

September 9, 2005

Nelson Mullins Riley & Scarborough  
Raleigh, NC

Commission members present: Steelman, Banzet, Bernholz, Conley, Criner, Curran, Gumbiner, Hudspeth, Isenhower, Lee, Seigle, Taylor, and Turner. Ex-officio members present: Beason, Harkavy, Laney, Little, Morris, and Schafer. Guests present: Linda Attarian, Vincent Collura, George Doyle, Betty Fuqua, Judge Robin Hudson, Deborah Isenhour, and Maggie Sloane. Staff present: Ratliff.

Judge Steelman thanked everyone for coming and noted there were a number of important matters on the agenda. First, two new Commission members were present and he recognized them. Martha H. Curran, Clerk of Superior Court in Mecklenburg County, was appointed to a new position on the Commission created as a result of the legislation establishing the Clerk Mediation Program. Jules Banzet, III, a Warrenton attorney, replaces Mr. Isenhower whose term expires on September 30, 2005. Mr. Banzet is appointed as a practicing attorney, not certified as a mediator. Following the introductions, Judge Steelman administered an oath of office to Ms. Curran and Mr. Banzet. Judge Taylor then administered an oath of office to Judge Steelman, who was appointed to his second term as a member of the Commission. Next, Judge Steelman presented a plaque to Mr. Isenhower, thanking him for his service to the Commission.

Judge Steelman next introduced guests. He began with Judge Robin Hudson of the NC Court of Appeals. Maggie Sloane from the North Carolina Association of Professional Family Mediators. Next, that Betty Fuqua was attending in the place of Ella Wrenn. Lastly, the mediator guests: Ms. Attarian, Mr. Collura, and Mr. Doyle.

Next, Judge Steelman called for approval of the minutes which were adopted without revisions. Thereafter, he asked Ms. Ratliff for the report of the Commission's office. Ms. Ratliff first reported that the office relocated to the AOC's Anderson Plaza facility and staff was pleased to finally have adequate space. She added that the rent was a little higher, but that difference was minimized by the fact that the landlord at the former location planned a \$200.00 per month increase when the lease was renewed. Ms. Ratliff also reported that the 2005/06 certification renewal period had now closed. She noted that the renewal period ran from mid-spring to late summer. This year, she reported, had not been a strong one for renewals. To date, some 100 certifications had not been renewed and the number of "inactives" had also gone up slightly, resulting in lower collections. She further explained that those mediators who had contacted her often cited a lack of work as their reason for not renewing. The losses notwithstanding, she still expected the office to have adequate funding, since there were \$30,000 in receipts over expenses last year. Ms. Ratliff also reported that the office had seen a decline in the number of original certification applications.

Ms. Ratliff also reported that the Annual Report for 2004/05 would be published shortly. She noted that complaint calls had picked up this quarter and she briefly described a few of the calls she had most recently taken. Lastly, she reported that in the wake of the assignment that Judge Steelman had given her to poll the other 49 States regarding a number of issues, that several state coordinators had agreed to meet to discuss issues of mutual interest. That meeting, she added,

would be co-sponsored by the Commission and the Georgia Office of Dispute Resolution and held in Atlanta on September 19.

Next, Judge Steelman asked Judge Robin Hudson to advise the Commission on the Court of Appeals Mediation Program. Judge Hudson distributed caseload statistics for the program and noted that it has been very successful. Her statistics showed that some 229 cases had opted into mediation between August of 2002 and September of 2005, and that 196 had completed mediation. Of the cases mediated, 100 or 51% had settled. Judge Hudson noted that participation in mediation at the appellate level was entirely voluntary and cases involving *pro se* litigants were not eligible for mediation. She noted that most of the mediation is done by sitting or retired Court of Appeals Judges (there are 12 sitting judges in the rotation), but that parties can also choose private mediators. Sitting judges conduct mediations at no cost, but retired judges and private mediators charge for their services.

Judge Steelman then invited Ms. Sloane to talk with the group about the North Carolina Association of Professional Family Mediators. Ms. Sloane noted that the organization had been active for about 15 years in North Carolina and that most of the members are active mediators. She added that about half of the members are lawyers with the remaining members including therapists, clergy, and human resources managers. They mediate in many arenas, including the courts, federal agencies, and private businesses. Ms. Sloane invited Commission members to attend meetings or to visit the organization's web site. She also advised the group that she had been one of the organizers of the first Clerk Mediation Program training that had been held recently. She said there was a lot of enthusiasm and mediators were very interested in the new program. Judge Steelman thanked Ms. Sloane.

Next, Judge Steelman called for committee reports and he began with the Executive Committee. He reported that both the Clerk Mediation Program legislation and the proposed changes to existing mediated settlement conference program and Commission enabling legislation had been adopted by the General Assembly with only minor changes. He noted that Senator Hartsell and Representative Hackey's efforts had been critical to passage and he hoped that Commission members would thank them when they had an opportunity. He also recognized Mr. Little's efforts. Judge Steelman also called attention to the new statute enclosed with the meeting materials which provides for pre-litigation mediation of territorial disputes between electric service providers and added that rules implementing that legislation were scheduled to be on the agenda at the Commission's November meeting.

Mr. Little next reported for the *Ad Hoc* Committee for Clerk Mediation. Mr. Little gave a brief account of how this matter had come to the forefront and called attention to the proposed rules to implement the statute. He noted that while these rules were modeled on existing mediated settlement conference program rules, they differed in that the Clerk retained considerable discretion, *e.g.*, the Clerk may order interested persons or non-party participants to attend along with the parties. He also noted that Rule 2 was a little different from current rules in that it mandated that all mediators participating in the program be certified.

Mr. Little then called attention to Rule 8 noting that MSC and FFS certified mediators would be eligible to mediate all Clerk referred matters except guardianship and estate disputes. Mediators handling those disputes would need to complete ten additional hours of training. He next called attention to Rule 4.B. which provides for mediators to attach copies of agreements reached in mediation to their reports in instances where the Clerk is required by law to review the agreement. He noted that this rule will necessitate a change in Standard III which addresses confidentiality. Confidentiality is fundamental to the mediation process, Mr. Little noted, but in

cases like guardianship and estate matters where there is great potential for abuse and fraud, there are important reasons to have the Clerk review and approve the agreement. Mr. Little commented that Representative Stam had requested the list of exceptions in Rule 1.C.(1). Ms. Curran suggested the list was not necessary. Mr. Laney asked about the political ramifications of deleting the exceptions. Mr. Little did not think it would be a problem.

Mr. Laney reported that he had received a call from elder/estate lawyer Mary Ann Dalton noting that she believed that the statutory citations in Rule 1.C.(1) were incorrect. He continued that she also expressed concern that in guardianship cases, the time frames provided for mediation were too long. Ms. Curran concurred. She had also spoken with Ms. Dalton and suggested that the time frame to object set forth in Rule 1.C.(3) should be shortened to five days as should the reporting requirements set forth in 6.B.(4)(a). Judge Lee asked Mr. Little whether he thought mediators in rural areas would travel to take the training course required by Rule 8? Mr. Little noted that the course required only ten hours of attendance and he did not think that would be a problem. He added that Ms. Dalton had expressed an interest in holding training at various locations around the State. Judge Taylor asked what type of professional would teach the capacity material? Mr. Little responded that he thought Ms. Dalton planned to work with a geriatrician. Judge Taylor mentioned that an organization called Partners in Justice had grant funds available to distribute to court programs working with developmentally disabled individuals. Judge Steelman noted that Guidelines had been developed which elaborated on the Rule 9 curricula.

Ms. Curran moved for adoption of the Clerk Program Rules with the following modifications: that Rule 1.C.(1) be revised to cite NCGS Chapters 45 and 48 and to delete the list of case specific exceptions and that the Rule be re-drafted to track the language in the Program's enabling legislation which addresses eligibility for referral; that the language in Rule 2.A. be revised to allow parties to select non-certified mediators; and that the word "Commission" be substituted for the word "program" in Rule 9.B. Judge Turner objected to the deletion of the language mandating certification. He observed that trained and qualified mediators have enjoyed a much higher success rate in his district. Ms. Curran responded that, though she was not discounting the need for training, she thinks a lot of the attorneys in her county will not be willing to complete the 50 hours necessary to qualify (40 for initial certification and ten additional hours to conduct adult guardianship and estate matters). Both Mr. Little and Mr. Beason disagreed. Ms. Curran suggested that the requirement for certification could be inserted later after it is certain there will be enough mediators available to serve the Program. Mr. Little stressed again that he did not think that would be a problem, noting that the recent guardianship/estate class had been full. Judge Turner moved to amend Ms. Curran's motion to eliminate her proposal that Rule 2.A. be revised to permit non-certified mediators to participate. Judge Turner's motion to amend Ms. Curran's motion carried by a vote of 9 to 1 with Ms. Curran voting against the motion. Next, Judge Steelman called for a vote on Ms. Curran's original motion as amended by Judge Turner's motion. The motion was approved unanimously.

Judge Steelman then asked Mr. Little to report for the *Ad Hoc* Committee designed to look at certain fundamental rule changes in both the MSC and FFS Rules. Mr. Little noted that the members of that committee were: Ms. Conley, Mr. Laney, Judge Lee, Judge Steelman, and himself. The first issue Mr. Little raised for discussion was a proposed revision that would mandate referral of eligible cases. He commented that both programs had proved their worth and the Committee felt strongly that courts should employ them to the maximum potential.

The second issue he noted for discussion was mandatory certification or the elimination of the provision allowing designation of non-certified mediators. Mr. Little added that non-certified

mediators who had mediated at least ten cases prior to September 1, 2005, would be grandfathered on application. Mr. Criner noted that he thought ten cases was a very low bar, and wanted 25. Judge Lee commented that he thought there would be resistance if it were more than 10. Judge Taylor asked how they arrived at the number "10". Mr. Laney responded that he recalled that the feeling was if a mediator had completed at least ten cases, that he or she had demonstrated a significant commitment to the mediation process. Speaking historically, Mr. Little noted that the reason that the nomination of non-certified mediator provision had been included originally was that there had been so few certified mediators available when the pilot was launched and there were coverage concerns. That was, he noted, no longer the case given that there were now some 1,200 certified mediators working in the courts. Ms. Conley added that there were also accountability concerns driving this proposed change – that a suspended or decertified mediator could continue to practice via nominations and there was no effective way to discipline non-certified mediators though their conduct was subject to the Standards. Mr. Little affirmed her points, noting that this change was the only way to put teeth in the Standards.

Next, Mr. Little addressed the third issue – nondiscriminatory appointment of mediators. This revision, Mr. Little reported, would require judges making mediator appointments to rotate down lists supplied by the Commission unless they had good cause to depart from the rotation. Mr. Criner noted that he opposed the good cause exception. From a practical standpoint, Judge Taylor asked what will the Commission do if a judge does not comply? Mr. Little noted her point, but responded that there have been ongoing complaints from mediators who have been excluded in some districts and other softer approaches, such as the model policy, had not worked. Ms. Fuqua added that this approach would encourage party selection.

Mr. Criner made a motion that the three proposed changes be adopted. Mr. Gumbiner suggested that non-certified applicants seeking grandfathering should be required to show proof satisfactory to the Commission's office of the ten mediations they conducted. Mr. Gumbiner also suggested that language be inserted noting that the non-certified mediators were party selected. Mr. Gumbiner's proposed amendments to Mr. Criner's motion were approved 8 to 1. Thereafter, Mr. Criner's motion was approved unanimously. Judge Steelman thanked Mr. Little and the members of the Committee for their hard work.

Next, Judge Steelman asked for the report of the Standards and Discipline Committee. Ms. Bernholz first reported on a matter involving an applicant who had been disciplined by the Judicial Standards Commission. She noted that her Committee was not making a recommendation on this matter since, under the existing Commission rules, it had no authority to consider it. Judge Steelman added that since the procedure set out under the current Commission Rules had been determined to be deficient, he suggested that he would like to offer the applicant the choice of proceeding under the new rules which were not yet adopted by the Court. Ms. Seigle suggested that since there had been considerable delay, that perhaps the Commission should proceed under the existing rules. Ms. Bernholz responded that the delay was not the result of the Commission but, rather, the need for the JSC and Court to complete their review of the matter. The consensus of the Commission was to offer the applicant a choice. Ms. Ratliff was asked to send him both sets of rules with a letter explaining that he could make an election.

Next, Ms. Bernholz noted a proposed revision to Standard VIII, Protecting the Integrity of the Mediation Process (proposed, new section B). The revision places a duty on the mediator to insure that the interests of respondents who are absent or unable to participate fully in mediation are considered by those present. Mr. Laney said that he did not favor this change and felt it was overreaching. Ms. Curran liked the revision and said that she particularly sees a need for it in guardianship matters. Mr. Laney replied that he agreed it was good practice, but should not be a



duty. There followed considerable discussion about already existing Section A. of the Standard. Mr. Little noted that this portion of the Standard was not before the Commission at this time. He also added that he was concerned that the Standards were written from an aspirational standpoint. Perhaps, he suggested, now that certification may be mandatory, the Standards should be reviewed in their totality to make it clear that complying with them is mandatory and not discretionary. The matter was referred back to the Committee with a charge that it also consider the broader issue.

Ms. Bernholz also reported that the Committee was withdrawing the proposed change it had earlier recommended to Commission Rule VIII.A.2.(c), limiting the Committee's authority to investigate complaints to those complaints occurring in a mediation context. She noted the discussion at the last meeting and particularly the observation that the State Bar does not confine its investigations to complaints that occur in the context of the practice of law. Next, Ms. Bernholz asked Ms. Ratliff to discuss a proposed revision to Standard III, Confidentiality. Ms. Ratliff noted that the proposed new Clerk Program Rules required mediators to submit agreements with their Reports of Mediator in some matters. Such attachments would violate Standard III as currently written, so an exception needed to be incorporated in the Standard. Mr. Little suggested that this change needed to be approved now. Proposed revisions to Standard III permitting such attachments were adopted unanimously.

Next, Judge Steelman called for Liaison Reports. Mr. Harkavy reported for the NCBA Dispute Resolution Section. He noted that in the coming year he hopes to have the Section consider issues of racial and gender diversity in the mediation profession. He is concerned that so few minorities and women are prominent in the profession. Judge Steelman noted that Mr. Minor had been planning to attend and report for the Network, but had been called out of Raleigh. Ms. Ratliff spoke briefly about the November retreat and reminded everyone to make their reservations.

Next, Judge Steelman called for new business. Ms. Isenhour noted that the NC Chapter of the Association for Conflict Resolution was considering the feasibility of organizing a statewide dispute resolution conference. She hoped for the Commission's support in this endeavor and there appeared to be interest.

Lastly, Judge Steelman asked about dates for the first Commission meeting in 2006. The group agreed on February 17. Professor Morris offered NCCU School of Law's new building as a meeting site. There being no further business, the meeting was adjourned.

# **Dispute Resolution Commission**

## **Minutes**

**Friday and Saturday, November 4-5, 2005**

**Green Park Inn  
Blowing Rock, NC**

Commission members present: Steelman, Banzet, Bernholz, Conley, Criner, Curran, Gumbiner, Hudspeth, Lee, Lewis, Seigle, and Turner. Ex-officio members and staff present: Cohen, Laney, Little, Morris, Ratliff, and Wrenn. Guests present: Michael Colo, H. Houston Groome, Melissa Johnson (Blue Ridge Dispute Settlement Center), Leila Jabber (Carolina Dispute Settlement Services), and Richard Feathers, participating by telephone.

Judge Steelman welcomed those attending, introduced guests, and thanked everyone for coming. He also thanked Ms. Wrenn for hosting the meeting. Next, he administered the oath of office to Sherman Criner and Diann Seigle who were re-appointed to second terms.

Judge Steelman asked for approval of the minutes and they were approved without amendment. Next, he called on Ms. Ratliff for the office report. She reported that copies of the Commission's Annual Report for FY 2004/05 had been distributed and noted that caseload statistics had not been attached to the Report. As they were now available, she called attention to the statistics for the MSC and FFS Programs that had been distributed. She observed that total referrals and settlement rates were up for both Programs. Next, Ms. Ratliff noted she and the AOC were continuing to work on the Commission's web site and that she was getting a framework in place to hold the new Clerk Rules and other materials once they are approved by the Court. She added that the project to post biographical information about mediators was also moving toward the test phase. Ms. Ratliff noted that she had spent a great deal of time on forms drafting this quarter and would be meeting with AOC Forms Committees in February. Lastly, she noted that former Commission member Randy Isenhower had written to express appreciation for his plaque and to say that he had enjoyed his service.

Next, as a part of the Executive Committee's Report, Judge Steelman asked Mr. Colo, an attorney in attendance today representing municipalities that generate electricity, to walk Commission members through proposed rules to establish a new program for mediation of disputes between electric service providers. Mr. Colo noted that Mr. Groome and Mr. Feathers, attorneys representing electric service cooperatives, were also present and had participated in formulating these Rules. Mr. Colo explained that the proposed rules were designed to promote resolution of disputes between electric cooperatives and electric cities regarding service to new neighborhoods. These proposed Rules were, he explained further, modeled on the Pre-litigation Farm Nuisance Mediation Rules, but differed in that if the dispute could not be resolved in mediation, it would be arbitrated by a member of the public staff of the North Carolina Utilities Commission. Following Mr. Colo's

summary, Commission members asked a number of questions about the Program and how it would operate. During the discussion, Messrs. Colo, Groome, and Feathers agreed to a number of minor revisions to the proposed rules and to two more significant revisions: 1) eliminating proposed Electric Rule 3.C. providing for selection of non-certified mediators, 2) reducing the amount of the proposed administration and mediation fees set forth in Electric Rule 7.B to make them consistent with MSC and FFS fees. The Commission unanimously adopted the Rules with the revisions. Mr. Colo indicated that he would make the changes agreed to and forward a revised copy to Ms. Ratliff next week.

Continuing his report for the Executive Committee, Judge Steelman stated that, unless there was some objection, he intended to designate Judge Robin Hudson as liaison to the Commission from the Court of Appeals Mediation Program. Next, Judge Steelman reported that the ADR Committee of the State Judicial Council had met on October 14 and considered the proposed new rules and rule changes submitted by the Commission. He added that the ADR Committee had not approved the elimination of the nomination of non-certified mediator provision from the FFS Rules. He explained that concerns had been expressed that there were not enough certified family financial mediators available to adequately serve an expanded FFS Program. The Commission's recommendation in this respect was referred back for further study. Judge Steelman added that Wade Harrison and Judge Neely have volunteered to be part of that discussion. The Committee, he added, had also asked that districts be allowed a period of time to comply with the provision in the FFS Rules requiring mandatory referral. Mr. Laney offered some language to be inserted in the proposed Order adopting the FFS Rules to give districts one year from the effective date of the rule change to comply. The Commission approved the language. Lastly, Judge Steelman noted that the discussion regarding the future of the ADR Committee was still ongoing.

There followed discussion about the ADR Committee's decision not to require certification of FFS mediators. Judge Turner noted that district court judges are also of the opinion that parties should be able to use non-certified mediators if they choose. Mr. Little suggested that perhaps this matter should be put on the back burner and the Commission should focus on what assistance it can offer district court districts establishing FFS Programs. He added that the Commission and AOC could sponsor orientation sessions for court staff and lawyers. He noted that past history indicated that such sessions were useful to pilot and expansion districts that held them. Judge Turner added that he thinks district court judges and family lawyers will eventually see the importance of mediator training and certification as they gain more experience with the FFS Program. Mr. Criner suggested the Commission should do more to educate judges and lawyers on the need for mediator professionalism. It was informally agreed that the Commission should approach the AOC about orientations and try to work with district court judges in preparation for statewide expansion of the FFS Program. Ms. Conley suggested that judges could be given a tape of a family financial mediation to view.

Next, Judge Steelman reported that he had determined to appoint a panel to consider an application for certification that the DRC's office had passed on to the Standards and

Discipline Committee. Ms. Bernholz, reporting for the Standards and Discipline Committee, noted that her Committee felt it had no jurisdiction to consider the matter under the current rules. Judge Steelman added that Judge Lee would chair the panel. He asked for the panel to have a recommendation on the matter for the Commission's February meeting.

Judge Lee reported for the Program Oversight Committee. He noted that his Committee had considered the issue of whether a corporate officer or representative who is not a licensed attorney can represent the corporation at a mediated settlement conference. He noted that his Committee had concluded that this is a very difficult issue, the law is not clear, and that, essentially, if the matter comes up again, Commission staff should refer callers to the State Bar. Judge Lee also noted that a mediator had, through the DRC's office, made a request that the Commission consider increasing the fee for court appointed mediators. This Committee determined that, given the budget constraints the State was operating under at this time, it was not appropriate to increase fees now. Judge Lewis suggested that perhaps it might be appropriate to permit mileage in court appointed cases. Mr. Little suggested this had not been done because rule drafters were concerned about appearing to subsidize out-of-district mediators in court appointed cases. Judge Steelman suggested that perhaps Judge Lee's Committee could look at this issue.

Mr. Criner reported for the Mediator Certification and Training Committee noting that they had met to consider mediator and trainer certification fees in connection with the new Clerk Mediation Program. The Committee, he reported, was recommending that no certification fees be charged in connection with this new program given that certification applicants would already hold MSC or FFS certification and the same expectation existed vis-à-vis the trainers. The Commission unanimously agreed.

The Committee reports concluded, Professor Morris reported that NC Central School of Law was launching a new Mediation Institute and that he would give a fuller report at a future meeting. Judge Curran reported that Representative Stam had no problems with the revising of the referral language in the Clerk Rules to eliminate the list of exceptions by case type. Commission members were asked to remember Judge Carroll and his family over the holidays. Judge Steelman reminded Commission members that the next Commission meeting was set for February 17 at North Carolina Central University School of Law in Durham and he asked Commission members about setting additional future meeting dates. After some discussion, the following dates were set: May 12, 2006, in Raleigh; August 25 in Greensboro; and November 3-4 at the Green Park Inn in Blowing Rock.

There being no further business, the meeting was adjourned.