

Dispute Resolution Commission

Minutes

Friday, February 15, 2008

North Carolina Judicial Center, Raleigh, NC

Commission members present: Steelman, Conley, Hay, Huckel, Hudspeth, McKown, Morgan, Tash and Turner. Ex-officio members present: Beason, Fuqua, Gullick, Huffman, Laney, Little, and Schafer. Staff and Guests present: Buell, Anderson, Crowell, McMullen, Morgan, Ratliff, and Robinson.

Judge Steelman thanked everyone for coming and noted guests: Professor Michael Crowell of UNC-Chapel Hill's School of Government; Ann Anderson and Judge Melzer "Pat" Morgan of the NCBA's Dispute Resolution Section; and his law clerks at the Court of Appeals, Scott McMullan and Carrie Buell. He next proceeded to administer the oath of office to new Commission members: Ann McKown, Michael Morgan and Gary Tash. Judge Steelman then asked for approval of the minutes which were approved as submitted.

Judge Steelman turned the floor over to Professor Crowell after explaining that he would make a presentation on judicial immunity and define the concept "officer of the court". Professor Crowell began by describing judicial immunity as a means of insuring judicial independence. The concept, he noted, is firmly rooted in common law and, when recognized, is absolute, shielding even judges who act maliciously or corruptly in performing their judicial duties. Immunity does not, however, he added, extend to purely administrative acts, such as hiring decisions. He acknowledged that there can be debate as to whether an action is a judicial or administrative function. In such cases, a court would look at "functionality", *i.e.*, what did the judge do and how the action relates to his/her work. Professor Crowell noted that North Carolina statutes give mediators judicial immunity. Such immunity, he suggested, was often extended to non-judges acting in a judicial or quasi-judicial capacity.

Judge Steelman asked whether North Carolina's immunity statutes applied to mediations held outside the court context? Professor Crowell suggested that was not clear. Mr. Little responded that the statutes specifically refer to court-ordered mediations. Professor Crowell suggested that since mediators are arguably performing a judicial function, they may be entitled to immunity under common law. Ms. Gullick asked whether the statutes protect only court-appointed mediators as opposed to party-selected ones? Professor Crowell responded that the statutes do not make a distinction in that respect. In terms of functionality, there is also no distinction. Ms. Anderson asked whether there is any distinction to be drawn between a mediator performing professional services and one scheduling a case. Professor Crowell responded that tasks involved in scheduling or otherwise preparing for mediation are, he believes, directly related to the case and, as such, are a judicial function. Mr. Little added that mediators are required by court rule to perform these functions. Mr. Tash asked about non-certified family mediators. Professor Crowell responded that the immunity situation is most clear in the context of court-appointed mediators; slightly less clear in the context of court ordered mediations involving certified, party selected mediators; and least

clear in the context of non-certified mediators conducting court-ordered mediations. However, even when the mediator is not certified, Professor Crowell still believes there is a strong functionality argument to be made. Mr. Little asked whether private parties can contract for judicial immunity. Professor Crowell does not think so, though they could give the mediator a release from liability.

The term, "officer of the court", Professor Crowell explained is used by courts when they want to justify putting additional obligations on a lawyer or want to discipline a lawyer for some reason, such as improper dress. Professor Crowell thinks it is questionable whether non-lawyers can be officers of the court. Ms. Gullick asks whether it would make any difference if the non-lawyer was certified by the Commission? Professor Crowell said he really did not know. Mr. Little asked what effect it would have if the Supreme Court expressly stated that mediators, whether lawyers or non-lawyers, were officers of the court? Professor Crowell agreed that might solve the problem. Mr. Little added that the judges who help draft enabling legislation for the mediation programs had been the ones to suggest the immunity provisions, saying that they considered settlement conferences a judicial function.

Judge Steelman noted that a certified mediator had been sued by a *pro se* party with regard to his actions in scheduling a case and filing a Report of Mediator. The Commission had asked the Attorney General's Office to represent the mediator. One before when a mediator had been sued, the Attorney General's Office had provided legal representation. This time, however, they declined the Commission's request, saying that mediators are not officers of the court and drawing a distinction between employees and independent contractors. They stated, that they had no duty to represent the latter. Professor Crowell noted that the emphasis should, in his opinion, have been on functionality; that they should have looked beyond whether the mediator was an independent contractor or employee and considered the broader public interest. Judge Turner noted that his district's Custody and Visitation Mediator, who was a State employee, would be entitled to representation. Since MSC and FFS mediators were providing the same kind of service, he did not understand why they would not be covered.

Next, Professor Crowell discussed the inherent authority of judges in the context of whether a judge had the power to remove a mediator from a district's court appointed mediator list. Professor Crowell said that he felt confident that a judge had that authority and was under no obligation to consult with the Commission. Judges can, he noted, discipline attorneys, the State Bar notwithstanding. Judge Steelman thanked Professor Crowell for coming and told him that his presentation had been helpful. There followed some discussion on the matter of the private mediator who had been sued. Ms. Gullick reported that the Section was going to be meeting about the situation and would keep the Commission informed.

Judge Steelman next called for Ms. Ratliff's office report. She first informed Commission members that Sharon Laue would be out for twelve weeks following knee surgery. She added that Judge Steelman had authorized the purchase of a lap top and a cell phone contract so Ms. Laue could work from home during her recovery. She added that Ms. Laue's absence would mean that the office would have to push the renewal period back until May 1st or mid-May. Given the financial cushion the Commission had accumulated through unspent revenues, she suggested that the Commission may want to hold to this later date in the future assuming all goes well this year.

Ms. Ratliff reported that her office and AOC technology staff were working with a focus group of volunteer mediators to correct problems that adversely affected the FY 2007/08 renewal effort. She also reported that materials relating to the new District Court Criminal Mediation Program are now posted at www.ncdrc.org. She also told the group about a situation involving some lost checks for certification fees. The Commission's office had sent the checks inter-office to AOC Fiscal, which never received them. The Commission's office advised AOC Fiscal in writing that it had asked the mediators to stop payment on the lost checks and to issue new ones. Nevertheless, when the lost checks appeared at AOC Fiscal some months later, AOC staff proceeded to deposit them. This resulted in the Commission's office having to procure refunds for those who had paid twice. Many of those contacted expressed considerable dissatisfaction regarding the situation. Ms. Ratliff stated that she was also very concerned about what happened and has now put safeguards in place, including a requirement that her staff hand-deliver deposits and get a receipt for them.

Ms. Ratliff next reported that AOC Technology staff had advised her office that it was time to replace the office computers due to their age. She asked the Commission to approve three new machines at a total cost of \$2,588.97 (not including monitors). A motion was made and the purchase unanimously approved. She also asked for approval to cut a window into Ms. Robinson's office to bring in some natural light and create a more pleasant work environment. The cost, she noted, would be approximately \$1,400 for labor and materials. This expense was also unanimously approved. Ms. Ratliff reported that she had distributed the Commission's request for comment on the proposed Standard III changes and had as yet received no response from the organizations contacted. She had, however, heard from a few mediators and their comments were included in today's handouts. Lastly, Ms. Ratliff noted that the Commission's Annual Report for FY 2007/08 had been distributed.

Next, Judge Steelman called on Judge Melzer "Pat" Morgan regarding the Dispute Resolution Section's request for an Advisory Opinion clarifying *pro bono* service of mediators. Judge Morgan explained that the Section wished to honor NCBA President Janet Ward Black's wish that more attorneys be involved in *pro bono* activities and to have mediators participate in her 4All campaign. He added that Legal Aid had sought the Section's help in creating a panel of mediators who would provide services at no cost to indigent parties. He clarified that Legal Aid wanted to assemble an actual panel, that their lawyers were not comfortable in asking mediators to take cases involving indigents even though mediators are required by program rules to provide such services. Some ethical questions regarding *pro bono* mediation services had arisen and the Section, was asking the Commission to address them in the form of an Advisory Opinion. He called attention to some handouts prepared by members of a Section committee (Judge Morgan, Frank Laney and Andy Little) and walked members through a series of questions. The committee, he noted, had also drafted some potential answers to the questions in an effort to facilitate the Commission's work. Judge Turner suggested that when one side is indigent, he is a little concerned about the other side being required to pay, that perhaps neither should have to pay. Ms. Anderson stressed that mediators will not be forced to participate in this *pro bono* effort, that it will be entirely voluntary. Ms. Conley reported that she sometimes sees problems arise when she tries to shift fees in domestic cases. Judge Steelman asked Ms. Gullick about the Section's time frame and she reported that they hope the matter can be referred to the Standards, Discipline and Advisory Opinions Committee and that an Opinion can be issued before June, 2008.

Though the Section was not requesting any changes, Ms. Gullick also noted concerns about proposed revisions to MSC/FFS Rule 8 requiring disclosure of bankruptcies by mediators and applicants for certification and certification renewal. She called attention to Title 11, Chapter 5, Subchapter II, Subsection 525 of the US Code which prohibits discrimination by a government agency against anyone who has filed for bankruptcy and is seeking the issuance of a license, charter, *etc.*, from the agency. Mr. Hay responded that it was a valid concern, but that he did not envision that the Standards, Discipline and Advisory Opinions Committee, which had requested the revision, would ever make a decision not to certify based on a filing for bankruptcy alone, *i.e.*, that in and of itself, a bankruptcy would never be a disqualifying factor. No motion was made and the proposed rules will stay as they are.

Ms. Ratliff reported for the Standards, Discipline and Advisory Opinions Committee. She noted that Professor Morris was attending to family matters in Michigan and Ms. Seigle, the vice-chair, was ill. She noted that the Committee had met that morning and considered a number of matters, including: how to respond to a formal complaint, how to respond to a number of informal complaints the Commission had received regarding the conduct of a certified mediator who was alienating court officials, how to respond to an advertising question involving *pro bono* service, how to respond to an individual who was publicly representing himself as DRC certified when he was not, and how to incorporate referrals to the Chief Justice's Commission on Professionalism into the Commission's Rules. She noted that all these matters were still in progress at this point.

Mr. Little reported for Judge Lee and the Program Oversight Committee. He noted that Karen Sisk, ADR Coordinator in District 26, had raised concerns about the conduct of a mediation firm working in Charlotte. She reported that the firm was requesting a large number of mediator substitutions and she suggested they were also making misrepresentations regarding payment of court appointed mediators. Ms. Sisk requested that the Commission take action to deter such substitutions by revising the rules to require that parties requesting a substitution pay a fee to the court. Mr. Little noted that the Committee had considered this matter earlier and recommended proposed revisions to Rule 7 which the Commission had approved. The proposed revisions are designed to deter substitutions by requiring a party seeking a substitution to provide proof that payment due the court appointed mediator was, in fact, made. Mr. Little added that the Committee recommended giving this approach a chance to work before making any further revisions such as the one Ms. Sisk recommends. Ms. Fuqua asked what was meant by "proof of payment". Mr. Little responded that he thought court staff should ask for a cancelled check. Ms. Ratliff pointed out the proposed Substitution of Mediator form which court staff had requested and which was being submitted for comment. She asked those present to let her know if they had any suggestions for edits.

In Mr. Criner's absence, Mr. Laney reported for the Mediator Certification and Training Committee. Mr. Laney noted that the Committee has considered questions from a mediator who wanted to establish a practice focused on medical malpractice disputes. First, the mediator asked whether he could have a co-mediator present who was not certified. The Committee told him, "no", the MSC Rules required certification. Then he asked whether he could have a medical expert present who would advise him on technical issues. The Committee, Mr. Laney reported, advised the mediator that it was concerned about such a situation in that it could easily lead to a mediation being converted to a neutral evaluation or that the expert could, in effect, become a *de facto* non-

certified, co-mediator. The Committee felt he could simply call the expert, there was no good reason to have him/her present in person. Mr. Laney also reported that the Committee was, at Ms. Seigle's request, considering Carolina Dispute Settlement Service's Employment Mediator Training to consider whether that training sufficiently tracked MSC/FFS Rule 9 curriculum to allow the Committee to recommend to the Commission that it permit attorney applicants who took that training to become MSC or FFS certified upon completion of a short (16-hour) MSC or FFS course. (The training is used by the State Office of Personnel to qualify mediators.) Lastly, Mr. Laney called attention to a proposed *Guide to Selecting a Mediator* designed to assist *pro se* parties and attorneys with mediator selection. Ms. Ratliff, he reported, wished to post the *Guide* at www.ncdrc.org. The *Guide* was approved for posting as submitted.

Mr. Laney next reported on the District Criminal Court Mediation Program. He noted there had been quite a lot of activity this quarter. He said there had been some misunderstandings about how the grandfathering provision was to work which were clarified. He reported also that he had suggested to Ms. Ratliff that, in order to be named on the Commission's web site as a participating program, each Center must submit a letter from the district's Chief District Court Judge or District Attorney or from the Center's Director stating that the district in question not only intended to have its mediators certified, but also to implement the new Supreme Court Rules, *i.e.*, that participation means both certification and implementation of the new Rules. Mr. Laney also reported that the AOC Forms Committee had not been receptive to the forms the Committee proposed, so they were paring back to a Report of Mediator only, which the Rules required and which had now been revised and re-submitted. He called attention to the current draft of the form. Ms. Huffman asked why the form did not report partial settlements? Mr. Laney responded that he would check on this. Ms. Ratliff added that the Commission has now certified its first trainer and mediator in connection with this program. Judge Steelman thanked Mr. Laney for all his hard work on this project.

Judge Steelman next reported for the Ad Hoc Committee to Revise the Standards of Conduct and Disciplinary Rules. He noted the Committee had met and begun to work its way through the Standards. He plans to have some recommendations for the May meeting.

Judge Steelman next called for Liaison reports. Ms. Fuqua reported for the Judicial Support Staff saying that she appreciated the Commission's willingness to tackle the mediator substitution issue and that court staff hoped the proposed revisions would help. Ms. Gullick reported that the Section's Annual Meeting was scheduled for April 11 and that, as noted above, the Section currently had some important matters before it. Ms. Huffman reported for the AOC that she was working to insure more reliability in statistical reporting for mediated settlement conference programs. She has been working with the Executive Director of the Clerk's Conference to develop a form to collect statistics for the Clerk Mediation Program. Mr. Laney reported for the federal courts that Judge Gates is chairing a committee to implement mediation in the Eastern District and is looking at the program operating in the Middle District. He also reported that the federal courts are revamping their information technology system. Judge Steelman reported that his office is moving to temporary quarters while their building is renovated.

There being no further business, Judge Steelman adjourned the meeting.

MINUTES

May 16, 2008
Sheraton Hotel, New Bern
10:00 a.m.

Members present: Steelman, Banzet, Conley, Criner, Huckel, Hudspeth, McKown, Morgan, Morris, Seigle and Turner. Ex-officio and staff members present: Fuqua, Gullick, Laney, Little, and Ratliff. Judge Steelman thanked everyone for coming.

Judge Morgan, a New Bern native, welcomed everyone to the City and noted the Morgan room, where they were meeting, was named after his late father, Leander Morgan, the first African-American mayor of New Bern. He also noted that May 16 was his father's birthday.

Judge Steelman called for approval of the minutes which were approved as submitted and asked Ms. Ratliff for the office report. She reported that Sharon Laue was back to work after surgery and that Ms. Laue expected to soon return to full-time status. In Ms. Laue's absence, Maureen Robinson's hours had been increased by five hours per week and, this change will be permanent. Renewal invoices were being mailed today and on-line renewal applications were scheduled to follow shortly. Much effort has gone into correcting problems with on-line renewal programming and formatting that surfaced last year, including conducting dry runs with a focus group. Renewal should run smoothly this year and we plan to begin work on Phase III, on-line payment. She would like to permanently move the renewal period to this year's mid-May date. With the financial cushion created by the non-reverting funds, there is no need to mail invoices earlier. Certifications have now passed the 1,700 mark, including 17 criminal district court certifications with 24 pending applications. The office's telephone traffic problem was now under control. The Commission, she explained, had been listed first on the "contact us" directory at www.nccourts.org, leading to many calls regarding matters outside the Commission's purview. That listing has been removed. Lastly, Ms. Ratliff reported that she had been doing a lot of speaking at the Network Conference, Mediation Institute Training, N.C. State University and the Dispute Resolution Section's Annual Meeting.

Judge Steelman presented the report for the Executive Committee. Judge Walker agreed to develop a policy relating to expenditure of DRC funds. The Commission should submit its policy to the State Auditor for review. In the meantime, the *status quo* would be preserved, *i.e.*, Ms. Ratliff would seek the chair's authorization for expenditures and then forward them to AOC Fiscal staff for approval and payment. There will be significant turn-over on the Commission this fall. Terms of five members are expiring: Banzet, Criner, Curran, Seigle and Steelman. While Mr. Banzet was eligible for re-appointment, he had decided not seek reappointment. Ms. Curran was also eligible for re-appointment, but he was unsure of her intentions. He asked Mr. Little to advise the Commission on recommendations made by the Dispute Resolution Section of the Bar Association. Mr. Little reported that the Section had requested the following names: Judge Lee (to chair), Jackie Clare (Mr. Criner's seat); Judge Linda McGee (Judge Steelman's seat), Victor Farrah (Mr. Banzet's seat), and Mr. Little (Ms. Seigle's seat). He added that they would make a recommendation regarding Ms. Curran's seat when they learned, if whether she wished to return. Ms. Ratliff noted that the new district criminal court position needed to be filled. Next, Judge Steelman reported that he would be

giving the DRC's report to the North Carolina Bar Association (NCBA) this summer. Finally, he reported on the effort to get legislation adopted to allow the Supreme Court to implement changes to MSC/FFS/Clerk Rule 5, Sanctions. He noted that a bill had been located into which the proposed legislation could be inserted, that he was seeking permission to do so, and that Representative Ross had agreed to shepherd the bill, if permission could be obtained from the bill's sponsor.

Judge Steelman called on Mr. Laney for a report on the Google Books agenda item. He reported that he had learned that Google is now scanning texts of books from five university libraries and that other books could be submitted to Google. Mr. Laney proposed to submit the book on NC Dispute Resolution that was published by the Commission and the NCBA. He has the NCBA's permission and now needs that of the Commission. He added that the inclusion of the book on Google Books might generate a very small amount of income from advertisers. He recommended that any funds generated be forwarded to the NCBA to cover costs of future reprints. A motion was made and Mr. Laney's proposal was adopted unanimously.

Professor Morris next reported for the Standards, Discipline and Advisory Opinions Committee. He began by calling the group's attention to the proposed Standard III revisions. He reminded everyone that the proposed changes had been approved for comment at the previous meeting and distributed. The copy before them now contained further revisions suggested by the Dispute Resolution Section. Ms. Gullick stated that the additional changes were in the nature of fine-tuning. Ms. Ratliff was asked if the proposed revisions had been shared with the mediators and she replied affirmatively. There was a motion to adopt and the revisions to Standard III were unanimously adopted. Professor Morris next called attention to a proposed Advisory Opinion which he explained was an outgrowth of the 4All campaign and the Section's interest in having more mediators participate in providing *pro bono* services through a Legal Services' *pro bono* mediator panel. Ms. Fuqua asked what she should say when the opposing party complains that the other side does not have to pay? Professor Morris and Mr. Little suggested she refer them to the mediator. She next asked if she would receive a copy of the list of panel members and Mr. Little responded that the list would be with Legal Services. Ms. Conley noted that the opinion is broader than legal services cases. Mr. Little responded that it does extend beyond legal services clients and makes it clear that a mediator who is reducing or waiving a fee at a party's request must disclose that fact up front. Judge Turner expressed concern about the scope of the Opinion. He has no objection to the panel, but in other instances, he believes that mediators should be paid for their services unless there has been a finding of indigency. He is concerned that a lot of folks will say they can't afford to pay and he posed the question, "What does can't afford mean? Others expressed concern that this Opinion might result in their getting more, sometimes unjustified, requests to waive their fees. Ms. Conley noted that when she waives or reduces the fee for one side, it often creates tension on the other side and results in complaints that the process is being dragged out at the expense of the side that is paying. Ms. Conley also noted that requests to reduce, waive or shift the mediator's fee often don't come up until the end of the mediation. Professor Morris responded that his Committee only looked at the ethical aspects of the Section's request and not the practical side. Mr. Little added that it creates a conflict of interest when a mediator seeks to negotiate his or her fee at the conference. Judge Morgan observed that if only one party is paying that it does create a feeling of imbalance. Mr. Little responded that disclosure is the bright line that addresses that. Mr. Hudspeth observed that a mediator can always say "no", if

he or she gets too many such requests. Mr. Criner asked how the disclosure should be handled? Mr. Little suggested that the mediator simply call opposing counsel and disclose that he or she will be waiving or reducing the fee for the other side. Ms. Conley said that she wants a letter from the other side saying that they have no objection to her reducing or waiving her fee. Ms. Fuqua asked whether Legal Services will be involved before the 21-day period lapses and she appoints someone who may not be on the panel? Ms. Gullick responded that is not likely. Mr. Little suggested that 4All is not aimed just at Legal Aid clients and that mediators have an obligation to provide services for parties who cannot afford their fees. This Opinion, he added, sets out a framework for them to do so. He added that attorneys who are working at a reduced rate or for free often do not want to have to take the extra steps necessary to have their client determined to be indigent for purposes of the mediator's fee. Mr. Criner asked what happens if the request to reduce, waive, or shift the fee comes up during the mediation? Mr. Huckel responded that the mediator will simply have to tell the party that he or she must ask the court for a determination of indigency. Ms. Conley asks what the mediator should do if the other side objects to the waiver? At this point, Ms. Gullick intervened and observed that this is a difficult issue that the Section debated for two years and could not reach unanimity. Judge Morgan moved for adoption of the Advisory Opinion and Ms. Seigle seconded. The Opinion was adopted with dissenting votes by Judge Turner, Ms. Conley and Mr. Criner.

Next, Professor Morris called attention to a pre-approval request that the Committee had denied involving an attorney applicant who had been convicted of a felony and had also had legal problems with the Federal Trade Commission which resulted in substantial civil judgments against him. Next, Professor Morris reported that his Committee had addressed three formal complaints this quarter. All three complaints had been dismissed. Two of the complaints were dismissed outright, one with a letter to the mediator referring him to an Advisory Opinion for guidance and the other with a suggestion to the mediator that he consider apologizing for a comment that he made to complaining party. A third complaint was referred to the Committee which, though dismissing the complaint, requested that the mediator meet with a member of the Committee to discuss how the mediator might modify his conduct to avoid similar such complaints in the future. Professor Morris added that Commission Member Gary Tash met with the mediator and found the mediator receptive. Professor Morris thanked Mr. Tash for his work on this matter. Professor Morris noted that this resolution was along the lines of the model that Mel Wright and the Chief Justice's Commission on Professionalism were using to address professionalism issues and that he hoped in the future to collaborate more with Mr. Wright. Ms. Ratliff noted that Mr. Wright was waiting for the State Bar to finalize rules to implement his program and would, share them with the Commission.

Professor Morris next reported that the Committee had addressed two informal complaints. The first involved a certified mediator whose erratic behavior resulted in a number of calls and letters from attorneys, court personnel, and District Attorney and Office of State Personnel staff. The mediator, he added, had also recently been convicted of six counts of making misrepresentations in order to collect unemployment benefits. The Committee determined not to take any action against the mediator at this point in the hopes that he would not have the funds to renew his certification. The second informal complaint involved calls from the public and media involving a Brunswick County School Board member who has posted information on the County's website claiming that he is an "NC Certified Mediator" when he is not. The Commission's office had twice written to the Board member and the Superintendent requesting

removal of the false claim. It is still posted. Professor Morris reported that the Committee planned no further action. Mr. Criner suggested that he thought this might be a violation of State law and that the Commission should consider turning the matter over to the Attorney General. Professor Morris replied that this is not a criminal matter in the way that it is against to law to practice law without a license. He does not believe there is anything more that can be done. Lastly, Professor Morris called attention to proposed revisions to the Commission's complaint form incorporating a release to enable attorneys and other witnesses to provide information to the Commission without fear they are violating prohibitions on confidentiality or attorney-client privilege. The revisions to the form were unanimously approved.

In Judge Lee's absence, Judge Steelman, on behalf of the Program Oversight Committee, called attention to a letter from Senior Resident Superior Court Judge Catherine Eagle's (District 18) that was included in the meeting packet. He reported that Judge Eagles writes that her district is having problems with the revisions to the MSC Rules requiring Senior Resident Superior Court Judges, in making appointments to mediate, to rotate through a list of all certified mediators who have expressed a willingness to serve the district. This has resulted in her appointing mediators who reside outside her district and who are not known to local attorneys. These appointments have led to an increase in requests for substitutions. In addition, her staff has experienced problems with mediators who do not follow either local rules or program rules. In order to address the problem and decrease the burden on her staff, Judge Eagles has moved to a new system of case management wherein mediator selections will be made during an early Administrative Conference. However, she asks the Commission to consider revoking the new rule and returning more flexibility to the Court relative to appointments. Judge Steelman reported that Judge Lee does not think this is a problem in all counties. Judge Turner agrees that it is more a problem in urban districts. Judge Turner believes that the new Administrative Conference will resolve the problems. Judge Steelman reported that Judge Lee suggests no action at this point. It is a new rule and he wants to leave matters as they are for now and see if others experience problems. Mr. Little stated that Judge Eagles has found a solution, though he concedes that the district's lawyers may not welcome another level of case management. He added that the alternative she proposes is a return to short lists, the very thing the Commission was trying to prevent.

Mr. Criner reported for the Mediator Certification and Training Standards Committee. He noted first that Ms. Seigle had brought a proposal to the Committee to permit mediators who took the Office of State Personnel's Employment Mediation course to become MSC or FFS certified upon completion of only a short 16-hour "short" course. She explained to the Committee that the curriculum for the Employment course very closely tracked the basic mediation curriculum for the MSC and FFS Programs. The Committee, voted down the request after Ms. Seigle reported that she had learned that the Governor and other State officials were concerned that they might lose mediators with this change and also because there was a general consensus that a rule revision would be required for implementation. Mr. Criner also reported that there was interest in further opening up FFS Rule 8 threshold criteria to permit certification of divorce planners and others with significant mediation experience. He reported that a would-be applicant had asked to address the Commission about this matter at its August meeting.

Mr. Laney reported for the *Ad Hoc* District Criminal Court Mediation Program. He reported that so far three Centers had elected to participate in the new program and that there were others considering taking action. Some, he said, had decided not to participate.

Judge Steelman reported for the *Ad Hoc* Committee to Revise the Standards and Disciplinary Rules. He called attention to the proposed redraft of the Standards of Professional Conduct for Mediators. After a brief discussion, the proposed Standards were unanimously approved for distribution and comment and Ms. Ratliff was asked to distribute them to the mediators and the same groups to which proposed Standard III was circulated earlier.

Judge Steelman next called for Liaison Reports: Ms. Fuqua reported that at the recent Judicial Support Staff Conference she had heard many expressions of support for mediation. However, she had also heard many complaints regarding the failure of mediators to comply with deadlines and submit reports. She stressed that the Commission needed to get control of this situation. Ms. Ratliff suggested to Ms. Fuqua that, she was willing to write letters to such mediators and would bring the matter to the Commission's attention if advised that the mediator did not improve. Mr. Little agreed that this conduct could result in a disciplinary complaint. Ms. Fuqua said that she would relay that information. Ms. Fuqua also reported that AOC staff had expressed concerns that the Commission was not active relative to arbitration. Ms. Fuqua responded that she understood that the Commission viewed the District Court Arbitration Program to be an AOC function and that arbitration was not within the scope of the Commission's authority. She also reported that the AOC was working to further refine its system for collecting caseload statistics. Mr. Little reported for Ms. Gullick that Ellen Gelbin would be Section's new chair and Commission liaison beginning July 1, 2008. Mr. Laney reported for the federal courts that the Eastern District was now implementing a mediation program. Professor Morris reported for the Mediation Institute that they are now offering five courses for academic credit. Judge Steelman reported that the Court of Appeals is moving to temporary quarters in the Old Wacovia Building for at least 15 months while the Court of Appeals Building is renovated. He thanked Ms. Seigle for continuing to allow the Court to use Carolina Dispute Settlement Services office for mediation. Lastly, he noted that the Court will be updating its statistical analysis of its mediation program.

Next, Judge Steelman called for other business. Ms. Seigle reported she had been contacted by a group of family mediators who were concerned about a local Wake County rule which set forth certification criteria which conflicted with FFS Rule 8. It was agreed that Ms. Seigle and Judge Morgan would approach Chief District Court Judge Rader and discuss the matter with him. There being no further business, Judge Steelman adjourned the meeting.

MINUTES

**Dispute Resolution Commission
August 15, 2008
Smith Moore Law Office in Greensboro
10:00 A.M.**

Members Present: Steelman, Conley, Criner, Curran, Hay, Huckel, Lee, Morris, Seigle, and Turner. Ex-officios present: Fuqua, Gelbin, Garcia (for Huffman), Minor, Laney (by telephone), and Little. Guests and staff present: Farah, Reif, Shubert, Tesfa, and Ratliff.

Judge Steelman welcomed everyone and introduced guests, including, new Commission member Victor Farah (effective October 1, 2008), Mark Reif (a certified mediator), Billie Jo Garcia (substituting for Alicia Huffman); and Judge Steelman's summer interns, Lee Shubert and Azaria Tesfa. Judge Turner then took a moment to welcome everyone to Greensboro, his hometown.

Judge Steelman called for approval of the minutes and they were approved as submitted. Next, he presented plaques to outgoing Commission members Sherman Criner and Diann Seigle. He thanked them for their dedication and many contributions to the Commission's work. He especially noted Mr. Criner's long tenure as Chair of the Commission's Mediator Certification and Training Standards Committee and Ms. Seigle's service as Vice-Chair of the Standards, Discipline and Advisory Opinions Committee. Judge Steelman added that a plaque had been mailed to Mr. Banzet who was unable to attend the meeting. Next, Judge Lee presented a plaque to Judge Steelman. He remarked that Judge Steelman was also completing his term and added that Judge Steelman had served the Commission with dedication and provided outstanding leadership as its Chair. Judge Steelman responded that he had enjoyed serving the Commission and found it to be a very hard working body.

Next, Judge Steelman called for Ms. Ratliff's report. She explained that most staff time this quarter had been devoted to the certification renewal period. Though the new on-line process had gone much more smoothly this year than last, she reported that the Commission's office was continuing to experience problems. Most notably, she observed that mediators were sending in their renewal checks, but failing to complete the on-line form with the result that there was a stack of checks at the office which could not be deposited due to a lack of corresponding renewal forms. She added that, as in past years, the vast majority of mediators were renewing and the numbers remained strong. Ms. Ratliff reported that she would be speaking with AOC technology staff to request additional changes to the on-line process.

Ms. Ratliff noted that she had distributed the monthly budget report for June 30, 2008, (the end of fiscal year report). She added that an auditor was reviewing the report because there was a discrepancy between DRC and AOC numbers relative to Commission deposits of revenues. (DRC records indicate about \$20,000 more in deposited revenues). She stressed that she thought the problem was related to the

discrepancy between the start of the AOC's fiscal year and that of the Commission's. Ms. Ratliff reported that she had met with the Mediator Certification and Training Committee to talk about adjustments to the Commission's fiscal year to better synchronize it with that of the AOC. She added that staff was preparing to distribute copies of the newly revised MSC, FFS and Clerk Rules to mediators, trainers, and court staff by mid-September and was working with the AOC Forms Committee on revised forms to implement the new rules. She noted that 25 district criminal court mediators and two training programs had been certified. Lastly, she observed that the Commission's staff was continuing to stay busy with disciplinary matters.

Next Judge Steelman called for Committee Reports and began with the Executive/Operations Committee. He began by noting that revisions to the MSC, FFS, and Clerk rules had now been adopted by the Supreme Court effective October 1, 2008. He also noted that legislation allowing judges to sanction parties who fail, without good cause, to pay mediator fees had been signed into law by Governor Easley. Noting how difficult it is to get legislation through the short session, he said he would write to Representative Ross and Senator Hartzell to thank them for their efforts on the Commission's behalf. Judge Steelman reported that two new appointees had been named to the Commission, Mr. Farah and Mr. Little, and that he was continuing to follow-up with the Chief Justice on the remaining vacancies. Next, Judge Steelman noted that Ms. Ratliff and he had met with Rex Whaley and Kesha Howell, of AOC Fiscal, to discuss development of a policy to give the Commission more autonomy over expenditure of its revenues. He added that Judge Walker had advised him that he was working on a policy that would cover all the various Commissions. On-line payment of revenue fees by mediators was also a topic of discussion at this meeting and Mr. Whaley and Ms. Howell had suggested that rather than pursuing credit card payment, the Commission should consider payment by electronic funds transfer. Credit card fees, they noted, cannot by statute be paid by a state agency. Therefore, a surcharge or special legislation would have to be involved. Costs could be kept much lower by a state agency with an electronic transfer. Lastly, Judge Steelman pointed out a recent case of interest, *Collier v. Dalenko*, 06 CVS 13133 which dealt with common law arbitrator immunity.

Mr. Criner next reported for the Mediator Certification and Training Committee. Mr. Criner introduced Mark Reif, a certified MSC Mediator, who wished to address the Commission regarding eligibility of non-attorneys for FFS certification. Mr. Reif explained that he wished to be FFS certified and had taken the 40-hour training only to find that he could not qualify because, as a non-attorney applicant, he did not hold Advanced Practitioner membership in the Association for Conflict Resolution (ACR). In addition, he noted that he did not fall into one of the professional categories enumerated in revised FFS Rule 8 (effective October 1). He suggested that the Advanced Practitioner Member requirement was burdensome and that, as an experienced mediator and long-time human resources professional, his credentials were more than adequate for certification. He said he did not understand the new rule which seemed to suggest that only lawyers and mental health practitioners had suitable education and experience to serve as FFS mediators. Following his remarks, Mr. Little suggested to Mr. Reif that he had the support of most, if not all, the members of the Commission. He suggested that

the family bar and, not the Commission, was the key here. Mr. Little shared a short history of the FFS certification requirements and strongly suggested to Mr. Reif that he address his concerns to the NCBA's Family Law Section. Mr. Laney added that Mr. Reif should not take his denial personally; that the Commission had labored for over a decade to craft rules that established qualifications for mediators, protected the public and satisfied the family bar. It was difficult task. Ms. Seigle added that, in her experience, ACR had become increasingly difficult to work with and she expressed concerns about the eligibility of students graduating from UNC-Greensboro's Masters in Conflict Resolution Program since they were not usually attorneys or mental health practitioners. Mr. Little responded that family lawyers had historically opposed anyone but attorneys mediating FFS cases and he suggested that it was the family bar that should be addressed and not the Commission. Mr. Reif thanked the Commission and said the he would contact the Family Law Section.

Mr. Criner then noted that his Committee had met with Ms. Ratliff and had determined to delay the FY 2008/09 annual certification renewal period to mid-June in order to better synchronize the Commission's fiscal year with that of AOC. Mr. Criner also noted that his Committee would be reviewing changes to the MSC, FFS and Clerk application forms to incorporate the new revisions effective October 1st.

Next, Judge Steelman reported for the *Ad Hoc* Committee to Revise the Standards of Professional Conduct for Mediators. He reminded everyone that the proposed Standard III revisions had been distributed for comment earlier. Judge Steelman stated first that he had spoken with Ken Kyre of the NC Association of Defense Attorneys and that they had no comments on the proposed revisions. He then directed those present to Frank Goldsmith and Burton Craig's letter on behalf of the North Carolina Academy of Trial Lawyers. There followed considerable discussion of the Academy's letter and some changes based on their comments were incorporated in the proposed revisions, including: deleting the language in paragraph #2 of their letter from the Standards; noting that the "in other respects" language in Standard III. D. was actually drawn from Rule 8.3; and that the, "lying, cheating, and stealing" language included in the comment section to Standard III was a characterization attributable to Bar staff describing conduct reportable under Rule 8.3. Kate Mewhinney of Wake Forest Law School had also sent an email comment suggesting some relatively minor changes and they were incorporated in the revisions as well. Judge Turner expressed some reservations about the way the public safety exceptions in Standards III were organized and that section was revised. Ms. Ratliff reported that there had been no further comments received except for those from a few mediators that had been distributed at the previous meeting.

Next, the Commission discussed proposed changes to other sections of the Standards. Professor Morris raised a concern about Standard VI and suggested inverting the first and second sentences. As an alternative, Mr. Huckel suggested adding comment language to Standard VI which addressed Professor Morris' concerns and Mr. Huckel's draft language was approved for inclusion. With the changes noted above, the proposed revisions to the Standards were approved unanimously. Judge Steelman then noted that in light of the revisions to the Standards, it had been suggested that the Commission's

Rules enforcing the Standards also be reviewed. He added that Professor Morris, on behalf of the Standards, Discipline and Advisory Opinions Committee, had agreed to undertake this task.

Next, Judge Lee reported for the Program Oversight Committee. He noted that Ms. Ratliff was working with the AOC Civil Forms Subcommittee to develop a revised Report of Mediator consistent with the newly revised MSC, FFS and Clerk Rules. He added that these forms, along with the new form to facilitate a substitution of mediator, were scheduled to go before the full Forms Committee in the next quarter.

Professor Morris reported for the Standards, Discipline and Advisory Opinions Committee. He noted that there were currently three complaints pending before the Commission and that one additional complaint had been dismissed as being wholly without merit. Professor Morris also reported that there had been one MSC certification application involving ethics concerns that had been reviewed and resolved. He also noted that Ms. Ratliff had sent letters to two mediators who had been reported by court staff for failing to follow program rules and to submit Reports of Mediator timely. He added that his Committee had met with Ms. Huffman to talk about MSC/FFS and Clerk Program caseload statistics and proposed changes to the reporting forms that would capture additional data. Professor Morris also noted that he plans to write a letter for distribution to mediators reinforcing the mediator's role as case manager and encouraging mediators to meet deadlines and submit Reports of Mediator timely. Ms. Ratliff, he added, will write a companion piece for inclusion in *The Intermediary*. Lastly, Professor Morris noted that his Committee looks forward to tackling the review and possible revision of the Commission's Rules enforcing the Standards of Conduct.

Next, Judge Steelman called for Liaison Reports. Ms. Fuqua reported for court staff that they appreciated the Commission's efforts to address the problem of substitution requests. Ms. Gelbin noted that she would report the revisions to the Standards back to the NCBA Dispute Resolution Section. She also indicated that the Section was interested in possibly polling Clerks of Superior Court in an effort to learn whether they are referring cases to the Clerk Mediation Program. Judge Steelman advised Ms. Gelbin that the Section's candidate for the criminal district court mediator seat on the Commission had withdrawn and she responded that they would nominate a new candidate. Ms. Garcia reported for the AOC that Ms. Huffman was attending the Family Court Conference and that the AOC is working to make mediation statistics for FY 2007/08 available. Professor Morris reported for the Mediation Institute that they had just completed their third summer and were offering five courses for academic credit. Mr. Schafer reported for the Industrial Commission that FY 2007/08 had been a banner year for their mediation program and that record number of cases had been referred. He reported settlement rates at 71%. He also noted that they are in the process of revising some of their rules. Judge Steelman reported that the Court of Appeals Mediation Program is working on developing and analyzing caseload statistics and he thanked Ms. Seigle for allowing appellate mediations to be held at Carolina Dispute Settlement Services.

There being no further business Judge Steelman thanked everyone for attending and adjourned the meeting.

MINUTES

NC Dispute Resolution Commission

November 7-8, 2008

Blowing Rock, NC

Members Present: Clare, Conley, Curran, Hay, Huckel, Hudspeth, Jackson, Lee, Little, Massiello, McKown, Morgan, Morris, Tash and Turner. Ex-officio members: Beason, Fuqua, Huffman, Laney and Steelman. Guests and staff: Anderson, Barnhardt, Johnson and Ratliff.

Judge Lee welcomed everyone to the Commission's annual retreat and noted this would be his first meeting as chair. He was happy to see so many in attendance and thanked Ella Wrenn for making the Green Park Inn available to the Commission. Next, he called for approval of the minutes. Mr. Tash noted that his presence was not reflected. With that change, the minutes were approved as submitted. Judge Lee then administered the oath of office to new Commission members: Ms. Clare, Judge Jackson, Mr. Little, and Ms. Massiello and to returning member Ms. Curran. Judge Steelman then administered the oath to Judge Lee as the new chair. Judge Steelman noted that he had enjoyed his service on the Commission and Judge Lee and Judge Steelman announced that Judge Steelman would continue to serve the Commission in the role of ex-officio from the Court of Appeals mediation program. Next, Judge Lee asked everyone to introduce themselves, including the guests that were present: Zeb Barnhart, and Ann Anderson from NCBA's Dispute Resolution Section, and Melissa Johnson from the Blue Ridge Dispute Settlement Services.

Judge Lee called for the office report. Ms. Ratliff first noted that she had met with a member of the NC Medical Board and the agency's Executive Director and Legal Counsel. They had contacted her to ask for information about how mediation could be incorporated into their regulatory process. Next, she noted that she had been trying to resolve a dispute with AOC fiscal staff regarding payment for coffee and rolls served at a morning committee meeting. The AOC had refused the request because less than 12 were present for the meeting. Judge Steelman had spoken with Judge Walker and Judge Walker had agreed to draft a policy that would allow more flexibility relative to Commission expenditures. Since nothing had been forthcoming, Judge Steelman suggested that the Commission draft a proposed policy and share it with the Office of State Budget and Management for comment. Ms. Ratliff reported that she had done this and was working with Cheryl Kelly at OSBM. Next, Ms. Ratliff said that she had met with AOC technology staff to talk about completely revamping the Commission's on-line renewal process to address concerns that had arisen over the past two years and to better integrate the renewal application and invoice components. She noted that mediators often sent checks without completing their renewal forms or visa versa, necessitating considerable staff follow-up. AOC staff has agreed to the changes she proposed and have committed to a new design for the 2009/10 renewal period.

Lastly, Ms. Ratliff reminded those present that she had distributed the cumulative monthly budget report for FY 2007/08 at the last meeting and explained that she and AOC fiscal staff were, with the help of an internal auditor, trying to address some confusion relative to renewal deposits. She had said that she was confident the confusion was an outgrowth of the fact that the Commission operates on a program year while the AOC operates on a fiscal year, but still wanted to sort the situation out. She has now met with the auditor and he has assured her that all Commission deposits for FY 2007/08 and, to date, for FY 2008/09 have been accounted for. Thereafter, however, the situation deteriorated when the auditor insisted the Commission did not have sufficient revenues last fiscal year to cover its expenses. Ms. Ratliff stressed that was not, in fact, the case. Rather, the auditor was failing to capture all the collections for the year since some were reported as carry forward and some as renewal fees. She said she did, however, agree with the auditor that Commission expenses were dramatically higher last year due primarily to rent, the New Bern meeting and a five hour increase in Maureen Robinson's hours. Unspent collections remaining at the end of last fiscal year were, she added, much less than past years, so there was less carry forward. She suggested the Commission should begin to look at either cutting expenses or increasing fees for the coming renewal period.

There followed some discussion about the last item in Ms. Ratliff's report and Judge Lee noted that he would shortly call an Executive Committee meeting to discuss the matter.

Next, Judge Lee called for Committee reports. Professor Morris reported for the Standards, Discipline and Advisory Opinions Committee. He first noted that revisions to Standard III, which the Commission had approved earlier, were back on the table. He explained that Alice Mine had contacted the Commission on behalf of the State Bar and suggested that it might be very difficult for Bar staff to provide the informal opinions that the proposed rule required mediators to seek before formally reporting an attorney for engaging in misconduct involving lying, cheating or stealing. Mr. Little noted that the informal opinions were integral to the proposed rule in that they helped to preserve confidentiality. There followed considerable discussion of Ms. Mine's comments. Mr. Laney suggested that perhaps this matter should be referred to the Bar's leadership. Judge Lee said that he would contact the State Bar President. Professor Morris next reported that his committee was reviewing the disciplinary rules and considering whether they should be re-cast to establish a complaint process that is more focused on solving problems that imposing discipline or that at least insures the Commission more flexibility in addressing complaints. Next, Professor Morris directed attention to the proposed advisory opinion. Ms. Curran noted that she thought the situation the opinion described needed to be addressed. She was surprised, however, that the opinion cited conflict of interest rather the confidentiality problems. Ms. Clare asked whether if the mediator agreed to serve as the administrator at no charge, there would be confidentiality concerns? She thought there would be. After considerable discussion, Judge Lee called for a vote and the Opinion was adopted as submitted and it was left to the Committee to consider whether there should be a second opinion addressing confidentiality in the same or similar situations.

Next, Professor Morris reported that Ms. Huffman and other AOC staff had met with the Committee to discuss caseload statistics reporting. He noted there had been some discussion about court staff reporting mediators who did not file Reports of Mediator timely. Professor Morris reported that the Committee had rejected that idea, but that the Committee had agreed that Ms. Ratliff would write an article for the newsletter encouraging mediators to take their case management responsibilities seriously and that Judge Lee had agreed to write a letter to mediators stressing the need to file timely and complete reports. Professor Morris added that the Committee had also returned the proposed MSC caseload reporting form to Ms. Huffman with some suggestions for simplifying it. At that point, Professor Morris deferred to Ms. Huffman who explained that she would like to retain some of the columns the Committee had requested be removed, since they were there only for the purpose of helping to keep the reporting accurate. She also asked why the Committee had removed the column for reporting partial agreements? Ms. Fuqua explained that information is not really helpful to superior court staff since they only need to know whether to schedule a trial. Judge Turner noted that family court judges would want that information. Following further discussion, it was determined that the columns which are automatically filled by the computer and intended to aid in accurate reporting be retained, but the partial settlements column be eliminated from the MSC form. Lastly, Professor Morris reported that the Commission had received a request for public records. He and Ms. Ratliff had talked through the matter and it appeared clear that since the Commission is a licensing body, it did not have to make all its certification and disciplinary records public.

Judge Lee next reported for the Program Oversight Committee. He noted a mediator had suggested that Rule 7 be revised to provide that when a plaintiff voluntarily dismisses his/her case, that the plaintiff be entirely responsible for any scheduling or postponement fees owed the mediator. The Committee felt it was better for the mediator to split the fee and let the parties bring the matter before the judge. At this point, Judge Lee asked Mr. Little if he would be willing to serve as chair of this Committee. Mr. Little agreed. Ms. Fuqua noted that she had heard court staff express some concerns about the Designation of Mediator forms the Committee had recently revised. Judge Lee asked Mr. Little to have the Committee review the forms and Mr. Little responded that they would have a recommendation for the February meeting.

In the absence of a Chair, Mr. Laney reported for the Mediator Certification and Training Standards Committee. First, Mr. Laney reported that Ms. Ratliff had asked the Committee to consider whether to impose a \$50.00 late fee on mediators who are tardy in paying their renewal fees. She explained that the numbers of mediators who chronically pay late are growing and it is difficult for staff to repeatedly contact them. The Committee, Mr. Laney reported, recommends that a late fee be adopted. Mr. Little asked whether the Commission had statutory authorization to impose a late fee? Ms. Curran suggested the Commission ask the State Bar whether they have specific authorization to impose a late fee. A motion was made to adopt a late fee for payments received after August 31st and it was unanimously adopted. Judge Lee asked Mr. Little's Committee to determine whether a statutory revision was necessary and, if so, to work on it. Ms. Ratliff was asked to contact the State Bar as suggested by Ms. Curran. Next, Mr. Laney noted

that the Committee had revised the MSC and FFS certification applications consistent with the last Supreme Court Rule changes and copies had been circulated. Judge Turner asked why the applications permitted applicants to designate "all" for purposes of identifying districts where they are willing to accept court appointments to mediate? He does not want to encourage applicants to make such a selection. Ms. Ratliff noted that it should not be a problem to remove that language. At the conclusion of Mr. Laney's report, Judge Lee asked Mr. Huckel to chair this Committee and Mr. Huckel agreed.

Next, Judge Lee called for liaison reports. Ms. Fuqua reported that court staff was enthusiastic about the recent form revisions. She reminded court staff at the Court Administrators' Conference that Commission staff will assist them if they are having problems with a mediator. Ms. Huffman noted that most Clerks are not using the mediation program so there is very little in the way of activity to collect and report. Lastly, she has been working with Jody Minor to develop procedures and a form to collect statistics for the new District Criminal Court Mediation Program. Judge Steelman reported that he will be working with Professor Morris and Central's Dispute Resolution Institute to begin to study the statistics for the Court of Appeal's mediation program and to measure its effectiveness. Mr. Laney reported that the Eastern District of North Carolina has adopted rules and will be launching a mediation program. He also noted that the ABA Dispute Resolution Section is meeting in New York on April 15-18, 2009. He added that the Section's Annual Meeting is scheduled for March 20, 2009, in Greensboro. Professor Morris reports that the Institute is looking forward to working with Judge Steelman and Judge Lee to study dispute resolution in North Carolina's courts.

Judge Lee next discussed upcoming Commission meetings. Meetings had been scheduled for February 13th in Raleigh and May 8th. It was decided that the May meeting would be held in Charlotte at the courthouse. He noted that additional meetings would be set at the February meeting. He reminded committees to plan their meeting schedules in advance to facilitate everyone's participation.

There being no further business, Judge Lee adjourned the meeting.