

Dispute Resolution Commission

Minutes

Friday, February 13, 2009

NC Judicial Center, Raleigh, NC

10:00 a.m.

Commission members present: Lee, Clare, Conley, Curran, Farah, Hay, Huckel, Hudspeth, Jackson, Little, Massiello, McKown, Morgan, Morris, and Turner. Ex-officio members present: Fuqua, Gelbin, Huffman, Laney, Minor, Schafer, and Steelman. Guests and staff present: Bailey, Barnhardt, Ratliff, Shy, Smith, and Stockert. (Excused: Gary Tash who was ill.)

Judge Lee welcomed everyone and acknowledged guests. Next, he called for approval of the minutes. Ms. Huffman requested the attached changes and the minutes were adopted with her revisions. Next, Judge Lee asked Mr. Farah to come forward to take his oath as a Commission member.

Judge Lee called for the office report. Ms. Ratliff reported the office was readying for the 2009/2010 certification renewal period. The office plans to mail renewal notices around June 8, but make no deposits until after June 30, in order to bring Commission bookkeeping into sync with the AOC fiscal year. Since the office is typically slower during the holiday period, she reported she used the extra time to catch up on complaints and certification denials and had been updating all postings on the Commission's web site. She added that the office was still receiving a steady flow of certification applications and that the number of active certifications now totaled 1,684 (not including inactive certifications.) She also suggested that the economic slowdown had hit mediation. She had a number of calls this quarter from mediators who were having difficulty locating *pro se* defendants or were having problems collecting their fees and had questions about using the Commission's Motion And Order For Show Cause Hearing (AOC-CV-815). Lastly, Ms. Ratliff reported that this quarter has brought increased activity in connection with the new District Criminal Court Mediation Program.

Next, Judge Lee asked Messrs. Stockert and Bailey from AOC Technology to present the new on-line renewal process. Mr. Stockert explained that the new process was intended to correct problems with the current approach. Specifically, he suggested that mediators would find the new system more user friendly and that the renewal invoice is now integrated into the renewal application, *i.e.*, a mediator cannot print an invoice until s/he has first completed and submitted a renewal form. This will eliminate situations where mediators submit one without the other and staff must follow-up. Mr. Stockert added that the AOC was now beginning to implement credit card payment for some operations and that Ms. Ratliff had made application to have a credit card payment option added to the renewal application. He suggested this would probably be at least a year or two out. Mr. Little asked how credit card payments would be secured and suggested the AOC look at organizations like Pay Pal to allay concerns about identify theft. Ms. Ratliff noted that credit card payment could be linked to the office's accounting system, eliminating the need for staff to manually process payments. Ms. Curran suggested that Ms. Ratliff attend a February 27 meeting at the Judicial Center relating to e-pay. Judge Lee thanked Messrs. Stockert and Bishop for their work on this project.

As Mr. Minor and Judge Steelman had to leave early, Judge Lee called on them to deliver their liaison reports. Mr. Minor reported that Mediation Network member centers had been very busy conducting mediations of appeals filed with OAH by Medicaid recipients whose claims for benefits and/or services have been reduced or denied. From October 1, 2008, through February 28, 2009, he reported that some 1,700 cases will have been referred for mediation. He noted these cases often involve parties with serious illnesses or mental health issues. Judge Lee asked Ms. Ratliff to include an article in the

Commission's newsletter regarding this initiative and Ms. Massiello offered to assist her. Mr. Minor also reported that, the economic situation notwithstanding, Centers were cautiously optimistic about the legislative session. Judge Steelman introduced his law clerk, Jayme Shy, and reported that the Court of Appeals was continuing to work with Professor Morris to collect and interpret statistics for its mediation program.

Judge Lee next reported for the Executive/Operations Committee. He first addressed some requests the office had received to supply flash drives or labels to permit solicitation of mediators. He noted the requesting organizations were very reputable and that in the past Ms. Ratliff had complied. However, due to an encounter she recently had with a complaining party, she had begun to re-think such requests and had brought them to his attention. He suggested that she contact AOC attorney Pamela Best. Ms. Best said: 1) that in posting contact information for mediators on its web site, the Commission had done all it is required to do relative to making the information public and 2) if Ms. Ratliff provides flash drives/labels for one organization, she must do so for all, no matter whether she objects to the intended use. Judge Lee asked whether Ms. Ratliff should continue to provide flash drives or labels and there followed considerable discussion. Mr. Minor asked whether the Commission ought to get releases from mediators before providing their addresses? It was suggested that perhaps Ms. Ratliff could simply e-mail announcements regarding training, *etc.*, rather than providing flash drives/labels. Judge Turner said it that would appear the Commission was endorsing the training or program which made him uncomfortable and he also questioned whether if she does that for one, she must do it for all? Mr. Farah added that if e-mail addresses are already posted, that a savvy individual can download the list, scan it and create his or her own flash drive. It was decided that for now, Ms. Ratliff call the organizations that made the requests and tell them the Commission has determined not to provide labels or flash drives until it considers whether to adopt a policy to address such requests. Next, Judge Lee reported that he had met with AOC Chief Financial Officer Rex Whaley, Judge Walker and Judge Smith to discuss the Commission's financial situation and rent. He reported that they had proposed that, as of January 31, 2009, the Commission's carry forward be \$133,624.59. Mr. Little moved the proposed amount be ratified and it was. Next, Judge Lee reported that the AOC had agreed to forego any further rent payments from the Commission effective February 12, 2009, and to convert the Commission's lease to a tenancy at will or some similar arrangement. The Commission would, however, remain responsible for electrical, janitorial and other such expenses. Judge Lee said he believed that the immediate financial situation has now been addressed. Lastly, Judge Lee called attention to the AOC Media Policy which had been distributed. Judge Lee reminded Commission members that they can speak for themselves individually as members, but cautioned that they not appear to be speaking for the Commission as a whole.

Next, Judge Lee asked Mr. Little to report for the Program Oversight Committee. Mr. Little first called attention to his Committee's proposal to increase the Rule 7 court-appointed mediator fee for scheduling and conducting MSC, FFS and Clerk mediations. Mr. Little noted that it had been a decade since there has been an increase in the hourly fee for services (in 1999 the hourly fee was increased from \$100 to \$125). He added that court staff has begun to express concerns that they are losing quality mediators who can no longer afford to accept court appointments at the current rate. Mr. Little acknowledged that the economy is not doing well, but added that the Commission has put off raising fees for that same reason for several years and the Committee felt it was time to move forward. He asked for the Commission to approve the proposed increases in scheduling, hourly and postponement/cancellation rates and they were unanimously approved. Next, Mr. Little asked those present to consider proposed revisions to G.S. 7A-38.2(d) which address certification and certification renewal fees. The Committee suggests replacing the current language with broader language modeled on the State Bar statute that would permit the Commission more flexibility in assessing fees. The Committee also proposes deleting G.S.7A-38.4A(4) and revising FFS Rule 8.H. to bring it consistent with MSC Rule 8.G. The proposed revisions were approved as a package. Judge Steelman suggested the Commission needed to move

quickly to get these proposals before the General Assembly and he volunteered to contact Senator Hartsell and Representative Ross.

Next, Mr. Little called attention to the Committee's proposal to increase the mediator certification renewal fee amount and to provide an incentive for mediators to pay their renewal fees timely. He suggested that given Judge Lee's success in eliminating rent, there appeared to be no immediate need to move forward with a certification fee increase. He suggested tabling that portion of the proposal for further study. However, he indicated that late payment of renewal fees was a problem for Commission staff given the amount of follow-up that was involved in contacting those who did not pay timely. As such, he and Mr. Laney recommended that the Commission adopt the following proposal for FY 2009/2010 which provides an incentive for mediators to pay their renewal fees timely: "The fee for a single certification (MSC or FFS) shall be \$140 if payment is received by the Commission on or before August 31, 2009, or \$170 if payment is received after August 31, 2009. If a dual certification (MSC and FFS) is being renewed, the fee shall be \$100 for each certification if payment is received by the Commission on or before August 31, 2009, or \$115 for each certification if payment is received after August 31, 2009." This proposal was approved unanimously and Ms. Ratliff was asked to submit it to the AOC Director. Next, Mr. Little called attention to proposed changes to MSC and Clerk Rule 2.A. to clarify that it is the responsibility of the parties to serve the Designation of Mediator on the mediator and all parties. He noted that this change was largely the result of concerns expressed by mediators and court staff that party-selected mediators were not being notified of their selection. He added that work was in process to add a certificate of service to the MSC and Clerk Designation forms. Ms. Fuqua added that when a mediator was court-appointed, that court staff would forward a copy of the order to the mediator and all parties. It was suggested that the term "selection" used throughout the rule be replaced with the term "designation". With that change, the Commission approved the proposed revisions to MSC and Clerk Rule 2.A. Ms. Huffman asked why a corresponding change to FFS Rule 2.A. was not proposed. Mr. Little responded that the FFS Rule was different in that it contemplated that the form would be filed with the court at a scheduling conference. Judge Turner observed that some district court staff was not being advised of the mediator's identity and that it was a problem. Mr. Little responded that the Rule would have to be re-drafted to define a different approach to start the process and noted that his committee was willing to consider that issue. Mr. Little next asked the Commission for some clarification on his committee's authority to work directly with the AOC Forms Committee and its subcommittees. It was agreed that Commission committees would take the lead on forms and work directly with the AOC Forms Committee and subcommittees. Judge Turner asked that if there was no district court judge on a committee, that one be consulted before changes were made to a district court form. Judge Lee agreed that Commission committees should consult with judges before seeking to revise forms.

Mr. Little continued by reporting that his committee was working with AOC forms staff to remove the "partial agreements" language from the MSC Report of Mediator and had removed the "all" option from certification applications relative to the designation of districts where a mediator is willing to accept court appointments. Lastly, Mr. Little reported that some questions had arisen this quarter in connection with service of a Motion and Order for Show Cause Hearing. AOC attorney Pete Powell indicated that the Motion was required to be served by a sheriff and court staff had raised questions about who pays for service. Ms. Curran suggested that she thought the Motion could simply be served by certified mail. Mr. Little said that his committee was taking this matter under advisement. At this time, Judge John Smith, new AOC Director, came in to welcome the Commission to the Judicial Center.

Mr. Huckel reported for the Mediator Certification Training Standards Committee. This quarter his Committee addressed two staff denials of certification due to a lack of MSC Rule 8.B(2)(c)(ii) work experience. The first involved a paralegal and the other a disabled individual limited in her ability to work full-time. He also reported that his committee had determined to slightly broaden the criteria under which certification applications filed by non-commissioned military officers would be evaluated

and approved. Lastly, he directed attention to the proposed *Commission Policy on Interpreting and Implementing FFS Rule 8.A*. Mr. Hudspeth suggested revising the language slightly to replace the term “board certified family lawyer” with “board certified family law specialist”. With that change, the Policy was unanimously approved.

Professor Morris reported for the Standards, Discipline and Advisory Opinions Committee. He first discussed that the committee was working to revise the Commission’s Rules relating to enforcement of the Standards to put in place some more informal and conciliatory options for addressing complaints. Next, he gave an update on the disciplinary matters his committee resolved this quarter. He noted that two of the matters involved complaints that were dismissed as without merit and two involved certification applications that raised ethical concerns. The applicants were approved, though the vote on one was not unanimous. Next, Professor Morris addressed Standard III. He explained that Alice Mine at the State Bar and certified lawyer-mediator LeAnn Nease Brown had submitted comments/concerns regarding revisions to Standard III that were adopted at the Commission’s meeting on August 15, 2008. The Committee had now addressed those comments/concerns by making further revisions to Standard III. Professor Morris briefly summarized the changes. He noted that the “shall” in C. had become a “may” and it had been clarified that before reporting a potential Rule 8.3. violation to the State Bar, that a mediator must first contact State Bar counsel and receive affirmation that the conduct in question would, in fact, be a violation. The Committee, he added, had also discussed the possibility of the Commission approaching the State Bar about creating a reporting exemption under Rule 8.3 for mediator-lawyers. He added that there was disagreement among members of the Committee as to whether the Committee had actually voted to recommend to the Commission that it seek such an exemption or had simply authorized individual members to pursue the matter and report back to the Committee/Commission on the Bar’s reaction. There was also disagreement among members about whether the Committee had intended to tie the provisions together in some way that would preclude a vote on the proposed revisions today.

Professor Morris suggested that Standard III had been under consideration for three years and his preference would be for the Commission to vote on the document before it. He also suggested it could be a while before the Bar acted and, assuming the exemption was approved, the Standard could be revisited. Judge Lee suggested that the floor be open for discussion. Mr. Little noted that he felt a vote today on the proposed revisions would be premature. He thought the Commission ought to go the State Bar and seek a Rule 8.3 exemption for lawyer-mediators. Mr. Little did not want to see mediators “judging” if at all possible and the exception seemed the optimal way to address the 8.3 dilemma. If the Bar rejects the request, then he stated that he would accept the revisions to Standard III contained in the draft disseminated for the meeting. He added that he did not know how the Bar would look at such a request, but he knew there would be at least some support. Mr. Barnhardt noted that when the committee first began to look at this issue some three years ago, it was at the height of the Nifong scandal and no one felt the Bar would allow any exemptions. The landscape might be different now. Mr. Laney expressed concern that the current version had not been circulated to the Section for comment. Mr. Farah asked how much time it would take to draft exemption language and get the matter before the Bar? Mr. Little agreed to draft a proposal immediately.

Judge Lee suggested a compromise -- that the most recent revisions to Standard III be circulated to the Section and that the Commission look to adopt them at the May meeting. In the meantime, Mr. Little could test the waters at the Bar and report back. Judge Jackson was concerned that if the Commission circulated the proposed revisions, it was sending a message to the State Bar that it really didn’t need to address the issue. Ms. Clare agreed. Judge Lee asked whether the proposal before the Commission could be marked in such a way that it would be clear that the Commission saw the exemption as the preferred solution? Messrs. Huckel and Hudspeth both suggested that if the exemption is the preferred solution, it would be a mistake to approve anything else. Professor Morris questioned whether it was the preferred solution. He recalled how the committee’s previous chair, Dorothy Bernholz, had become

committed to the notion that mediators should not be about protecting lawyers' egregious conduct to the detriment of the public. Professor Morris suggested that Rule 8.3 violations are rare and he questioned how much more time and energy should reasonably be committed to this issue. At that point, Mr. Farah proposed a straw vote on whether an exemption should be sought. Ms. Curran asked whether it had to be a total exemption or could be a compromise? Mr. Little suggested that all the discussion was evidence of how confused people were about this issue. He strongly suggested that the proposed revisions be tabled until May. Following more discussion, Mr. Farah withdrew his straw vote and the Commission voted to table the proposed revisions to Standard III until the May meeting and charged Mr. Little with circulating some exemption language to the Commission prior to the May meeting. Mr. Laney asked whether the additional proposed revisions should be circulated to the Section. Judge Lee said, "no", not until the Commission had approved them.

Judge Lee next called for Liaison Reports. Ms. Fuqua reported for court staff that she had heard concerns relating to the certificates of service on the Designation forms and staff is pleased the Commission is trying to resolve the matter. Ms. Gelbin reported that the Section is also very concerned about Standard III. She also notes that the Section is interested in continuing to build on its success with the *pro bono* panels and noted that over 80 mediators volunteered to serve. Mr. Barnhardt added that the Section's Annual Meeting would be held on March 20 in Greensboro. Mr. Laney suggested the Commission consider paying Ms. Ratliff's NCBA dues to facilitate her participation at Section Council meetings. Judge Turner moved that the Commission pay the Executive Director's dues and the motion passed unanimously. Ms. Huffman reported that she had received a question from a judicial assistant in district court about whether there was a standard form or order to permit cases to be exempted from the FFS Program like there is for exemption from custody mediation. Her staff contacted Ms. Ratliff who referred the issue to Mr. Little. He explained that there was no standard form; however, he knew that local districts have developed their own forms for exemption. He advised AOC that it was best to address this need locally with a local form if they so choose. Ms. Huffman reported that her staff has been assisting a district with the start up of a FFS Program in their district. Formally, the district had refused to put the program in place because the Chief District Court Judge said he needed additional judicial staff. AOC has been assisting the new judicial assistant by reviewing local rules and forms regarding the process and procedure for the FFS to maximize efficiencies and the JA's ability to track the statistics accurately. She also reported that her staff had been consulted by AOC legal staff who was involved in planning a training for Clerks regarding the Clerk Mediation Program. Ms. Huffman reported that 51 clerks have submitted their ADR reports to AOC to date and in total, 7 districts have referred 10 cases for mediation. There was no update to give on MSC or FFS statistics since the last DRC meeting. Mr. Laney reported for the District Criminal Court Mediation Program that the one year period to apply for provisional certification has lapsed and the Commission has now issued its first full 2-year certifications for that program. The program is also starting to expand and three additional centers based in Hickory, Statesville, and Wilmington have submitted applications. Currently, 31 one-year certifications and three two-year certifications have been issued. One training program has been approved and a second application is pending. In addition, Mr. Laney reports there are many healthy mediation programs operating in district criminal court that are not part of this initiative. Professor Morris reports for the Dispute Resolution Institute that Central's Law School is hosting the ABA's annual competition on representation in mediation on February 28-March 1, and the is in need of volunteer mediators and judges. Mr. Schafer reports that funding cuts have affected the Industrial Commission and they may need to use telephone mediation. He says that settlement rates remain very strong at 76% and he reported on the appointment of new Commissioner Staci Meyer and the promotion of Wanda Taylor to Chief Deputy Commissioner.

Judge Lee reminded everyone that the next meeting is scheduled for May 8 in Charlotte and there being no further business, adjourned the meeting.

MINUTES

Dispute Resolution Commission

May 8, 2009

Mecklenburg County Courthouse, Charlotte, NC

Members present: Clare, Curran, Farrah, Hay, Huckel, Hudspeth, Jackson, Lee, Little, Massiello, McKown, Morgan, Morris, Tash, and Turner. Ex-officios: Fuqua, Laney, and Steelman. Guests and staff: Barnhardt, Carlson and, Gullick (Dispute Resolution Section members, but present in their individual capacities); Benade (mediator); Kolodziej (Trial Court Coordinator, District 26); and Ratliff.

Judge Lee called the meeting to order, thanked Ms. Curran for hosting and recognized guests. He next called for approval of the minutes which were approved as submitted. He then asked Ms. Ratliff for the office report. She reported that the office was having difficulty getting equipment and having bills paid given the State's current financial crisis and that she has asked Judge Lee to intervene on a couple of matters. She next reported that a few minor adjustments were being made to the new on-line renewal process and that she is very encouraged by the results of some trial runs using volunteer mediators. She asked mediator members of the Commission to give her feedback when they have completed renewal. Ms. Ratliff noted also that the office has been busy reactivating inactive and lapsed mediators and processing new applications. She stated that she had been worried that renewals might drop given the economy, but that she had been reassured by this activity. She noted that there had also been a lot of activity in connection with the new Criminal District Court Program as provisionally certified mediators transitioned to full certification. She added that there had been questions regarding implementation of Rule 7 of the District Criminal District Court Rules and she thanked Ms. Massiello and other Center staff for their patience. Lastly, she added that a newsletter had gone out.

Judge Lee next reported for the Executive Committee. He began by discussing the Commission's request that the AOC authorize the Commission to pay for Ms. Ratliff's NCBA and Section memberships so that she may be appointed as liaison. He noted it might be difficult to get such an approval at this time given the economy. He asked Ms. Ratliff to contact Whitney Van Haam, Director of Membership at the NCBA, to see whether the Bar would be willing to waive the fee given that the Commission is a State agency. Next, Judge Lee noted that, in order to conserve funds, the Governor and Judge Smith were encouraging meetings by telephone. Since future meetings may need to be conducted in that fashion, he asked the Commission to consider how it wished to handle telephone attendance and voting. He added that three Commission members were attending by telephone today. Judges Jackson and McKown said they saw no problem as long as those attending in that manner heard the full discussion on any issue on which they voted. Mr. Tash asked whether those attending by telephone should have a valid excuse for their physical absence. Judge Lee said that he was willing to consider such requests on a case-by-case basis. Mr. Huckel moved to permit attendance by telephone in the Chair's discretion and voting by telephone, provided the member voting heard the full

discussion on the issue. The motion passed unanimously. Judge Jackson noted that it may be difficult to move meetings around the State if locations do not offer good teleconferencing facilities. Ms. Curran added that she hopes that the voting rule will be applied equally, that is, if a member walks into a meeting late and misses part of the discussion, s/he should not be allowed to vote. Judge Lee agreed that the rule should be applied fairly in both situations. He also noted that the new rule would be effective immediately so that those present today by telephone could vote.

Professor Morris reported for the Standards, Discipline and Advisory Opinions Committee. He yielded the floor to Mr. Little to explain the Committee's recommendation regarding the State Bar's request that the Commission comment on attorney mediator reporting of attorney misconduct. Mr. Little noted that the proposal is in two parts. The first part contains proposed language for submission to the State Bar that recommends a revision to Rule 8.3 exempting mediators from reporting attorney misconduct. Should the Bar be unwilling to revise the Rule, then the second part of the proposal revises Standard III to conform it to Rule 8.3 and permit reporting of attorney misconduct after the mediator has first obtained an informal, oral opinion or advice from the State Bar that the conduct violates Rule 8.3 and is required to be reported. Mr. Little noted that the State Bar has already permitted exceptions to the Rule 8.3 reporting requirement and he talked about the need for mediators to be neutral rather than adopting an investigate or judgmental posture. He asked the Commission to approve part one as the first line of defense and part two as the fall back position.

Judge Turner asked that the specific reference to "superior court" mediator be stricken from the last page of the proposal, *i.e.*, that the rule apply across the board to all certified mediators. Mr. Little agreed that was a typographical error. Ms. Gullick and Mr. Laney expressed their support for the recommendation as presented by Mr. Little. Both noted that lawyers may sometime fudge the truth when they are negotiating, *e.g.*, they may withhold information or characterize a figure as their "bottom line" when it is not. Mediators should not, they argue, be put in the position of investigating such statements. Judge Turner argued in favor of reporting -- If a lawyer is required to reveal that another lawyer has destroyed damning documents, then how is it different when the lawyer is a mediator? Mr. Laney believes that mediation is not the practice of law and that having a different standard is appropriate. Mr. Tash thinks that a reporting requirement could chill the mediation process. Mr. Little reports that Alice Mine of the State Bar has suggested to him that the Bar will be receptive to the change. Judge Lee said that he agreed with the exception, but he does not believe the State Bar will adopt it. Mr. Carlson noted that he also favors an exception. After further discussion, the recommendation as presented by Mr. Little was adopted with two opposing votes. Mr. Laney asks where this matter goes from here and Mr. Little suggested a letter to the State Bar be written as soon as possible. Judge Lee offered to draft it.

At that point, Professor Morris proceeded with the Committee's report by directing attention to the flow chart showing proposed revisions to Commission Rule VIII which enforces the Standards of Professional Conduct for Mediators. He added that the primary intent of the revisions is to add a more informal referral track to operate alongside the

formal disciplinary track. It was suggested that the CJCP referral option be separated out from the option to refer to a Commission member(s) for counseling. Judge Turner asked what happens if the Commission refers a mediator to PALS or FRIENDS and the mediator refuses to cooperate. Mr. Barnhardt said he believes that PALS and FRIENDS will advise the Commission of such. Ms. Ratliff stated that Mel Wright with the CJCP has told her that his Commission's process is confidential and there can be no report back. Mr. Laney asked about referrals to boards regulating other kinds of professionals and it was suggested that option be included. Professor Morris said that he would incorporate the suggestions and plan to have a draft of revised Rule VIII at the next meeting.

Mr. Huckel reported for the Mediator Certification and Training Standards Committee. He first directed attention to a proposed revision to the Commission Policy on Interpreting and Implementing FFS Rule 8.A. Both Judge Turner and Ms. Curran suggested that four years of judicial experience might be a little light. Professor Morris asked what was meant by family cases? Does it include juvenile or child support cases or only equitable distribution cases? It was noted that new district court judges receive training in family law. Mr. Laney noted that he thought the reference to Rule 8.A. was incorrect, that the cite should be to the first unnumbered paragraph of Rule 8.A. The proposed revision was approved with the corrected citation and the insertion of the word, "have" in section 1. Mr. Huckel next explained that a certified divorce financial analyst (CDFA) had asked the Committee to consider recommending to the Commission that the professions enumerated in FFS Rule 8.A.2.(a)-(g) be expanded to include CDFA's. Because she had also been previously approached by certified financial planners (CFP) and denied their applications, Ms. Ratliff also asked the Committee to consider this group since she felt their training was more extensive than that of the CDFAs. Mr. Huckel reported that after reviewing the training, experience and other qualifications of both groups, that the Committee determined not to recommend their inclusion. It was noted that the Committee felt that the qualifications required for both these designations fell far short of the education and training required for the professions already enumerated.

Lastly, Mr. Huckel reported on the proposed Requirements for Observer Conduct. He noted that Ms. Clare had raised this issue with the Commission. Ms. Ratliff was asked how the office proposed to distribute the Requirements if adopted. She responded that she would post them on the Commission's web site, forward them to trainers, and include a copy in all application packets. It was suggested that mediators who were being observed might want to forward a copy to those who had asked to observe. Ms. Curran asked whether a catch-all phrase should be added at the end of the document to give the mediator wider discretion. With that change, the Requirements were adopted unanimously.

Mr. Little reported that the Program Oversight Committee had not met this quarter and had no business to bring before the Commission.

Judge Lee next called for liaison reports. Judge Steelman reported that the Court of Appeals Mediation Program was continuing to work with Professor Morris and his students to gather statistics and evaluate the Program. Mr. Laney reported that caseloads

were down in the federal Appellate Mediation Program. In Jody Minor's absence, Judge Lee asked Ms. Massiello about the Medicaid Mediation Program. She responded that the Centers were very busy. Ms. Ratliff added that Ms. Massiello had been interviewed about that effort in the last edition of *The Intermediary* and the interview had been picked up by the Elder Law Section's newsletter. Mr. Laney noted that Value Options, which represents DHS in many of the Medicaid mediations, had recently admitted to taping mediations conducted over the phone. Professor Morris added that he understood that Value Options had agreed to discontinue this practice. Professor Morris reported that Central University School of Law's Institute for Dispute Resolution is proud to be graduating its first group of law students who will also receive a certificate in dispute resolution. Ms. Fuqua reported for the judicial support staff. First, she introduced Ms. Amy Kolodziej, Trial Court Coordinator, District 26. Ms. Kolodziej, she said, wanted to discuss with the Commission a problem that mediators in her district and across the State had been experiencing. Ms. Fuqua and Ms. Kolodziej explained that parties were telling mediators very early on that their cases were settling and there was no need for mediation. When the mediators insisted on receiving proof before reporting the cases as settled to the court, they meet with resistance from the parties. They added that often these cases are not settled and later are back on the docket. Mr. Little suggested that mediators offer to give parties some more time to finalize their negotiations and ask to receive a copy of the settlement agreement, dismissal or consent judgment when they are through. If s/he does not hear back, the mediator should contact them again and if they still have not settled, go ahead and set a date. Mr. Huckel suggested that court staff should not be shy about asking judges to reprimand attorneys and parties who tell mediators that their case is settled when it is not, and then ask for a trial. Judge Turner agreed and noted that his local rules allow parties to defer appointment of a mediator, if they think they can settle. But, if they can't, then he appoints a mediator and expects them to work hard to resolve the matter. Lastly, Ms. Fuqua announced that she is retiring in August and noted how much she had enjoyed serving on the Commission. Judge Lee thanked her. She said that she had suggested Karan Whitley in District 19A as her replacement.

Judge Lee asked about scheduling the next meeting and those present agreed on September 25, 2009, at the Judicial Center. Given the financial situation, Judge Lee elected to schedule no further meetings. There being no further business, the meeting was adjourned.

Dispute Resolution Commission

Minutes

Friday, September 25, 2009

NC Bar Center, Cary, NC
10:00 a.m.

Commission members present: Lee, Clare, Hay, Huckel, Hudspeth, Little, Massiello, Morris, and Turner. Ex-officio members present: Beason, Carlson, Huffman, Laney, Schafer, Steelman, and Whitley. Guests and staff present: Benade (by telephone), Barnhardt, and Ratliff.

Judge Lee welcomed everyone and introduced guest, Mr. Benade, who mediates in Charlotte, and new ex-officio members, Mr. Carlson (NCBA Dispute Resolution Section) and Ms. Whitley (NC Judicial Support Staff Conference). Minutes from the May meeting were adopted as submitted and Judge Lee asked Ms. Ratliff for her office report.

Ms. Ratliff reported that the Commission had concluded its FY 2009/10 mediator certification renewal period. She said that so far 1,754 certifications have been renewed with total collections of \$192,715. She noted that this was already some \$7,000 more than collected during the whole of FY 2008/09. That said, however, she noted that she was concerned because 109 MSC mediators had not renewed this year. Collections would have been correspondingly lower had that figure not been counter balanced by an even higher number of new certifications in FY 2008/09. Ms. Ratliff next reported that the newly re-vamped on-line renewal process had been very successful. There had been fewer technical problems and complaints than in the past two years. She added that AOC technology staff had advised her that the credit card payment option could likely be implemented this year in time for the FY 2010/11 renewal period. She reported that the Program Oversight Committee had agreed to assist her with this project. Ms. Ratliff reported that staff has also been pleased with the result of the August 31st deadline for payment initiated this year by the Commission. Staff believed the deadline had resulted in fewer mediators paying late, thereby reducing the administrative work involved in processing late renewals. Lastly, she reported that the Commission's Annual Report for FY 2008/09 was included in the handouts distributed that morning.

Ms. Ratliff then asked Ms. Huffman if she would like to discuss the caseload statistics for the MSC and FFS Programs. Ms. Huffman reviewed the numbers with the group. She noted that her office had worked hard to increase the accuracy of these reports, particularly with reference to the "begin pending" column. She expressed concern that many cases being filed are not being ordered into mediation. Judge Lee noted that it might be helpful to know what was happening with these cases, *e.g.*, were they settling before being ordered to mediation. If so, could mediation be said to be the catalyst for these early settlements? Ms. Ratliff reported that a superior court litigant had contacted her recently and expressed dismay that he was being forced to pay to participate in a program with such a low rate of settlement, *i.e.*, 31.9%, as reflected in the statistical report's resolved through conference column. Ms. Ratliff explained that the settlement rate for cases actually mediated was higher, 53%. Mr. Laney suggested that the percentages column might need to be modified. Judge Steelman reminded everyone that

Professor Morris' students were at work analyzing statistics for the Court of Appeals Mediation Program and he suggested that they might be of help here. Judge Lee asked Ms. Huffman if she was willing to chair a committee that would undertake a review of the caseload statistics. Ms. Huffman agreed and Professor Morris, Mr. Laney, Mr. Carlson, Mr. Schafer and Ms. Whitley agreed to also serve. Judge Lee thanked Ms. Huffman for her work with the statistics.

Judge Lee next reported for the Executive/Operations Committee. He first directed attention to a proposed policy for responding to requests from the public for mediator contact information. He noted that the proposed policy provided for the Commission's office, upon request, to provide mediator names and mailing addresses in electronic format. Those requesting email addresses, telephone numbers or other contact information would be directed to the Commission's web site. With some wording changes suggested by Judge Turner, the policy was adopted. Judge Lee next reported that the Commission's office was helping register members to attend the State Ethics Commission Programs. He noted it was clear that the Commission was a covered entity. It was asked whether ex-officios had to attend the training program and it was clarified that they did not.

Judge Lee then advised members that the Office of State Budget and Management had confiscated some \$48,000 of unspent revenue (carry forward) accumulated by the Commission over a several year period. He noted that OSBM had originally taken \$68,000 in unspent revenue but returned \$20,000 of the money at his and the AOC's request. Judge Lee reported that he had tried to contact Budget Director Charlie Perusse in an attempt to discuss the matter, but had been unsuccessful. He added that he had written a pointed letter to Mr. Perusse also, but had received no response. There followed discussion. Mr. Little asked how we can avoid this next year? There was discussion about whether the Commission could separate fiscally from the AOC and open its own back account. Several doubted that could happen. Litigation was mentioned as a possibility. Judge Lee said that he would continue to try to work with Mr. Perusse and the AOC both to regain the money taken and to prevent this from happening again. He added that Judge Smith had been very supportive. Ms. Ratliff was asked to use the newsletter to notify mediators of the taking. Next, Judge Lee noted that the Commission's recommendation for rule changes to the MSC, FFS and Clerk rules had been forwarded to the ADR Committee of the State Judicial Council. Mr. Laney, who chairs that body, said that the Committee will conduct its review by email. Lastly, Judge Lee noted that he had received no further word on appointments to the Commission, but that he expects all those currently serving to be re-appointed.

Next, Professor Mark Morris reported for the Standards, Discipline and Advisory Opinions Committee. Professor Morris began by directing attention to proposed revisions to the Commission Rules and particularly Rule VIII. He explained that the Rule VIII revisions were substantial and were largely intended to make enforcement procedures more flexible by adding less formal alternatives, such as conciliation, to the more formal investigative and hearing procedures already in place. Mr. Laney added that changes to the other rules were in the nature of clarification and fine-tuning. Professor Morris added that the Protocol amplifying the Commission's Rules had been folded into the Rule VIII revisions and the Committee was now recommending that document be eliminated. After a short discussion, the Commission approved the proposed revisions to its Rules and eliminated the Protocol. Next, Professor

Morris asked the Committee to turn its attention to proposed revisions to the Guidelines which assist staff in determining whether an application which raises conduct issues can be processed in-house or must be referred to the Committee. During a brief discussion, Mr. Little raised some concerns and the document was referred back to the Committee. Next, Professor Morris asked for consideration of the Committee's recommendation that a definition of the word "Conviction" be included on certification and certification renewal applications. He explained this was necessary because applicants were not reporting prayers for judgment continued (PJs) or other kinds of deferred prosecutions. Ms. Clare asked about expungements of record. The group agreed that expungements need not be disclosed. After a short discussion, the Committee voted to approve the insertion of the proposed definition in MSC and FFS applications and renewal applications. Lastly, Professor Morris updated the group on complaint activity over the quarter and reported that the Commission's request for an exemption for mediators under Rule 8.3 would be before the State Bar's Ethics Committee on October 22 at 8:30.

Wayne Huckel reported for the Program Oversight Committee. He called the group's attention to a proposed policy allowing the Commission to loan a donated copy of the NCBA's 2008 Basics of Family Law DVD to applicants for FFS certification. He explained that there would be no charge, but that those to whom the DVDs were loaned would be required to provide a deposit equal to the cost to replace the DVDs. The policy was adopted as submitted.

Mr. Laney next informed the group that there is some interest in reprinting the Green Book. He explained that the Book is now being used by several law school classes. He noted that he and Ms. Ratliff had recently been approached by a Virginia court official who wished to re-print a portion of the book.

Next, Judge Lee called for ex-officio reports. Karen Whitley reported that judicial support staff continue to wait for some resolution regarding the certificate of service on the Designation of Mediator and other forms. Ms. Ratliff reported that the matter was continuing to be addressed. Mr. Carlson reported that the Dispute Resolution Section is very active right now and looking at a number of issues. He said that he looked forward to collaborating with the Commission. Professor Morris reported that Central Law School's Dispute Resolution Institute now has twelve third year students enrolled in its certificate program and Institute is moving forward with a number of research projects. Mr. Schafer noted that settlement rates for the Industrial Commission Program remain high at 70.2%. He reported that the *IC Mediated Settlement Agreement* is in the process of being revised to add language to insure that the agreement is enforceable if a party later reneges. Lastly, he noted the IC annual conference for mediator would be held October 7-9 in Raleigh.

Judge Lee noted that he wished to set dates for upcoming meetings. The following dates were set: February 5, 2010; May 21, 2010; and September 17-18. The Commission suggested Pinehurst as a possible location for the September retreat given the Green Park's closure.

There being no further business, Judge Lee thanked everyone for coming and adjourned the meeting.