

Minutes

NC Dispute Resolution Commission

**September 17-18, 2010 Retreat
Little River Golf and Resort
Carthage, NC**

Friday 1:00 p.m.

The Commission's business meeting was preceded by an appeal of a Standards, Discipline and Advisory Opinion Committee decision to deny an application for mediator certification. Those members who heard the appeal were: Lee, Bryant, Conley, Curran, Huckel, Hudspeth, Jackson, McKown, and Turner.

The business meeting commenced at the conclusion of the hearing. Commission members present: Lee, Bryant, Clare, Conley, Curran, Farah, Hay, Huckel, Hudspeth, Jackson, Little, McKown, Morgan, Morris, Tash, and Turner. Ex-Officio Members: Barnhardt, Huffman, Laney, Steelman and Whitley. Guests and staff: Anderson, Benade, Doyle, Gullick, and Ratliff.

Judge Lee began the meeting by praising the strong turnout, welcoming everyone and thanking the Commission's office, and particularly Maureen Robinson, for arranging for the excellent accommodations. Next, he recognized Mr. Huckel and Professor Morris and thanked them for their service to the Commission during their term. He then presented each with a plaque. He added that Ms. Gullick would be replacing Mr. Huckel effective October 1 and that a replacement had yet to be named for Professor Morris. He also welcomed Mr. Barnhardt, the new Dispute Resolution Section Chair, replacing Mr. Carlson.

Next, Judge Lee called for the office report. Ms. Ratliff reported that the certification renewal period for 2010/11 was strong and that the Commission was in good shape financially both with regard to the renewal fees collected during the certification period and the carry forward amount which was approximately \$102,000. She reported that the AOC had told her that it would be unable to assist the Commission in implementing a credit card payment feature (in connection with on-line renewal) for the foreseeable future. She said she was disappointed in that there was considerable demand for this among the mediators and she believed staff time and effort could be conserved. She noted that a new edition of *The Intermediary* was published this quarter and the Commission's Annual Report for FY 2009/10 had been finalized and would soon be distributed. She added that the office had been busy with Committee meetings and disciplinary matters.

Judge Lee began the Committee reports. He noted that the Executive Committee had met to discuss a number of matters, including a new effort to study the Clerk Mediation Program and to determine why it has been underutilized. He asked Mr. Little to speak about this new effort. Mr. Little explained that the group, which was established by the Section and chaired by William Wolcott, had met on September 28 and that a number of Clerks or their representatives were in attendance. He pointed out a proposal that, if adopted, would provide for the Commission to co-sponsor the effort, make Commission staff available to assist the group, and provide up to \$1,500 in funds to help with reimbursement of travel and meeting expenses. Ms. Curran thinks that if the rules were modified slightly, Clerks would see more potential. She added that she had become interested in foreclosure mediation after attending a conference. Mr. Little noted those cases had been excluded from the program, but that could be changed. Messrs. Little and Benade explained that the Committee planned to establish pilot sites in a number of counties which would

study the program and evaluate how it was working. Judge Lee called for a vote on the proposal and it was approved unanimously. Ms. Huffman distributed copies of the statistics gathered for the Clerk Program for 2009/10. Those statistics underscored the lack of utilization.

Judge Lee turned the group's attention to a second proposal relating to re-publication of the *Green Book* and turned the floor over to Mr. Laney. Mr. Laney recounted the history of the Book and explained that copies from the first printings had been exhausted and there was interest in updating and re-publishing the Book. The *Green Book* Committee had been reconstituted to explore the matter. Mr. Little asked about electronic publication. Mr. Laney will look into that possibility and report back. The proposal calls for the Commission to become a joint sponsor of the project and to contribute \$15,000 to the cost of re-publication. Mr. Little noted that additional funding would likely be available through the Section and the NCBA's endowment fund and that Carolina Dispute Settlement Services had already agreed to purchase 500 copies. Ms. Curran asked whether there should be any restrictions on the money? Mr. Laney responded that the money would not be given as a lump sum, but rather invoices for particular payments would be tendered to the Commission. Ms. Ratliff asked whether copies of the book might be made available to certified mediators? Mr. Laney noted that could be discussed. Judge Lee called for a vote and the proposal was adopted unanimously.

Next, Judge Lee expressed his regret about the AOC's decision not to implement credit card payment. Ms. Huffman suggested that layoffs of IT staff and security concerns likely played a role in the decision. Judge Lee next called attention to new legislation providing for pre-litigation of public records disputes. After brief discussion, the new legislation and program were referred to the Program Oversight Committee. Mr. Little was asked to contact the General Assembly and relay concerns about the program's design, *i.e.*, the pre-litigation format, and express the Commission's interest in having an opportunity to consult on future legislation that establishes mediation programs. Judge Lee next reported that Mr. Huckel's position on the Commission would be filled by Lynn Gullick effective October 1, and that Professor Morris' successor had not been named. However, he added that Ms. Clare would replace Professor Morris as chair of the Standards, Discipline and Advisory Opinions Committee. He added that, new appointee, Ms. Bryant had received her letter from the State Ethics Commission and that, because she was a mediator whose conduct was regulated by the Commission, she had a potential conflict of interest which was required to be noted in the minutes. Lastly, Judge Lee reported that the AOC was looking at Commission staff positions to determine whether any reclassifications were in order.

Next, Mr. Huckel began the report of the Mediator Certification and Training Standards Committee by calling attention to a draft policy to address: 1) requests that certification fees be waived for a period due to financial hardship, 2) requests that fees be waived entirely when the mediator is active duty military, and 3) situations where a check has been returned marked "NSF". The policy was adopted unanimously. Mr. Huckel reported that the Committee was also considering the question of whether once certified pursuant to criteria requiring licensure, a mediator could, thereafter, drop his/her licensure. He noted this issue could lead to a discussion of whether CME should be mandatory. Mr. Huckel also reported that the Committee had considered a request that it recommend broadening the professions listed in the FFS eligibility criteria to include licensed teachers. The Committee had determined to deny the request. Lastly, Mr. Huckel asked to be able to continue his report on Saturday morning after his Committee had a chance to meet to discuss an additional applicant and his requests. Judge Lee agreed.

Professor Morris next gave an update on disciplinary matters addressed this quarter for the Standards, Discipline and Advisory Opinion Committee: 1) A complaint was dismissed by the Chair; 2) An applicant reported that her license to practice law had been suspended and the

suspension stayed. Professor Morris spoke to her about the matter and, following that conversation, directed staff to return the applicant's check and invite her to reapply when the period of suspension had concluded, approximately six-months, 3) A private reprimand was issued to a mediator who had altered an agreement after it had been signed. In addition to the reprimand, a Committee member met with the mediator to counsel her regarding her conduct. Professor Morris reported that the mediator had voluntarily placed her certifications on inactive status during the investigation. She had since requested to return to active status, and the Committee had agreed; and 4) The Committee had issued the denial that was heard that morning on appeal. Professor Morris noted he had to leave and asked Ms. Clare to finish the Committee report on Saturday.

Mr. Little next reported on the Commission's request that the State Bar create a Rule 8.3 exception for mediators. He reported that the State Bar Council had approved the exception and it would now go to the Supreme Court for consideration. He noted it had been helpful that several members of the Council had taken mediation training and understood the need for confidentiality. He noted that the SDAO Committee would now need to consider additional revisions to Standard III. Mr. Hudspeth complimented Mr. Little on his efforts and Judge Lee presented him with a small token to mark his efforts. At this point, the Commission recessed until Saturday morning.

Saturday, 8:00 a.m.

Judge Lee turned the floor back to Mr. Huckel who reported that last quarter two individuals had questioned the MSC Rule 8 college degree requirement for non-attorney certification. These individuals had requested that the Commission recommend elimination of the requirement to the Court or, in the alternative, recommend modification by requiring only a 2-year degree and/or inserting a provision for waiver in appropriate circumstances. The Committee had decided not to make a recommendation to eliminate or modify the four-year degree requirement and had reported that at the last Commission meeting. That report, he added, had been favorably received. This quarter, Mr. Huckel reported that another applicant lacking a degree had come forward. The Committee had denied the application and advised him that it would not make a recommendation to the Commission to eliminate the requirement or to provide for its waiver. Anticipating that there might be an appeal, Mr. Huckel asked the Commission to, again, consider the matter and the Commission voted unanimously to support the four-year degree requirement.

Judge Lee asked Ms. Clare to complete the report of the Standards, Discipline and Advisory Opinions Committee. She drew attention to draft Advisory Opinion #10-17 which addresses whether a mediator may transition to the role of arbitrator at the request of the parties. The new opinion, she explained, differentiates between that situation and one where the mediator emerges a fiduciary. The Opinion also discusses some best practice issues for making the transition. The Opinion was unanimously adopted. Next, she drew attention to a second draft Opinion and explained it was being presented for discussion only. That Opinion raised attendance issues, *i.e.*, should a mediator allow a mediation to continue where 1) a corporate party does not have legal counsel at the conference and is represented by an officer only or 2) a party arrives at the conference with an out-of-state lawyer who has not obtained temporary authority to practice in NC. The Opinion, Ms. Clare explained, provided for the mediator to continue the mediation, leaving it to the parties to raise their concerns with the appropriate authorities, *e.g.*, the courts or the State Bar. There followed considerable discussion of the matter. Mr. Farah suggested that perhaps the two issues should be addressed in separate opinions. He especially thought the second scenario was problematic. He also questioned whether the parties would have authority to settle their dispute in this situation. Mr. Little responded that the Opinion addresses best practice

and not legal or ethical issues. Ms. Curran said she felt the Committee should consult with the State Bar on these matters and especially scenario #2. The Committee agreed to do so.

Next, Ms. Clare raised an issue that has come before staff on several occasions, *i.e.*, whether a mediator can or should speak with a State Bar investigator who calls the mediator in the course of investigating an attorney's conduct occurring during a mediation. Mr. Little noted that this issue was not discussed when enabling statutes and the Standards were originally drafted, so he suggested the Committee/Commission may want to consider this issue and re-write the rules as it deems appropriate. He asked for feedback from the Commission. Mr. Farah observed that there are definitely two sides to this issue: 1) a mediator may be able to help exonerate an attorney who has been unfairly accused and help conserve State Bar resources, but on the other hand, 2) the mediator is, in essence, testifying in a situation where there are no prosecutorial protections in place, no judicial officer is presiding and no limitations have been placed on the conversation. Judge McKown asked whether there is an issue if both parties' waive? Ms. Clare asked who would seek the waiver? She suggested the investigator should request the waiver and not the mediator. Mr. Farah pointed out that there are other witnesses and that mediators could be asked about confidential information. Judge Lee pointed out that not all privileges are sacrosanct, including lawyer and doctor/patient privileges. If the State Bar can't get waivers, Mr. Farah noted, than perhaps there should be a judicial proceeding. Following additional discussion, the Commission provided the Committee with the following feedback to assist it with its drafting: 1) the investigator should ask the parties for waivers if he wants to question the mediator; 2) if waivers are not granted, then a judicial proceeding would be necessary for the conversation to occur; and 3) the attorney must be advised of the complaint.

Next, Mr. Little reported for the Program Oversight Committee. He first reported that the Committee is working on a fee collection kit which it plans to have ready for the next Commission meeting. He asked Judge Lee to inquire whether his colleagues would be willing to write letters on behalf of mediators who have not been paid. He also asked him to inquire whether judges would be willing to hear verified motions in lieu of requiring mediators to attend and testify in contempt proceedings for failure to pay mediator fees. Judge Lee said he would be happy to do so. Judge Lee asked what a party had to show to be relieved of an obligation to pay. Mr. Little noted that the statute/rules provide no guidance as to a definition of indigency and that it is a case-by-case evaluation. Ms. Curran said she thinks it is the same standard that would apply in determining whether a party can pay court costs. Mr. Little thinks this is a different situation, that the judge makes the determination after the mediation is over. Mr. Farah asks whether an attorney advancing costs would be liable for the fee? Mr. Little responded, "no".

Mr. Laney then reported that the Commission's office had received a request from a Center Director to reactive the District Criminal Court Mediation Program Committee to allow Directors to come together to talk about the program and the certification process. He asked whether the Commission would be willing to cover the meeting costs involved in assembling this group for one or possibly more meetings to discuss these issues. The Commission unanimously agreed to cover the meeting costs.

Committee reports having concluded, Judge Lee asked out future meeting dates and the following dates were selected, January 28 and May 6 in Raleigh. It was agreed that the 2011 retreat would be held in September and Ms. Ratliff was asked to look for a location in Asheville.

Committee reports having concluded, Judge Lee asked liaisons to report. Ms. Whitley noted judicial support staff was continuing to register concerns about mediators not filing Reports timely and failing to follow through in districts where they had agreed to accept court appointments. Ms. Whitley talked about the burden of having to create a separate list for

mediators who lived in non-contiguous counties, but had agreed to accept court appointments in her district. Mr. Little agreed that the Program Oversight Committee would meet with Ms. Whitley and discuss and address these concerns. Ms. Whitley also suggested that it might be good to clarify where Reports of Mediator are to be sent because there is still some confusion in that regard. Mr. Doyle reported for the Section that a *Basics of Mediation* CLE was planned for October 22. Ms. Huffman reported court staff was now working with the new statistical forms and that MSC/FFS statistics for FY 2009/10 were available. Ms. Ratliff added that the statistics would be posted on the Commission's website. Mr. Laney reported that the federal courts had hired a new mediator, Ed Smith, who would be based in SC. Mr. Little noted that Mediation, Inc., was co-sponsoring a February CME opportunity involving Mark Victor, an expert in litigation risk analysis (advanced decision tree analysis). It was noted that changes to the IC's mediation program rules were imminent. Judge Steelman reported that the number of civil appeals had declined with the economic downturn and fewer mediations were occurring now.

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

Minutes

NC Dispute Resolution Commission

**May 21, 2010 Meeting
NC Judicial Center, Raleigh
10:00 a.m.**

Commission Member present: Lee, Bryant, Clare, Conley, Curran, Farah, Hudspeth, Little, McKown, Morgan, Tash (by phone), and Turner. Ex-Officio Members present: Beason, Carlson, Huffman, Laney, Schafer, Steelman and Whitley. Guests and staff present: Barnhardt, Benade, Poe, Walsh, Werry, Ratliff and Robinson.

Judge Lee called the meeting to order and asked for introduction of guests. Judge Steelman introduced his law clerks, Travis Werry, Austin Walsh, and Amy Poe. Judge Lee noted that mediator Len Benade of Charlotte was also present. Next, Judge Lee called attention to minutes from the February 5, 2010, and February 26, 2010, meetings. Both minutes were approved as submitted.

Judge Lee welcomed everyone and introduced the Commission's newest member, Dawn Bryant. Judge Lee administered the oath of office to Ms. Bryant and to a number of members who were being sworn to second terms: Judges McKown and Turner, Mr. Hudspeth, and Ms. Conley. Judge Turner then administered the oath of office to Judge Lee who was also being sworn to a second term. Judge Turner asked whether plaques could be distributed at the beginning of an appointment rather than at the end. Judge Lee asked staff to look into having certificates printed at the beginning of a term with a plaque indicating dates of service awarded at the end.

Judge Lee asked Ms. Ratliff for her office report. She began by noting that it was time for the certification renewal period to begin and that notices would be mailed on June 1st. She added that credit card payment was still not available. Judge Lee agreed that the Executive Committee would assist her with this. She noted there would be only one difference in the renewal application from last year – mediators would be given an opportunity if they wished, to opt out of having their email address publicly appear on the Commission's website. She explained this was being done to protect mediators from scammers. However AOC technology staff had advised her they did not expect many mediators to withdraw their email addresses since most understood this was an inherent risk of doing business today. Ms. Ratliff also reported that the office was still tweaking the website reorganization that had occurred earlier this year. She noted that the office had received calls regarding information that had been inadvertently dropped from the site. Ms. Ratliff noted that the Committees had been very busy this quarter and that she had been doing a lot of speaking. In particular, she noted that she and Judge Lee had spoken at the Judicial Support Staff Conference held in Concord in April. Lastly, Ms. Ratliff informed Commission members that the office, in consultation with Judge Lee, had reserved the Fall River Resort in Carthage for the Commission's September retreat. She provided details about accommodations and rooming arrangements and noted that members would need to make their reservations soon. Ms. Ratliff concluded her report by thanking Ms. Robinson for her assistance in locating the resort.

Judge Lee reported that the Executive Committee had not met this quarter. He added that Ms. Ratliff had advised him that money taken from the Commission's account by OSBM had been restored. He noted that members had received letters from the State Ethics Commission regarding their Statements of Economic Interest. No member, he added, had been advised that

s/he had an actual conflict of interest, but a few had potential conflicts: Ms. Clare (and her husband, Tom, who is a certified mediator), Ms. Conley, Mr. Huckel, Mr. Hudspeth, and Mr. Little (they are mediator appointees to a Commission that regulates mediator conduct). Judge Lee added that each would need to recuse him/herself in appropriate circumstances.

Mr. Little reported for the Program Oversight Committee. He explained first that the Committee was pulling together a kit to assist mediators having trouble collecting fees. The kit would contain: 1) Sample letters that a mediator could ask a referring judge to send to a party who failed to pay. (Mr. Little noted that a letter Judge Stephens used very effectively in his district would be among those included.) 2) A set of procedures and a form to ask the court to order payment. (This option could be used in districts that do not issue an order specifying that mediators be paid. This option will also provide for the mediator to appear via an affidavit rather than make an actual appearance.) 3) The kit will contain procedures and forms for establishing contempt. Mr. Little explained that in creating the kit the Committee was responding both to the current economic climate which was producing many failures to pay and complaints on the part of mediators about the need for them to miss a day of work to attend a contempt proceeding. Mr. Little added that judicial cooperation is very important when there is a failure to pay. Often these matters can be taken care of informally if support staff is willing to make a call or a judge to write a letter. Judge Turner thinks that if judges are willing to write a letter, that will take care of 95% of the problems. Judge Lee suggests there may need to be a proposed amendment to a district's local rules to allow a mediator to appear by affidavit. Ms. Bryant asked about circumstances where parties are not paying. Mr. Little and Ms. Clare responded that it was in both party select and court appointed cases. Mr. Schafer noted that the Industrial Commission is sending out more letters regarding payment. Mr. Little thanked Judge Turner for his work on the kit, noting that he crafted the first round of letters.

Next, Mr. Little reported that at the last Commission meeting a prohibition on recording had been adopted. Some members had expressed concern that the prohibition had no sanctions in the event of a breach. This concern was referred to the Committee. The Committee had determined not to recommend the addition of sanctions since the Committee believed that the prohibition alone was enough to deter recording. He asked whether the judges present thought that someone could be held in contempt for violating a program rule as opposed to violating an actual court order? Judge Lee suggested speaking with Professor Michael Crowell at the School of Government. Mr. Little agreed to contact him.

Mr. Little next reported on efforts to energize the Clerk Mediation Program. He reported that Bill Walcott is chairing an *ad hoc* committee at the request of the Dispute Resolution Section. The Committee will look at why Clerks are not using the Program. Mr. Little noted, for example, that some clerks are concerned about being tied down to a particular list of mediators. Ms. Bryant added that she has heard that Clerks are concerned about the cost involved in referring parties to mediation. Ms. Curran added that time is often an issue and matters must be addressed quickly. Also, she added that there are often large numbers of folks involved in these hearings which could be cumbersome for a mediator. Mr. Little noted that many believe the Program is underused. Mr. Laney asked about foreclosure cases. That issue was raised with the clerks and they felt they already had an expedited process in place to handle foreclosures. Ms. Curran noted that her office has been flooded with foreclosures, but, again, she expressed concern about the need to pay mediators. Mr. Little suggested this may be a matter that should be discussed with Clerks down the road.

Mr. Little then noted that the issue of credit card payment of mediator fees had been before this Committee initially. He advised Judge Lee that the Executive Committee will need to look into

who will pay the processing charge. Ms. Curran said that she thought the processing fee would be around 2% of the total amount charged.

Lastly, Mr. Little noted that the Commission's enabling legislation provides that mediators may be compelled to testify in State Bar hearings/proceedings. The question, he added, has come up as to whether mediators should be able to respond to State Bar investigators. Mr. Laney thinks that if a mediator may testify at a hearing, it would be silly to prohibit his/her speaking to an investigator. Mr. Farah disagreed, noting that a judge is in charge of a hearing. S/he will tease out whether it is appropriate for a mediator to testify and what it is important for him/her to testify about. There are no such safeguards in place when a mediator simply speaks to an investigator. Mr. Laney responded that a mediator can refuse to participate and may be able to help clarify that the grievance is not legitimate or explain that s/he knows nothing that would help the proceeding. Ms. Curran added that State Bar proceedings are often slow and, in such situations, mediators might help to move them along. It was suggested that this matter should be before the SDAO Committee and it was agreed it would be transferred. It was also suggested that this could become a Standard III (confidentiality) issue in that the parties have not waived confidentiality.

Ms. Ratliff reported for the Mediator Certification and Training Standards Committee in Mr. Huckel's absence. The Committee had met twice during the quarter to discuss an applicant for superior court certification. Staff had denied his application because the applicant did not have a 4-year degree. The applicant initially asked the Committee to waive the requirement. The Committee declined. Applicant later asked the Committee to consider revising MSC Rule 8.B.(2)(c)(ii) to remove the requirement. The Committee determined not to go so far as to recommend removal, but was willing to put the matter before the Commission for discussion. Ms. Ratliff called attention to a history of the Rule and the applicant's proposal for revision which provided for 15 years of professional, administrative, or management experience and a 2-year associate degree. The Commission discussed the matter and determined not to recommend revision on the basis that the 4-year degree was a necessary threshold requirement to insure minimal qualifications. The Commission recognized that the applicant in question, though without a degree, had otherwise excellent qualifications and acknowledged that it was impossible to write a rule that worked in all circumstances.

Ms. Ratliff reported for the Standards, Discipline and Advisory Opinions Committee in Professor Morris' absence. She reported first on the proposed Guidelines for Reviewing Convictions, Disciplinary Actions, *etc.* Judge Morgan suggested that the first part of the document should be identified as the "Preamble". He also noted some grammatical problems. The document was approved with those changes. Next, she reported on pending and disposed complaints/ethical matters: 1) that one applicant, whose certification application had been denied by the Committee, had appealed to the full Commission; 2) that one mediator had been sanctioned privately and would be meeting with Committee members to discuss the complaint; 3) that one applicant who had initially been denied due to an on-going probationary period, had completed his term and had now been approved; 4) that one complaint had been dismissed by the Chair following investigation; and 5) that one complaint was pending. Mr. Laney added that he remembered that the Committee had set aside Standard III, Confidentiality, when the proposed revisions to the Standards, which have since been adopted, were sent to the Supreme Court. He hopes that the SDAO Committee will go back and pick up Standard III again once the exception effort has concluded.

Mr. Little reported for the Rule 8.3 *Ad Hoc* Committee. He noted that the State Bar had been pleased to receive the latest Advisory Opinion. The family bar, he understands, still intends to

oppose the effort. He added that the exception was before the State Bar Ethics Committee which should vote on it soon.

Ms. Huffman next reported for the *Ad Hoc* Committee on Caseload Statistics. She first discussed the Committee's work briefly and explained some proposed changes to the caseload report form. Mr. Little asked about cases that impasse, but go on to settle when the dialogue begun in mediation continues? Ms. Huffman and Ms. Whitley agreed that it would be good to have that information, but explained that there was no feasible way to capture it. Judge Turner asked about an amended mediator's report that would capture cases that settle after mediation. Ms. Whitley explained that it would be hard to amend her numbers once reported. Mr. Little suggested that it was impossible to know from the statistics what percentage of cases ordered to and actually mediated ended up in trial. Ms. Huffman noted it would be impossible to get that information in FFS cases. She thought it might be available in MSC cases but that individual case files would have to be pulled. Ms. Huffman and Ms. Whitley stressed that court staff were already overburdened. Mr. Laney asked whether a case could be reported in more than one column regarding its disposition. Ms. Huffman responded that a case's disposition is reported in only one column. Mr. Schafer complimented Ms. Huffman on her work chairing the Committee and acknowledged that it is probably not feasible to follow up on what happens after a mediation in terms of whether the dialogue continues and eventually leads to a settlement. Ms. Huffman added that would require a research project. Mr. Schafer noted that he thinks that the biggest problem is still the districts that are not reporting. The Commission, he added, cannot fulfill its statutory duty to monitor program performance without that information. Mr. Laney said that the ADR Committee of the State Judicial Council would contact court staff to thank them for their efforts in collecting data. Ms. Huffman asked whether he would also write to those who do not report? He said that he would consider it. Judge Lee added that the Executive Commission ought to also look at the situation.

Judge Steelman mentioned some numbers that he was aware of that indicated that there had been a decline in the trial rate since the imposition of mediated settlement. Mr. Little expressed interest in those numbers. Ms. Huffman asked Ms. Whitley whether court staff were comfortable with the changes to the report form. She said they were and Ms. Huffman asked for a vote on the proposed revisions to the caseload reporting form and they were adopted. Ms. Huffman noted there were some inconsistencies between the mediator and other neutral reports and suggested the Commission may want to address them. She added that by the next meeting she planned to have caseload numbers for FY 2009/10. Judge Lee thanked the Committee.

Judge Lee next called for Liaison Reports. Mr. Laney reported that there is still interest in producing an updated version of the Green Book. He asked what Committee he should work with? Judge Lee suggested the Executive Committee. Mr. Laney reported that researchers are interested in looking at data for cases mediated in the Eastern District's bankruptcy court. Ms. Whitley reported that the JSCC was pleased to have Judge Lee and Ms. Ratliff at their annual meeting. She asked that Commission members keep in mind the limitations on court staff that are imposed by heavy work loads and inadequate staffing. Judge Lee added that he was very pleased to be at the conference. Mr. Barnhardt reported that he is pleased to be the new chair of the Section. He added that the Section's annual meeting will be held at the Grandover this coming February. Mr. Schafer mentioned some new case law that has impacted IC agreements. There being no further business, Judge Lee adjourned the meeting.

Commission Meeting

February 26, 2010

9:00 A. M.

By Telephone Conference

Members Present: Chairman Lee, Clare, Conley, Curran, Farah, Huckel, Hudspeth, Jackson, Little, McKown, Morgan, Morris, Tash and Turner. Ex-officio members, guests and staff: Barnhardt, Carlson, Huffman, Laney, Ratliff, and Schafer.

Judge Lee thanked everyone for participating and noted that the purpose of the meeting was to discuss the proposed advisory opinion distributed at the February 5th Commission meeting. After determining that everyone had the most recent draft of the opinion, he turned the meeting over to Mr. Little on behalf of the Ad Hoc Committee that wrote the opinion. Mr. Little thanked everyone for responding to his survey regarding the opinion and noted that everyone who responded concurred in the result, but that two had expressed concerns about the impartiality argument underpinning the opinion. As such, the opinion had been redrafted around more of an abuse of the mediation process argument. Judge Lee asked whether there was a motion to adopt the opinion and Mr. Hudspeth so moved with Judge McKown providing a second and the floor was open for discussion. Mr. Little first noted that there was a minor subject verb disagreement in Standard VIII.B. as recently revised by the Supreme Court and, where that Standard was quoted in the opinion, the grammar was corrected.. Ms. Ratliff said that she would look into getting the grammar corrected in the Standard.

Ms. Huffman asked whether a mediator would be obligated to report to the court in an instance where the mediator knew that a party was seeking to perpetrate a fraud on the court, *i.e.*, the mediator knew that a party and his/her attorney had intentionally failed to disclose a valuable marital asset on his/her equitable distribution inventory affidavit. Mr. Little responded that the opinion does not address the issue of disclosure. That issue, he reminded everyone, was being addressed by the proposed Rule 8.3 exception pending before the State Bar. Judge Turner asked about the meaning of the word "knows" in the third paragraph of the opinion and about situations where parties were posturing? Mr. Laney suggested that was a good question and that he was not sure what level of knowledge was required. Ms. Conley noted that as a practical matter, mediation in ED cases may be held relatively early and the parties are still sorting through their information and sometimes may need to revise their affidavits, *i.e.*, something was left off, but it was inadvertent. Judge Lee noted that down the road the Commission may need to draft a second opinion to define "knows", but that it was clear to him that this situation involved fraud. Mr. Little agreed and noted that the opinion was very narrowly drawn to address an issue raised by the family bar in the context of the Rule 8.3 discussion.

Judge Lee called for a vote on the opinion and the advisory opinion was adopted unanimously. Ms. Ratliff asked whether the opinion should be posted immediately and she was told to do so. Judge Lee thanked the Ad Hoc Committee for their work in drafting the opinion.

Judge Lee noted that the Supreme Court had adopted the Commission's recommendations for proposed revisions to the program rules and Standards of Conduct. The effective date, had added, is March 1, 2010. Several mediators, he reported, had raised the issue of whether the mediator fee increase was applicable in cases ordered into mediation prior to March 1, 2010, but mediated on or after that date. After a short discussion, it was determined that the fee increase would apply only in cases ordered to mediation on or after March 1st. Lastly, Judge Lee asked whether anyone had heard anything regarding appointments. No one had had any further word. Judge Lee noted that he is continuing to keep the issue before the Chief Justice.

There being no additional business he adjourned the meeting.

Dispute Resolution Commission

Minutes

Friday, February 5, 2010

NC Judicial Center, Raleigh, NC

10:00 a.m.

Commission members present: Lee, Clare, Curran, Farah, Hay, Jackson, Little, McKown, Morgan, Morris, Tash, and Turner. Ex-officio members present: Barnhardt, Beason, Huffman, Laney, Minor, Schafer, and Whitley. Guests and staff present: Benade (by telephone), Bryant, Ratliff, and Robinson.

Judge Lee thanked those who had traveled in the inclement weather and noted that several were participating by telephone. He welcomed guests – Dawn Bryant from Carolina Dispute Settlement Services and Lynn Benade a certified mediator from Charlotte. He called for approval of the minutes which were approved as submitted and then asked Ms. Ratliff for her report.

Ms. Ratliff reported that an edition of the *Intermediary* was published in December during the holiday lull. During that same period, the office had also begun re-organizing information on the Commission's web site to separate application and program materials. She explained that the re-organization was based on feedback provided by callers. She noted that she had also made a request to the AOC that the office be permitted to spruce up the Commission's web site with some more color or photos, but was told that was not possible. Lastly, during the holiday lull, she reported that she had contacted a number of dispute resolution directors in other states to ask about their efforts to interface with judges. She obtained a copy of the *Judges' Mediation Bench Book* published by the Alabama Center for Dispute Resolution and added that the Program Oversight Committee had agreed to consider publishing such a book for NC judges. Next, Ms. Ratliff reminded everyone that at its last meeting, the Commission had adopted a policy on sharing mediator contact information, *i.e.*, that the office would respond to such requests by providing U.S. mailing addresses electronically. She reported that she was working with AOC Technology staff to implement the policy and that she had also requested that the office be empowered to isolate and electronically reproduce mediator email addresses and telephone numbers. She suggested that such information could be useful in facilitating communications between judges/court staff and mediators and between researchers who might be hired by the Commission to study the various programs and mediators.

Next, Ms. Ratliff reported that the 2009/10 certification renewal period was closed and that there had been about 10% attrition among the MSC mediators and 6% attrition among the FFS mediators relative to the number of mediators who were certified both at the end of 2008/09 and 2009/10. She suggested that this was a significant loss compared to previous renewal periods, but that the loss had been entirely offset by new certifications issued during the 2008/09 fiscal year and the 2009/10 year to date. Essentially, renewals had dropped off, but new certifications were robust. As such, she reported that fee collections had remained strong and, for the first time, fees collected to date this fiscal year had already exceeded \$200,000, not including the \$20,000 carry forward from the previous year. She added that office staff had

continued to meet with AOC Technology staff to discuss adding a credit card payment feature to the on-line renewal process. She hopes to have that enhancement in place for the 2010/11 renewal period. Lastly, she reported that when she talked with Directors in other states that she had heard much bleak news over funding issues. Many State offices were being forced to cut staff and curtail services. She said she was grateful for the vision of those who established the Commission's office as self-supporting.

Judge Lee next reported for the Executive Committee. He reminded everyone to file their required reports with the State Ethics Commission by March 2, 2010. Next, he reported that the \$48,000 in certification fees that had been removed from the Commission account by the Office of State Budget and Management would be restored. He added that Judge Smith and Mr. Whaley had been very supportive of his efforts to persuade OSBM to return the fees. Judge Lee then asked whether anyone had heard anything regarding the open positions on the Commission. He noted that Ms. Bryant had expressed interest in the district criminal court certified mediator seat that was created by Terri Massiello's resignation. He noted that Melissa Johnson had also expressed interest. Judge Lee said that he would contact the Chief Justice.

Professor Morris reported for the Standards, Discipline and Advisory Opinions Committee. Professor Morris indicated that his Committee met on October 28 to discuss several matters, including: a complaint, an appeal of an applicant whose FFS certification who been previously denied by the Committee, and two applications (one MSC and one FFS) which raised character concerns. Lastly, he reported that the Committee was working to revise the Guidelines by which staff initially evaluated convictions, disciplinary matters, tax liens, *etc.*, to determine whether it was necessary to refer them to the Committee.

Mr. Little reported for the Program Oversight Committee. First, he introduced a proposed change to the MSC, FFS, Clerk and DCC Program Rules that would prohibit the recording of a mediation conference. Professor Morris asked what happens when they do record. Mr. Little responded that the Committee had not discussed that issue and that no punishment was provided for in the rule. Ms. Bryant observed that a mediator could refuse to conduct the conference and suggested that the court probably had inherent authority to hold the person recording in contempt. Mr. Minor noted that the Medicaid mediators had encountered problems with taping and the Attorney General's office had acted to stop the practice. Mr. Tash asked whether the rule should specify that a violation will lead to the mediator terminating the conference. Mr. Little suggested that the Committee ought to look at the notion of sanctions. Mr. Farah asked about ramifications of attorneys doing the taping as opposed to parties. He also raised the issue of parties violating other program rules and noted it could be a lengthy discussion. Judge Turner suggested that the sentence prohibiting recording seemed a little long to him. Judge Lee suggested some wordsmithing that broke the language into two sentences. With that change the proposed rules were unanimously adopted. The Committee will further consider the enforcement/sanctions issue that was raised.

Next, Mr. Little introduced a proposal to eliminate the requirement in MSC, FFS, DCC and Clerk Rule 6 that a mediator distribute evaluation forms to parties at the conclusion of mediation. He briefly explained how that language had gotten in the rules in the first place and, though it was well intended, noted that many mediators were ignoring the requirement. Parties who registered formal complaints against mediators, he noted, often seized on this issue in an effort to buttress their complaints. The SDAO Committee, he added, had asked the Program

Oversight Committee to consider striking the requirement. In striking the requirement, he added, nothing would prevent a mediator from still distributing an evaluation if s/he wanted to have that information for his his/her own information and reflection. The Commission unanimously agreed to eliminate the requirement. Next, Mr. Little introduced a proposal to strike the language in FFS and DCC Rule 6 requiring the mediator to distribute an informational brochure to the parties. He noted that the situation here was similar to the one noted above. The Commission unanimously agreed to eliminate the requirement. Ms. Ratliff asked whether the office should continue to publish the brochure and evaluation and keep them posted on the web and the Commission responded affirmatively.

Next, Mr. Little reported that his Committee was looking at the language in the enabling legislation for all the programs that addressed inadmissibility of negotiations. Although the language varied among the statutes, MSC and FFS enabling legislation relating to inadmissibility of negotiations, provides that a mediator is permitted to reveal confidential information in "disciplinary hearings" before the State Bar. A question, Mr. Little noted, had been raised by a mediator as to whether this language permitted him to speak to a State Bar investigator. He stated that the Committee was still discussing this issue.

Mr. Huckel reported that his Committee had considered an application for a waiver of the 40-hour FFS training requirement from an applicant who had taken an on-line basic mediator training course in California. Though the applicant had completed some 80 hours of on-line training, Mr. Huckel noted that there were no role plays included and that only five hours of the course focused specifically on family and family law issues. He reported that the Committee denied her request and would continue to look at such applications on a case-by-case basis. Mr. Minor noted that he was very concerned about the growing number of such courses and the number of people taking them. He thought the situation was being driven by tight economic times. He was opposed to on-line training. Mr. Beason agreed, saying he could not imagine how on-line training without role plays could be effective. Ms. Ratliff noted that she would not necessarily have realized that this was on-line training if Mr. Minor has not alerted her earlier to be aware of California applicants and she had not gone to the trainer's website. She asked whether the Commission would object if she revised certification applications to ask applicants to indicate whether any portion of their training was offered on-line if they did not take an approved training? There was no objection.

Mr. Little reported for the *Ad Hoc* Committee on that proposed Rule 8.3 exception. He explained that the Commission's proposal for a Rule 8.3 waiver had been presented to the State Bar Ethics Committee which voted to submit the proposal for public comment. The family bar, he added, had raised some concerns. At one point, the members of the *Ad Hoc* Committee realized that Bar staff had changed some of the wording in the proposal presented for comment. Those changes resulted in making the permissive reporting requirements under Standard III, mandatory, for example, the edited version would require a mediator to report under Standard III if an attorney made threats. Mr. Tash said that he understands that the Family Law Council intends to oppose the exception. Mr. Little noted that the Rule 8.3 exception reads as follows: "This Rules does not require disclosure of information learned during a mediation by a lawyer who is serving as a certified mediator and who is subject to the NC Supreme Court Standards of Professional Conduct for Mediators unless disclosure is allowed by the Standards." Mr. Little reported that a blanket 8.3 exception was not likely to pass and that he could live with

this change. He asked whether the Commission wished to ratify it? Judge Lee called for a vote and the revised version was approved with Mr. Farah abstaining. Next, Mr. Little explained that the family bar had expressed concerns about situations where a party and his/her attorney intentionally fail to disclose a marital asset(s) during a mediation and how a mediator would handle that if there was an 8.3 exception. He added that he had drafted an Advisory Opinion that addressed intentional failure to disclose in the context of a family financial mediation and that he hopes will reassure the family bar. He asked that the members read the Opinion and suggested that Judge Lee schedule a telephone meeting to discuss it. He explained that the opinion was essentially crafted around an impartiality or neutrality argument. Professor Morris said he was not comfortable with the impartiality theory and believed the issue was more that the integrity of the process was compromised, that the mediator was complicitous if s/he allowed the mediation to continue. Judge Lee asked whether the Commission approved the result if not the analysis, and there was approval. Judge Lee scheduled a telephone conference and vote for Friday, February 26 at 9:00 a.m. and sent the Opinion back to the Committee for further consideration.

Ms. Huffman reported for the new *Ad Hoc* Statistics Committee. She inquired about the Committee's charge and scope. After a short discussion, it was determined that the Committee would work to interpret and evaluate the statistical information collected to date and to consider how to better refine collection efforts in the future. It was suggested that Ms. Huffman might want to include George Doyle in the discussion. He is a member of both the Dispute Resolution and Family Law Sections.

Judge Lee next called for liaison reports. Ms. Whitley reported for the NCJSS. She asked whether AOC forms could be saved as word documents (they can be saved as word documents in Casewise). She also reported that one district had recently adopted a local rule providing that only the mediator could request an extension of the court's deadline for completion. Ms. Ratliff said that she would assist her in exploring this matter with AOC Forms staff. Mr. Barnhardt reported on activities that the Dispute Resolution Section has planned for its upcoming annual meeting and invited everyone to attend. Mr. Laney reported that the supply of Green Books has nearly been depleted. He asks whether the Commission would support, financially and otherwise, an updating and reprinting of the book. He suggested it would cost between \$20,000 and \$25,000 to reprint. Judge Lee and the other members expressed their support. Mr. Minor reported that the MNNC will soon be publishing its statistics for FY 2008/09. He added that 23 community mediation centers processed 19,400 referrals that year, serving 63,000 citizens. The resolution rate was 93%. He also reported that the centers had processed some 5,324 Medicaid appeals since October 1, 2008. Judge Lee acknowledged the hard work of the centers and expressed the Commission's appreciation.

There being no further business Judge Lee, again, thanked everyone for braving the roads, asked them to drive safely going home and adjourned the meeting.