Minutes

NC Dispute Resolution Commission

Friday & Saturday, September 14-15, 2012
Crowne Plaza Hotel, Asheville, NC

Friday September 14, 2012
1:00 PM

Members present. Lee, Anderson, Bryant, Clare, Conley, Gullick, Hay, Hicks, Hudspeth, Little, McKown, Morgan, and Turner. Ex-Officio Members present: Ellis, Huffman (for Cole), Laney, and Whitley. Guests and Staff present: C. Anderson, Cash, Davis, Ellis, Vincent, and Ratliff.

Judge Lee began the meeting by welcoming everyone and introducing new Commission members Judge Charles Anderson (district court, Hillsborough, replacing Judge Turner) and Judge Teresa Vincent (district court, Greensboro, replacing Judge McKown). He noted that Senior Resident Superior Court Judge Jesse Caldwell (Gastonia, replacing Judge Lee) and mediator Gary Cash (Asheville, replacing Ms. Conley) had also been appointed, but could not be present today. Mr. Cash, he added, would attend Saturday along with new ex-officio member and Dispute Resolution Section chair, Rene Ellis. Judge Lee added that Mr. Little would succeed him as chair. Judge Lee presented plaques to retiring Commission members: Conley, Hay, Hudspeth, McKown and Turner and thanked them for their service. Mr. Little presented a plaque to Judge Lee thanking him for his service as a member and his leadership as chair. Judge Lee added that successors for members Hay, Hudspeth and Justice Jackson had yet to be named. Mr. Laney distributed copies of the newly re-published *Alternative Dispute Resolution in NC: A New Civil Procedure* to those who had received plaques. Lastly, Judge Lee recognized former Commission member and Asheville mediator Barbara Davis who was visiting the meeting.

Judge Lee called for approval of the May minutes and they were approved without change. He asked Ms. Ratliff for her report. She first reported that the certification renewal period for FY 2012/13 was about to close and that the numbers had held steady: 1,320 (active MSC), 109 (inactive MSC), 286 (active FFS), 86 (inactive FFS), 166 (active Clerk), 14 (inactive Clerk), 60 (DCC) for a total of 2,041 active and inactive certifications outstanding. She added that as of yesterday, 153 MSC certifications and 11 FFS certifications had not been renewed. She noted that mediators are continuing to inquire about credit card payment as a way to pay their certification fees. She reminded Commission members that the renewal application had been revised this fiscal year to ask mediators whether they had worked with an observer during the year and if not, why not. She said the office was still processing that information, but she was surprised by the number of mediators, 158, who reported having conducted no mediations during the period. Next, Ms. Ratliff gave an end of fiscal year report for FY 2011/12 noting that the Commission had $187,587.08 in expenditures and $214,394.00 in revenues, leaving a

surplus of $26,806.92 plus $12,600 in unspent revenue returned by OSBM this fiscal year. The addition of these unspent funds brings the cumulative unspent revenue amount to $152,826. She reported that Sharon Laue had retired on August 31, 2012, and noted that Maureen Robinson had moved into her old office. She asked the Commission to approve a $1,300 expenditure for some new chairs for the office. The Commission approved the purchase up to $2,000. She also reported that the Commission was running out of storage space for files and it was suggested that she think about contacting a company that does information scanning and storage. Lastly, she noted that at the May meeting the Commission had asked her to contact Mr. Minor for the purpose of telling him that he had been missed at Commission meetings. She said she had done so and he had advised her that he was too busy to attend, but might find a center director to attend in his stead. He said he appreciated the inquiry.

Judge Lee next called on Ann Anderson to report on an initiative proposed by new Section Chair Rene Ellis -- creation of a Task Force on Mediation and the North Carolina Federal Courts. The Task Force will be looking at federal trial court mediation programs and identifying any concerns that the mediators and other stake holders may have. She reported that some of the preliminary concerns noted to date were: compensation of mediators, reporting requirements, and discipline of mediators. She asked Commission members to let her know of any issues they would like the Task Force to consider.

Judge Lee reported for the Executive/Operations Committee first calling attention to proposed changes to G.S. § 7A-38.2(b) intended to authorize the Commission to address instances where individuals claimed to be certified or as eligible to be certified when they were not. The proposal was adopted with some grammatical changes and some re-arrangement of the text. Ms. Ratliff was asked to re-circulate the proposal once the revisions were incorporated. Judge Lee also noted that he and Mr. Little, in the absence of other Committee members who were unavailable, had conducted an exit interview with Ms. Laue and personnel interviews with Ms. Ratliff and Ms. Robinson.

Mr. Huspeth reported for the Mediator Certification and Training Committee. He turned the floor over to Ms. Clare to lead the discussion regarding changes to Commission Rules VIII and IX. Ms. Clare noted that with more experience addressing complaints and holding hearings, the Commission had realized there were some problems with these rules. The revised copies before the Commission were intended to address these concerns. She then walked those present through the changes noting the more substantive revisions. The changes were adopted with minor corrections.

Next, Ms. Clare reported for the Standards, Discipline and Advisory Opinions Committee. She first called attention to the State Bar's Proposed 2012 Formal Ethics Opinion 2 relating to a lawyer-mediator's drafting of a mediation agreement (contract) for pro se parties. She noted that the Commission had seen this Opinion before, but the Committee was proposing some additional revisions to it. She added that the number of pro se parties involved in the legal system is increasing and this is an area that needs clarification. Considerable discussion followed. Ms. Anderson noted that EEOC

mediators are drafting agreements for pro se parties and Ms. Bryant noted the same thing is happening in the family arena. Mr. Laney asked about district criminal court mediators who are also preparing agreements. Ms. Bryant noted that the district criminal court mediators are drafting pursuant to a very specific statute. Mr. Little observed that this program may be different because the DA and Judge have final authority in the matter, i.e., they can override the agreement and in that sense it is not final, but he still has concerns. Ms. Bryant responded that in her district, the DA may never see the agreement, the mediator simply advises the DA that the parties have reached an agreement. Judge Turner said that he felt the Opinion worked for superior court mediation, but he was not so sure about family mediation. In that arena the sands shift constantly, the parties may have a lawyer one day and not the next, and pro se parties expect the mediator to produce a binding agreement. If mediators can't draft, it would likely put an additional burden on district court judges to draft orders. Judge Turner suggested some additional changes to the revised document for the purpose largely of brevity. Ms. Clare was asked to also make it clearer that the scenario raised in the inquiry involved pro se parties. The proposal was adopted, though not everyone voted, and the Opinion will be re-submitted to the State Bar with the SDAO comments and additional revisions approved at the meeting. Ms. Ratliff will get the additional changes to Ms. Clare.

Saturday, September 15, 2012
8:00 AM

Ms. Clare continued her report by calling attention to a proposed revision to Standard VII.H. on holiday gift giving/receiving by mediators. Some raised concerns about enforceability and others suggested simply leaving the matter to the common sense and discretion of mediators. Following more discussion, Ms. Ratliff was asked to insert a period in the proposal after the word "mediations" and to substitute the ABA's Model Standard II, Impartiality, for the remainder. With these changes the proposal was adopted. Mr. Little stated that after October 1, he intends to bifurcate the SDAO Committee into two committees, one handling grievances and disciplinary matters and the other working with the Standards, Advisory Opinions and matters involving the State Bar or other disciplinary bodies. He added that Mr. Tash will chair the former and Ms. Clare the latter.

Mr. Little next reported for the Program Oversight Committee. He first presented a new addition to the Commission's website, a "Mediator Toolbox", which will pull a number of practice aids together on the Commission's home page. Next, he called on Ms. Huffman to make a presentation on caseload statistics. Ms. Huffman passed out copies of the current caseload numbers and explained how judicial support staff could use CaseWise to facilitate reporting. She noted that currently some districts are not reporting. Others are reporting, but are keeping statistics by hand or using an Excel spread sheet rather than using CaseWise to report. Some districts, she noted, are using CaseWise, but have developed their own codes rather than using the standardized ones. Mr. Little noted that during his term as chair, he hopes to bring more uniformity to statistical reporting and encourage every district to report using CaseWise and the authorized codes. There followed some discussion about why the statistics were important. Mr. Little talked

about the need to be accountable to the General Assembly and to show that the programs are working. Ms. Ratliff said that she gets calls from the public asking about the numbers. There followed additional discussion on how Mr. Little's goal might be accomplished and he noted that he would be looking to some of the newer members to help with this project. Next, Mr. Little called attention to a proposed revision to FFS Rule 1.C.(5) and it was adopted as submitted.

Mr. Laney next reported for the Book Committee. He was pleased to report that the book had now been published for the second time. He noted that he had made a miscalculation in costs and was off about $2,000. He asked for additional assistance from the Commission in making up the shortfall. The Commission approved the request up to $2000. He also noted that there would likely be a few excess books available for around $2.00 a copy and he asked whether the Commission would like to purchase them. He did not know the exact amount, but stressed, again, that it would be a small number. The Commission agreed to purchase them.

Next, Rene Ellis reported for the NCBA's Dispute Resolution Section. She called attention to a letter in the meeting packet from George P. Doyle regarding the upcoming annual meeting of the Section and the possibility of bringing nationally recognized trainer Gary Friedman to the meeting as a keynote speaker and presenter. The letter asked for the Commission's financial support with the project. Ms. Ellis noted that Mr. Friedman's honorarium would be approximately $6,000. The Commission approved the request and agreed to fund the effort up to $6,000 contingent upon the Section also making application for funds from the Endowment Committee. It was also suggested that in light of the contribution, that Ms. Ellis explore whether it might be possible to have a reduced tuition for all certified mediators or to have a scholarship provided for mediators who could not otherwise afford to attend. She will check on both possibilities.

Ms. Ratliff was asked to get email oaths out to the new Commission members before October 1 and Mr. Little noted that he wanted to have four Commission meetings this year and set the following dates: December 7 in Raleigh, February 1 and May 17 at locations to be determined and September 13-14 at the Crowne Plaza Hotel in Asheville. There being no further business the meeting was adjourned.

Minutes

NC Dispute Resolution Commission

Friday May 11, 2012
North Carolina Judicial Center, Raleigh, NC
10:00 a.m.

Members present. Lee, Anderson, Bryant, Clare, Conley, Farah, Gullick (by telephone), Hay, Hicks, Hudspeth, Little, McKown, Morgan, Tash and Turner. Ex-Officio Members present: Beason, Cole, Doyle, Laney, Schafer, and Whitley. Guests and Staff present: Batten, Ellis, Goldberg, Huffman, Igou, and Laue, Ratliff and Robinson.

Judge Lee called the meeting to order, welcomed everyone, and introduced guests, including: Rick Igou and Rene Ellis from the Dispute Resolution Section and two UNC-CH MPA students, Dane Batten and David Goldberg, who would present research they conducted for the Commission. Judge Lee next administered the oath of office to new Commission member, Susan Hicks, Moore County Clerk, and to returning members Bryant and Clare. The minutes of the January meeting were approved without change.

Ms. Ratliff reported for the office that staff member Sharon Laue would be retiring on August 31st after 14 years and the Commission would be recognizing her service during lunch. She added that Ms. Laue had made many contributions to the work of the Commission and that, over the years, many mediators had complimented Ms. Laue's cheerful manner and helpfulness. She added that the office was gearing up for the upcoming renewal period and that staff were making arrangements for the fall retreat. She noted that she had very much enjoyed working with the MPA students this winter and spring, though it had been a struggle to get the information they needed for their project. Lastly, she asked Commission members to approve purchase of a new printer for Ms. Robinson which they did.

Judge Lee turned the floor over to Messrs. Batten and Goldberg who presented results of the research that they and their colleagues, Meghan Boyd and Davena Mgbeokwere, conducted on the Commission's behalf. The students were asked to dig into caseload statistics for the MSC program collected by court staff over a two-year period in an effort to learn whether mediation might be generating more settlements than the numbers reflected. The students surveyed attorneys in four judicial districts to ask questions about the ultimate outcome of their cases and their perceptions about the role mediation played in settlement. The students reported that 68.6% of cases that initially impassed in mediation went on to settle and that 74% of the attorneys involved in those cases believed mediation contributed to those eventual settlements. In addition, they reported that attorneys indicated that 11.2% of cases classified as "disposed without ADR" had, in fact, been mediated, suggesting that the Commission may need to encourage better mediator reporting. Lastly, they noted that many attorney narrative responses had been very

positive about mediation, though there had been a few negative comments as well. Ms. Ratliff indicated that the student's evaluation would be posted in full on the Commission's website. Judge Lee thanked the students for their interest and hard work.

Next, Judge Lee reported for the Executive Committee that all monies confiscated by OSBM had been returned to the Commission's accounts and he would be working with Rex Whaley of the AOC to get statutory approval to allow the Commission's unspent revenues to be sequestered in an account under AOC control which OSMB could not access. The funds, he stated, would still be subject to state audit, but not accessible to OSBM. Judge Lee also asked Mr. Little and the Program Oversight Committee to work with Ms. Cole on encouraging more uniform reporting of mediation caseload statistics and bringing responsibility for compiling the numbers back into the Commission's office. Judge Lee asked for an update on the deadline extension issue and Mr. Little responded that he is still looking at that matter and will plan to post draft letters and forms on the Commission's website in the near future. Next, Judge Lee introduced some proposed legislation that would address the issue of misrepresentation of certification. Following discussion, Mr. Farah suggested some revisions. It was determined to table the draft until the September meeting. For purposes of that meeting, Ms. Ratliff was asked to redraft to include Mr. Farah's revisions and to supply some examples of situations where certification had been misrepresented. Next, Judge Lee noted for the minutes that Ms. Hicks had received a letter for the SEC stating that no existing or potential conflicts of interest had been found that might impact her service on the Commission.

Ms. Clare next reported for the Standards, Discipline and Advisory Opinions Committee. She first called attention to proposed Advisory Opinion 12-23 which cautions mediators against speaking voluntarily with State Bar investigators conducting a preliminary investigation of a complaint regarding attorney conduct that occurred during mediation. The AO was adopted unanimously. Ms. Clare next gave an update on the issue of attorney and non-attorney mediators drafting agreements reached in mediation. She noted that the matter was before two committees at the NC State Bar and that she and Mr. Laney would be contacting Alice Mine to schedule an appointment to try and obtain some clarification on the State Bar's position relative to mediator drafting. Next, Ms. Clare introduced a memo on holiday gifts. She reported that Ms. Ratliff had received a request from a mediator asking whether he could give chocolates to his mediation clients and those he hoped to retain as clients. Ms. Clare noted that such gift giving could be construed as a violation of Standard VII.H (Conflicts of Interest). She reported that her committee had discussed this matter at length and been unable to reach agreement. Some argued against gift giving and the perceptions and scrutiny it invited. Mr. Little noted that he favored a bright line prohibition and thought gifts should be limited only to letters and cards expressing thanks. Others had no problem with gifts of nominal value such as pens, calendars, a cup of coffee, or lunch. Judge Morgan suggested that folks just get festive during the holidays and that the Commission should show a little flexibility and common sense, that no one would reasonably think that someone could be unduly influenced by a box of chocolates. Ms. Clare noted that the Committee was only seeking input at this point and the matter would likely be back on the September agenda. Next, Ms. Clare reported that two other potential Advisory Opinions were in the works – both addressing the issue of whether a mediator is enabling the authorized practice of law by

1) conducting a mediation at which an out-of-state attorney attends with his client and 2) conducting a mediation at which a corporation appears though a representative who is not its attorney. Ms. Clare added that she is consulting with the State Bar on both scenarios.

Ms. Clare reported that there were four complaints before her committee this quarter: one was dismissed by the Committee, but the mediator referred for counseling with a committee member (the complaining party has now appealed that determination); one was dismissed by the Chair; two are still pending. One serious ethics breach relating to confidentiality was self-reported by a mediator this quarter. The mediator, she reported, had inadvertently given a copy of one couple's agreement in a divorce mediation to another couple. The couple who received the agreement reported the breach to the district bar councilor. The Chair and staff advised the mediator in the matter.

Lastly, Ms. Clare reported that there is an inconsistency in DRC Rule VIII.D.(4) regarding who could appeal the imposition of a sanction or referral. Judge Lee agreed there was a clear inconsistency and asked the SDAO Committee to have a proposed revision correcting the situation available for consideration at the September meeting.

Mr. Hudspeth next reported for the Mediator Certification and Training Committee. Mr. Hudspeth first called attention to proposed revisions to the MSC and FFS Trainer Guidelines. The changes would expand the amount of time that trainers are required to devote to discussion of ethics and the Standards of Conduct and would require discussion of advisory opinions adopted to date. The revisions were approved. Mr. Hudspeth also noted that in light of mediator criticism, the committee had worked with Commission staff to tighten up and abbreviate the on-line renewal application and made other changes that were approved earlier this year. Next, Mr. Hudspeth reported that his committee had addressed a number of matters that came up this quarter dealing with training completed out-of-state and observations. Lastly, he also reported that the State Bar had asked for the Committee's assistance in evaluating a Christian conciliation course that had been submitted for CLE credit.

(At this time, Ms. Laue and Ms. Robinson joined the Commission for lunch and cake. Judge Lee presented Ms. Laue with a plaque and she addressed the group and said that she had enjoyed working with the Commission over the years and would miss everyone.)

Mr. Little reported for the Program Oversight Committee and reiterated that he would address the deadline extension matter soon. He also mentioned that there was some interest, particularly in District 10, in expanding FFS Rule 1 to give the court authority to refer family matters beyond equitable distribution to mediated settlement, including support and custody disputes. He suggested his Committee may want to discuss this matter further in September.

Mr. Laney next reported for the Book Committee. He first discussed the total amounts contributed by various entities to this project and indicated that there had already been some preliminary orders placed for the book. The Commission voted to distribute copies of the book to: all Commission and ex-officio members, all certified

mediators (active and inactive), Senior Resident Superior Court Judges, Chief District Court Judges, and all NC law school libraries and the Supreme Court Law Library. Ms. Ratliff was also asked to contact the ABA to determine how many law libraries (plus 50 Supreme Court libraries) there were throughout the US. Mr. Laney reported that the cost of the book should run approximately $6-7 dollars per copy with shipping. Cost to order (off Amazon, for example) after the initial shipment will be $10-12 per copy. There followed some discussion about shipping costs for Commission purchased books and Mr. Laney suggested that he thought it made more sense to have the publisher ship the books directly if the Commission could supply labels. The Commission agreed to publisher shipment with Ms. Ratliff to supply labels (see costs in attached spread sheet.) Mr. Laney concluded his report by noting that the book should be out by the end of August or early September.

Judge Lee next called for Liaison reports: Mr. Doyle reported for the Section that this would be his last meeting and that Rene Ellis would succeed him as Chair. He recapped some of matters that he had pursued while Chair and noted that had enjoyed working with the Commission. Judge Lee thanked him and welcomed Ms. Ellis. Judge Lee noted Jody's Minor absence and asked Ms. Ratliff to call and let him know that the Commission had missed his participation. Mr. Schafer noted that there had recently been some turmoil at the Industrial Commission, but that its mediation program had gone unscathed. Ms. Whitley noted that the extension issue continues to be a problem for court staff and she is pleased that Program Oversight is addressing the matter.

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

Minutes

NC Dispute Resolution Commission

Friday January 27, 2012
North Carolina Judicial Center, Raleigh, NC
10:00 a.m.

Members present. Lee, Anderson, Bryant, Clare, Conley, Farah, Gullick, Hay, Little, McKown, Morgan, Tash and Turner. Ex-Officio Members present: Cole, Laney, Steelman and Whitley. Hudspeth, Jackson and Schafer were excused. Guests and Staff present: Benade, Doyle, Hanson, Igou, Leone, Morris, Percival, Ratliff, and Smith.

Judge Lee called the meeting to order and introduced guests, including: Judge Steelman's law clerk, Lynn Percival; Robin Frank Smith from Carolina Dispute Settlement Services (CDSS); Professor Mark Morris and law students Valerie Hanson and Leah Leone from NC Central University School of Law (NCCU-Law); and Charlotte mediator, Len Benade.

Judge Lee asked Professor Morris to introduce Ms. Leone and Ms. Hanson who had won the Jeffry S. Abrams' National Mediator Competition held in Houston. Ms. Leone took first and Ms. Hanson second place with Professor Morris coaching. Professor Morris praised their mediation skills and noted that their wins were a significant accomplishment. Judge Lee presented a framed copy of a Commission Resolution noting their achievement to both woman and to Professor Morris.

Next, Judge Lee called for approval of the minutes of the September meeting and they were approved. He next asked for the office report. Ms. Ratliff reported that proposed rule changes were adopted by the Supreme Court effective January 1, 2012, and the new rules were distributed to mediators and court staff. She also reported that the MSC and FFS Reports of Mediator had also been revised, distributed and posted and that the Farm Forms were scheduled to be reviewed later. Two editions of *The Intermediary* were also published this quarter with the second focusing on the revised rules. Ms. Ratliff also reported that the Commission's Annual Report for 2010/11 had been published and distributed. Next, she noted that the Commission's proposal to have the assistance of UNC-CH MPA students to do research had been accepted and four students would be surveying lawyers to learn: 1) whether the mediation process affects final outcomes in cases reported impassed during the actual conference and 2) whether there is a mediator underreporting problem. She added that the students' final report should be available by April, 2012. Ms. Ratliff thanked Commission members for responding to requests from the office to comply with State Ethics Commission requirements on training and reporting. Next, Ms. Ratliff requested that a laser printer be replaced in the office. The Commission approved the $2051 purchase. Lastly, she noted that the office had confirmed that the Commission's annual retreat would again be held at the Crown Plaza in Asheville.

Judge Lee next called for Committee reports and he reported for the Executive/Operations Committee. He first noted that OSBM had agreed to restore the $12,600 it removed from the

Commission's account. He added the Mr. Stahl would be working with the Commission to help legislatively clarify its financial independence.

Mr. Little reported for the Mediator Certification and Training Commission on behalf of Mr. Hudspeth who is recovering from back surgery. He first reported on staff denials of certification applications/requests from applicants. He noted that to streamline the renewal process, the Committee had shorted the on-line renewal application and renewal letter. He also noted that the website would be updated to incorporate the recent MSC/FFS Rule 2 change requiring that letters from mediators seeking court appointments be forwarded to the Commission rather than to judicial officials as required previously. Next, Mr. Little discussed proposed revisions to MSC Rules 8.B., 8.C. and 8.J. and FFS Rule 8.D. and changes to accompanying observation forms. The Commission reviewed the proposals and made some minor changes. Judge Lee asked that these revisions be put back on the agenda for the May meeting. Lastly, Mr. Little shared the Committee's changes to the policy on dated training (training more than ten years old) with the Commission. No objections to the Committee's changes were noted and Ms. Ratliff will post the revised policy. As a way of fostering opportunities for observations, Mr. Tash suggested revising the online renewal form to ask mediators whether they allowed any observers during the reporting year. Ms. Ratliff was asked to add that inquiry to the renewal form.

Judge Lee next asked Mr. Laney and Mr. Little to present their position papers on whether mediators could/should be compelled to testify at state bar hearings relating to attorney discipline (papers are attached as part of the minutes). Though they held differing views on the subject and interpreted the Commission's enabling legislation differently with regard to what it required, both agreed that the Commission needs to focus on how the statute should be revised to best and most appropriately address the matter in the future. Mr. Little believes that there are sound public policy reasons, including protection of the public, to justify compelling mediators to testify. Moreover, he reports that State Bar staff is under the impression that mediators are compellable. Mr. Laney believes that mediators must maintain confidentiality and should have no role to play in correcting bad acts that occur within the negotiations' process. There followed considerable debate on the matter, including discussion about the notion of mediator privilege, how absolute should/can confidentiality be, the State Bar's expectations, and public policy considerations. A motion was made that the Commission vote on the following question: "Should a mediator be compellable to testify before the State Bar in a disciplinary hearing against a lawyer for violating the Rules of Professional Conduct?" The vote was 7 "yes" and 5 "no". A second motion was made to clarify program enabling legislation by striking, "any agency established to enforce standards of conduct for mediators or other neutrals" and substituting "Dispute Resolution Commission". This motion was approved by a vote of 7 to 4. This change will need to be submitted to the General Assembly. Ms. Clare asked whether the proposed advisory opinion on this same topic should move forward or be held in abeyance until the General Assembly has acted? Her Committee will discuss the matter.

Ms. Clare next gave the report for the Standards, Discipline and Advisory Opinions Committee. She began with a proposed AO that addressed mediators charging for review of documents prior to mediation. The AO was adopted with the Committee instructed to add some language at the end referencing the Industrial Commission's mediation program and noting that its rules and operations might necessitate a different response to the inquiry. Next, Ms. Clare called attention to a second AO relating to confidentiality. That Opinion was adopted with the following changes to the second sentence of paragraph three: "This opinion goes further to state that it would be ~~best~~ better practice for a mediator~~s~~ to ask the parties whether they need to negotiate a confidentiality agreement to govern their conduct during and after the mediation when confidentiality is an issue." Ms. Clare reported that the Committee was working on other Opinions addressing additional matters, some of which will need to be submitted to the State Bar as well.

Next, Ms. Clare called attention to a letter the Committee has received from State Bar Deputy Counsel David Johnson addressing the Commission's inquiry on the role of non-lawyer mediators in memorializing agreements reached by *pro se* parties during mediation. She added that the Committee has not yet had an opportunity to fully consider the letter and would be doing so shortly. She added that she has not yet heard from the State Bar Committee which is addressing the same question from the perspective of attorney mediators. Ms. Clare next reported that three separate instances have recently come to the Committee's attention of non-certified individuals holding themselves out to the public as being certified by the Commission. She reported one of these instances to the consumer protection staff at the Attorney General's office and was advised that they simply did not have the resources to investigate the matter. She added that her Committee had discussed these situations and had questions about whether a certification, as opposed to a licensing body, could be empowered to issue cease and desist orders or take further action against such parties. She asked whether the Executive Committee might be willing to consider this issue. Judge Lee responded that the Executive Committee would take on the matter. Ms. Clare then updated the Commission regarding complaints – one was recently dismissed by the SDAO Chair and four additional complaints were currently pending. She noted that her Committee had been consistently busy this quarter and would be meeting following the Commission meeting. Mr. Little reported for the Program Oversight Committee. He first reported that the Commission had received a number of inquiries from court staff regarding the MSC/FFS Rule 3.C changes and the withdrawal of the posted Motion to Extend Deadline for Completion. Due to the fact that there was so much confusion, he reported that there would be additional discussion of this matter and involvement of court staff. He also noted that a form letter and short form order would be developed and made available and that some clarification from AOC Legal may be necessary.

Mr. Laney reported for the District Criminal Court Mediation Committee. He reported that the group had met twice since the last Commission meeting. Among the matters discussed at the meetings were: the possibility of combining the DRC and MNNC certification processes and centers' charging for DCC mediations. At that point, he introduced Robin Frank Smith, Director of Volunteer and Court Services at CDSS. Ms. Smith reported that while the new legislation provided for mediators to collect a fee for services, it provided no guidance concerning collection or documentation of fees which are to be paid directly to the Centers. She added that Wake County's district court judges did not want to begin charging fees until the Commission had reviewed and approved CDSS' proposed policy on charging, collecting and receipting fees. Ms. Smith called attention to two documents before the Commission, a proposed policy statement and a reporting form which notes payment and receipt. She explained that the defendant would pay the administrative fee up front and that if they don't pay, there would be no mediation and that CDSS would retain the fee regardless of whether mediation is successful. The Commission approved the policy and form, noting that what they were approving was not a general policy, but applied to CDSS only. Judge Lee asked Ms. Smith to work with Mr. Laney to determine what the other Centers participating in the Commission supported program were doing and whether these documents might be of assistance to them. They agreed to do so.

Mr. Laney next reported on the soon to be republished Green Book. He expects the book to be republished in late April or early May. He reported that expenses have been a little more than expected and he asked the Commission for some additional funds. The Commission agreed to provide an additional $3,160 toward the effort.

Next, Judge Lee called for liaison reports. Ms. Cole reported that DeShield Smith had left the NCJC and would assume new duties as a Business Systems Analyst working out of Bryson City.

Though a final decision has not been made, she will likely assume some of Ms. Smith's duties. Mr. Doyle reported that the Section would be celebrating its 20th birthday at its annual meeting and CLE program to be on February 24, 2012, at the Grandover. Judge Lee would be their dinner speaker. Ms. Whitley reported for the JSSC noting the Rule 3.A. concerns mentioned earlier and adding that in some districts a $20.00 filing fees was being assessed to file a Designation of Mediator form.

Judge Lee noted that the next meeting of the Commission was scheduled for May 11, 2012, at the NCJC and the fall retreat would be held September 14-15, 2012, in Asheville. There being no further business, he thanked everyone for coming and adjourned the meeting.

The Proper Contours of Mediator Confidentiality Under North Carolina Law

Frank Laney

January, 2012

For the consideration of the Dispute Resolution Commission:

One of the central tenants of mediation is confidentiality – the idea that what is told to a mediator will be held in complete confidence by the mediator. The purpose of mediator confidentiality is to encourage parties to voluntarily open up to the mediator and divulge information that would otherwise be kept strictly to the party or the party's attorney. By getting access to this private information from each side, the mediator can hopefully assist the parties in coming up with creative solutions that may meet each side's unique needs or to encourage parties to make movement toward settlement that they would otherwise be afraid to make for fear of failure or rejection. But it is the assurance that this information will never be used against the one giving it that makes it possible for the mediator to have access to these private thoughts.

However, early in the development of mediation in our state, it became evident that absolute confidentiality of all matters discussed in mediation, irrespective of the circumstances, was not feasible in the real world. So the question was and still is, where to draw the lines, how to balance the parties' and mediator's legitimate need for confidentiality and society's interest in seeing that predatory or improper behavior is detected, prevented and/or punished.

The current issues before the Commission revolve around what should a mediator say when someone involved in a mediation has a claim brought against them or is charged with wrongdoing related to acts that occurred in the mediation. Please allow me to make several background observations to help frame the discussion.

1. We are writing on a blank slate. The framework for this discussion is that whatever the Commission decides should be the policy, will be followed by an effort to amend the present statutes to reflect that policy. Therefore, whatever may be the current law or current policy of this or any other organization should not restrict our discussion. Any new law that the legislature passes will, by definition, rewrite current law and override any governmental policy.
2. The fact that our slate is blank does not mean that we should not be guided at some point by what we can politically get passed by the General Assembly. However, that should be a secondary issue, after we formulate what we think is the best policy for mediation in our state.
3. The current MSC and FFS statutes provide for mediator confidentiality only in civil cases, not in criminal cases. The committee that drafted the original statute debated this issue at length and came to the conclusion that trying to forbid mediators from testifying in criminal cases was probably not going to pass the legislature, and if it did, it probably would be difficult to uphold in the courts.

Immunity from testifying in criminal cases is not an issue that we should try to revisit. So our present discussion relates only to civil matters, whether they are in courts or in administrative agencies.

4. The present statutes explicitly allow mediators to give testimony about elder abuse and child abuse, presumably in criminal proceedings. Another express exception in the present statutes allows for the mediator to testify in proceedings for sanctions under the FFS or MSC statute. As under those statues the only sanctions that can be levied are for failure to attend or to pay a mediator's fee, the only thing that a mediator can give evidence on is who attended and/or the amount of the fee owed and who owes it. As neither of these exceptions is in question at this time, I note them only for completeness.

   GS 7A-38.4A(j) and 7A-38.1(l) [Inadmissibility of negotiations.] – Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

   (1) In proceedings for sanctions under this section;

   (2) In proceedings to enforce or rescind a settlement of the action;

   (3) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or

   (4) In proceedings to enforce laws concerning juvenile or elder abuse.

   As used in this subsection, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

   No settlement agreement to resolve any or all issues reached at the proceeding conducted under this section or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties [and in all other respects complies with the requirements of Chapter 50 of the General Statutes]. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a [mediated settlement conference or other] settlement proceeding.

   No mediator, other neutral, or neutral observer present at a settlement proceeding under this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

Persons in Mediation Against Whom Claims May Be Brought

There are five classes of persons who are likely to have claims brought against them arising out of a mediation – the mediator, a party or party representative, an attorney for a party, another professional who is present at a party's request and a non-party participant who is not a professional. Let us consider each group.

Mediators

If a mediator is charged in any forum – Commission, State Bar, civil court, criminal court or any other venue – then Standard III E would apply.

> *E. Nothing in this Standard shall prohibit a mediator from revealing communications or conduct occurring prior to, during, or after a mediation in the event that a party to or a participant in a mediation has filed a complaint regarding the mediator's professional conduct, moral character, or fitness to practice as a mediator and the mediator reveals the communication or conduct for the purpose of defending him/herself against the complaint. In making any such disclosures, the mediator should make every effort to protect the confidentiality of non-complaining parties to or participants in the mediation and avoid disclosing the specific circumstances of the parties' controversy. The mediator may consult with non-complaining parties or witnesses to consider their input regarding disclosures.*

In my view, this Standard adequately and properly sets forth the mediator's freedom from the expectations of confidentiality in the event a complaint is filed against the mediator. My only suggestion is to consider whether this is adequately reflected in the present statute and if the new statute needs language to make this Standard clearly consistent with the law.

Parties

The party, party representative and the non-party participant all are subject to the same types of claims being brought against them. They will not be charged with professional malfeasance, since they are not professionals (or if they are, they fall under the last group discussed below.) They would be sued in civil court for such things as fraud in the making of the agreement or breach of contract. In such cases, the current statute allows the mediator to testify, but only if the agreement is reduced to a writing, and then only to attest to the signing of the agreement. If a party is charged with a crime, then as noted above, the mediator would be as compellable to testify as any other citizen. **Thus, I do not recommend any changes in the policy or law as related to mediator confidentiality and this group.**

Attorneys

The third group is attorneys who are charged with malfeasance. If the charges are criminal, that situation is already covered above. If they are civilly sued for malpractice, the present law and policy would prevent the mediator from testifying in court or giving discovery except to attest to the signing of an agreement. **I would not recommend changing this policy.**

If the attorney is brought before the State Bar, several issues arise. First, is reporting – this is the 8.3 issue and we seem to have formulated a clear policy with the State Bar that if an attorney violates 8.3 and Standard III in a mediation, then the mediator not only may report it but has a duty to report it to the State Bar. (While this statement may not be as articulate as possible, we all know what this rule is and I hope to set its consideration aside with no further discussion.) Second is voluntary conversations with investigators. Third is compulsory testimony under subpoena.

Let me lay out a bit of background on the State Bar process and policies. A non-lawyer has no duty to speak to the State Bar or its representatives except under a subpoena. A lawyer has no duty to speak to the State Bar or it representatives except under 8.3, under subpoena and under 8.1 when an attorney is charged with misconduct. (See End note below for text of 8.1.) As 8.1 deals only with a lawyer's duty to cooperate in the investigation of his or her own misconduct and the misconduct of the mediator is discussed above, 8.1 has no relevance here. Therefore, the question boils down to – Under what circumstances should a mediator reveal things said and done in a mediation to the State Bar or to an investigator or advocate for the accused attorney in a Bar complaint proceeding?

A lawyer-mediator has a duty under 8.3 to report 8.3 and Standard III violations to the State Bar. In doing so, the mediator should make a full and complete report, preferably in writing. But once a matter is reported, whether by the mediator or another person, what is the mediator's role? **I argue that it is to maintain confidentiality.**

Bad acts in negotiations is not a problem mediation was designed to fix. Long before mediation ever came to North Carolina, attorneys and parties where entering into negotiations and settling disputed matters. It is most probable that any situation, good or bad, that could arise in a present day mediation has already arisen in our state's history in a private negotiation without the benefit of a mediator. Any malfeasance that arose in those unmediated negotiations was dealt with by a system deemed adequate by society. There was no epidemic of rogue negotiators that led to the establishment of mediation. Just because there is now a mediator present should not lead to the burdening of that mediator with any policing or regulatory duties beyond that of simply providing good mediation services.

Mediators are not here to fix every ill in the present day adversarial system. An analogous issue that was raised repeatedly in the formative years of the MSC program was, who is going to protect inadequately represented parties? My answer was, the exact same people who protect them in court – nobody. If a party appears in court with an ill prepared or untalented attorney, there is no super referee that somehow rebalances the situation and makes everything fair. People that hire bad attorneys get bad results and people that hire no attorneys get whatever they can. The same situation plays out in mediation and the mediator is under no more compulsion than a judge to level the playing field. (Actually, the mediator does in fact have more leeway to use tools that are probably not available to judges to try and rectify power imbalances. Similarly, a mediator does have lots of tools and opportunities in the mediation to try and work with attorneys and parties to prevent or correct bad behavior by attorneys.) Mediators should not be charged with protecting parties with bad attorneys and they should not be charged with aiding in the prosecution of bad attorneys.

This is also similar to an argument raised in the 8.3 discussion which I found to be particularly unconvincing. Some lawyers were concerned that false information was or could be conveyed in a mediation and that under the peculiarities of that area of the law, conveying such information could be an unethical act. The lawyers wanted to burden the mediator with policing this situation, while there is no evidence that these same lawyers were doing anything to police similar information exchanges that occur outside of mediation. Mediators are not truth police and are not here to correct all the ills of litigation. **Once the mediation is over, the mediator should have no role in trying to correct what may have occurred in the mediation.** Without the mediator there are the same witnesses that there are and always have been in any unmediated negotiation and the parties and the State Bar should get by with that information.

Even in our own rules, while we encourage the mediator to protect the integrity of our process, we do not include an exception to the confidentiality rule. So when a mediator believes that someone is abusing or taking advantage of the mediation process, the mediator has several options to try and rectify the situation, but to breach confidentiality is not one of them.

The law protects doctors, ministers and other professionals from revealing what people told them in confidence because we as a society value the services of doctors and ministers and realize that without a guarantee of confidentiality that these professionals will not be able to adequately provide the services we as a society want and need. The same is true of mediators. If the general public or the members of the bar start to believe that what they tell mediator can and will be used against them, then our ability to delve into the parties' true needs and interests will be severely hampered. No matter that the chances are small that information will, in fact, be used against a participant, the mere chance will create an extreme chill. Social researchers have determined that people are irrationally risk averse. We spend good money to insure against things that are, in fact, very unlikely to occur. Parties will buy cheap insurance in mediation by simply clamming up.

As noted in the first paragraph of this section, mediators are not compellable to give evidence in the trial courts of our state, except in very limited, well defined circumstances. I see no reason why we should open up these confidential communications to the State Bar when they are not available to the courts themselves. We do not allow mediators to testify in civil courts, I see no reason to make an exception for State Bar proceedings.

I realize that as mediators who take on the job of helping people solve their problems, we will have great compassion for those unfairly or wrongly accused and we will want to sweep in and give critical testimony as to who said what to whom. But that is not our job, and we get onto a slippery slope by taking on that responsibility. If parties want to bring that issue back to us as mediators, we can then help them to resolve it. But we should no more be testifying about what happened in mediation in disciplinary proceedings, than we would in a trial on the underlying case. If people want to fight, they will have to do it without the benefit of a mediator as an ally on either side.

I also realize that every lawyer wants access to any and all evidence, no matter how irrelevant or unpersuasive. But the fact that the State Bar wants it, does not mean that we have to make it available. I am reminded of a wise Superior Court judge in Winston-Salem. A couple who just could not stop fighting had been referred to every social services agency there was. Out of desperation, someone sent them to the local mediation center. They managed to reach an agreement of some sort. But as was predictable, they got into more fights and he eventually killed her. For the murder trial the DA wanted all the evidence of their past conflict history, and so subpoenaed the volunteer mediator. The program director objected, but wound up negotiating with the DA that the director would take the stand and explain mediation and identify the agreement reached in mediation and then the DA could read the agreement to the jury. But once the director took the witness stand, the judge said, "I am surprised to see you. What are you doing here?" To which the director replied, "Well, I do not want to be here, but I was subpoenaed." Thereupon, the judge called the attorneys to the bench and said to the DA, "If this mediator's testimony is the best evidence you have, I am dismissing your murder charge." The DA promptly reevaluated his case and dismissed the mediator from the witness stand. If the mediator is the only evidence in a case, it might be too weak a case to prosecute.

Mediators should not volunteer to provide information to the State Bar or any other agencies nor should they be compelled to give testimony. I believe that the present statute makes the mediator immune to subpoena unless the testimony being sought falls within one of the express exceptions. We should consider if we want that to be made more explicit, or if it is clear enough.

Other Professionals

This group is any professional present in the mediation other than an attorney. They could be parties, non-party participants or professionals present in some professional advisory capacity. For example if a medical doctor or a social worker were to make threats against their spouse in a FFS mediation, that professional's board might find such

conduct unbecoming. Or if an accountant or engineer offered an opinion in a mediation that was false or not supported by evidence, then once again that professional's board may wish to take action. **If any non-attorney professional has claims brought against them in their professional capacity by their professional board or organization, then whatever the rule we adopt for the State Bar should apply to those other professionals as well.**

Endnote

Rule 8.1 Bar Admission and Disciplinary Matters
An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6 [attorney client privilege].

Comment
[1]... The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct…

The Proper Contours of Mediator Confidentiality Under North Carolina Law

Frank Laney

January, 2012

For the consideration of the Dispute Resolution Commission:

One of the central tenants of mediation is confidentiality – the idea that what is told to a mediator will be held in complete confidence by the mediator. The purpose of mediator confidentiality is to encourage parties to voluntarily open up to the mediator and divulge information that would otherwise be kept strictly to the party or the party's attorney. By getting access to this private information from each side, the mediator can hopefully assist the parties in coming up with creative solutions that may meet each side's unique needs or to encourage parties to make movement toward settlement that they would otherwise be afraid to make for fear of failure or rejection. But it is the assurance that this information will never be used against the one giving it that makes it possible for the mediator to have access to these private thoughts.

However, early in the development of mediation in our state, it became evident that absolute confidentiality of all matters discussed in mediation, irrespective of the circumstances, was not feasible in the real world. So the question was and still is, where to draw the lines, how to balance the parties' and mediator's legitimate need for confidentiality and society's interest in seeing that predatory or improper behavior is detected, prevented and/or punished.

The current issues before the Commission revolve around what should a mediator say when someone involved in a mediation has a claim brought against them or is charged with wrongdoing related to acts that occurred in the mediation. Please allow me to make several background observations to help frame the discussion.

5. We are writing on a blank slate. The framework for this discussion is that whatever the Commission decides should be the policy, will be followed by an effort to amend the present statutes to reflect that policy. Therefore, whatever may be the current law or current policy of this or any other organization should not restrict our discussion. Any new law that the legislature passes will, by definition, rewrite current law and override any governmental policy.
6. The fact that our slate is blank does not mean that we should not be guided at some point by what we can politically get passed by the General Assembly. However, that should be a secondary issue, after we formulate what we think is the best policy for mediation in our state.
7. The current MSC and FFS statutes provide for mediator confidentiality only in civil cases, not in criminal cases. The committee that drafted the original statute debated this issue at length and came to the conclusion that trying to forbid mediators from testifying in criminal cases was probably not going to pass the legislature, and if it did, it probably would be difficult to uphold in the courts.

Immunity from testifying in criminal cases is not an issue that we should try to revisit. So our present discussion relates only to civil matters, whether they are in courts or in administrative agencies.

8. The present statutes explicitly allow mediators to give testimony about elder abuse and child abuse, presumably in criminal proceedings. Another express exception in the present statutes allows for the mediator to testify in proceedings for sanctions under the FFS or MSC statute. As under those statues the only sanctions that can be levied are for failure to attend or to pay a mediator's fee, the only thing that a mediator can give evidence on is who attended and/or the amount of the fee owed and who owes it. As neither of these exceptions is in question at this time, I note them only for completeness.

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   As used in this subsection, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

   No settlement agreement to resolve any or all issues reached at the proceeding conducted under this section or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties [and in all other respects complies with the requirements of Chapter 50 of the General Statutes]. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a [mediated settlement conference or other] settlement proceeding.

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Mediators

If a mediator is charged in any forum – Commission, State Bar, civil court, criminal court or any other venue – then Standard III E would apply.

> *E. Nothing in this Standard shall prohibit a mediator from revealing communications or conduct occurring prior to, during, or after a mediation in the event that a party to or a participant in a mediation has filed a complaint regarding the mediator's professional conduct, moral character, or fitness to practice as a mediator and the mediator reveals the communication or conduct for the purpose of defending him/herself against the complaint. In making any such disclosures, the mediator should make every effort to protect the confidentiality of non-complaining parties to or participants in the mediation and avoid disclosing the specific circumstances of the parties' controversy. The mediator may consult with non-complaining parties or witnesses to consider their input regarding disclosures.*

In my view, this Standard adequately and properly sets forth the mediator's freedom from the expectations of confidentiality in the event a complaint is filed against the mediator. My only suggestion is to consider whether this is adequately reflected in the present statute and if the new statute needs language to make this Standard clearly consistent with the law.

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The third group is attorneys who are charged with malfeasance. If the charges are criminal, that situation is already covered above. If they are civilly sued for malpractice, the present law and policy would prevent the mediator from testifying in court or giving

discovery except to attest to the signing of an agreement. **I would not recommend changing this policy.**

If the attorney is brought before the State Bar, several issues arise. First, is reporting – this is the 8.3 issue and we seem to have formulated a clear policy with the State Bar that if an attorney violates 8.3 and Standard III in a mediation, then the mediator not only may report it but has a duty to report it to the State Bar. (While this statement may not be as articulate as possible, we all know what this rule is and I hope to set its consideration aside with no further discussion.) Second is voluntary conversations with investigators. Third is compulsory testimony under subpoena.

Let me lay out a bit of background on the State Bar process and policies. A non-lawyer has no duty to speak to the State Bar or its representatives except under a subpoena. A lawyer has no duty to speak to the State Bar or it representatives except under 8.3, under subpoena and under 8.1 when an attorney is charged with misconduct. (See End note below for text of 8.1.) As 8.1 deals only with a lawyer's duty to cooperate in the investigation of his or her own misconduct and the misconduct of the mediator is discussed above, 8.1 has no relevance here. Therefore, the question boils down to – Under what circumstances should a mediator reveal things said and done in a mediation to the State Bar or to an investigator or advocate for the accused attorney in a Bar complaint proceeding?

A lawyer-mediator has a duty under 8.3 to report 8.3 and Standard III violations to the State Bar. In doing so, the mediator should make a full and complete report, preferably in writing. But once a matter is reported, whether by the mediator or another person, what is the mediator's role? **I argue that it is to maintain confidentiality.**

Bad acts in negotiations is not a problem mediation was designed to fix. Long before mediation ever came to North Carolina, attorneys and parties where entering into negotiations and settling disputed matters. It is most probable that any situation, good or bad, that could arise in a present day mediation has already arisen in our state's history in a private negotiation without the benefit of a mediator. Any malfeasance that arose in those unmediated negotiations was dealt with by a system deemed adequate by society. There was no epidemic of rogue negotiators that led to the establishment of mediation. Just because there is now a mediator present should not lead to the burdening of that mediator with any policing or regulatory duties beyond that of simply providing good mediation services.

Mediators are not here to fix every ill in the present day adversarial system. An analogous issue that was raised repeatedly in the formative years of the MSC program was, who is going to protect inadequately represented parties? My answer was, the exact same people who protect them in court – nobody. If a party appears in court with an ill prepared or untalented attorney, there is no super referee that somehow rebalances the situation and makes everything fair. People that hire bad attorneys get bad results and people that hire no attorneys get whatever they can. The same situation plays out in mediation and the mediator is under no more compulsion than a judge to level the playing

field. (Actually, the mediator does in fact have more leeway to use tools that are probably not available to judges to try and rectify power imbalances. Similarly, a mediator does have lots of tools and opportunities in the mediation to try and work with attorneys and parties to prevent or correct bad behavior by attorneys.) Mediators should not be charged with protecting parties with bad attorneys and they should not be charged with aiding in the prosecution of bad attorneys.

This is also similar to an argument raised in the 8.3 discussion which I found to be particularly unconvincing. Some lawyers were concerned that false information was or could be conveyed in a mediation and that under the peculiarities of that area of the law, conveying such information could be an unethical act. The lawyers wanted to burden the mediator with policing this situation, while there is no evidence that these same lawyers were doing anything to police similar information exchanges that occur outside of mediation. Mediators are not truth police and are not here to correct all the ills of litigation. **Once the mediation is over, the mediator should have no role in trying to correct what may have occurred in the mediation.** Without the mediator there are the same witnesses that there are and always have been in any unmediated negotiation and the parties and the State Bar should get by with that information.

Even in our own rules, while we encourage the mediator to protect the integrity of our process, we do not include an exception to the confidentiality rule. So when a mediator believes that someone is abusing or taking advantage of the mediation process, the mediator has several options to try and rectify the situation, but to breach confidentiality is not one of them.

The law protects doctors, ministers and other professionals from revealing what people told them in confidence because we as a society value the services of doctors and ministers and realize that without a guarantee of confidentiality that these professionals will not be able to adequately provide the services we as a society want and need. The same is true of mediators. If the general public or the members of the bar start to believe that what they tell mediator can and will be used against them, then our ability to delve into the parties' true needs and interests will be severely hampered. No matter that the chances are small that information will, in fact, be used against a participant, the mere chance will create an extreme chill. Social researchers have determined that people are irrationally risk averse. We spend good money to insure against things that are, in fact, very unlikely to occur. Parties will buy cheap insurance in mediation by simply clamming up.

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I also realize that every lawyer wants access to any and all evidence, no matter how irrelevant or unpersuasive. But the fact that the State Bar wants it, does not mean that we have to make it available. I am reminded of a wise Superior Court judge in Winston-Salem. A couple who just could not stop fighting had been referred to every social services agency there was. Out of desperation, someone sent them to the local mediation center. They managed to reach an agreement of some sort. But as was predictable, they got into more fights and he eventually killed her. For the murder trial the DA wanted all the evidence of their past conflict history, and so subpoenaed the volunteer mediator. The program director objected, but wound up negotiating with the DA that the director would take the stand and explain mediation and identify the agreement reached in mediation and then the DA could read the agreement to the jury. But once the director took the witness stand, the judge said, "I am surprised to see you. What are you doing here?" To which the director replied, "Well, I do not want to be here, but I was subpoenaed." Thereupon, the judge called the attorneys to the bench and said to the DA, "If this mediator's testimony is the best evidence you have, I am dismissing your murder charge." The DA promptly reevaluated his case and dismissed the mediator from the witness stand. If the mediator is the only evidence in a case, it might be too weak a case to prosecute.

Mediators should not volunteer to provide information to the State Bar or any other agencies nor should they be compelled to give testimony. I believe that the present statute makes the mediator immune to subpoena unless the testimony being sought falls within one of the express exceptions. We should consider if we want that to be made more explicit, or if it is clear enough.

Other Professionals

This group is any professional present in the mediation other than an attorney. They could be parties, non-party participants or professionals present in some professional advisory capacity. For example if a medical doctor or a social worker were to make threats against their spouse in a FFS mediation, that professional's board might find such conduct unbecoming. Or if an accountant or engineer offered an opinion in a mediation that was false or not supported by evidence, then once again that professional's board may wish to take action. **If any non-attorney professional has claims brought against them in their professional capacity by their professional board or organization, then whatever the rule we adopt for the State Bar should apply to those other professionals as well.**

Endnote

Rule 8.1 Bar Admission and Disciplinary Matters
An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6 [attorney client privilege].

Comment
[1]... The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct…

Andy's Position Paper
As To Whether a Mediator Should Be Compelled to Testify
In Disciplinary Hearings Before The State Bar Under NCGS 7A-38.1(l)
January 27, 2012

Introduction

We meet today to discuss a portion of the 1995 statute that authorized the establishment of mediated settlement conference in all judicial districts. Frank Laney and I have different opinions about how that section ought to be read, but he and I have agreed that we should focus on how the statute ought to read and how it should be applied in the future.

That does not mean, however, that we are writing on a completely clean slate. The reading I suggest today has been the majority interpretation of the present statute for 16 years, not only among the many members of the DRC, but also among members of the State Bar staff and Ethics Committee. That history, taken together with important policy considerations, suggests that the statute should allow mediators to testify in disciplinary hearings before the State Bar.

The Current Statute

The statute we are dealing with today is NCGS 7A-38.1, specifically Section (l). That section was originally drafted for use in the pilot program from 1991-1995 and was entitled "Inadmissibility of negotiations". It stated simply that Rule 408 of the Rules of Evidence applied to things said and done in a MSC. Nothing at all was said about whether and under what circumstances the mediator could be called to testify about things said and done in an MSC.

A committee of the DR Section of the NCBA, which I chaired, was established to make recommendations to the Supreme Court's Dispute Resolution Committee for legislation to authorize the MSC program state-wide. Section (l) was redrafted to make the inadmissibility formulation stronger. The result was a complicated provision which has many exceptions and has been amended over time. I set out the current version of that part of Section (l) below in red. The underlined portions were added later. I should point out that this is not the part of Section (l) that is being debated today.

Inadmissibility of negotiations. – Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

(1) In proceedings for sanctions under this section;
(2) In proceedings to enforce or rescind a settlement of the action;

(3) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or

(4) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this section, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement conference or other settlement proceeding.

The Section in Dispute

The second part of Section (l) was an entirely new provision. The impetus for its creation was a growing trend among attorneys to subpoena mediators to testify in Superior Court hearings concerning the enforcement of oral settlement agreements allegedly reached during mediation. Many years later, the DR Section sought and obtained amendments to Section (l) to require that settlement agreements be in writing and signed to be enforceable, but in 1995 there was no such provision and mediators were receiving subpoenas to testify about who said what in mediations across the State.

While the subject of mediator confidentiality had been discussed often in the creation of the pilot program, it had never been addressed in statutory or rule form. The drafting committee believed that the principle of confidentiality was a crucial component of the MSC program and that mediators should not be testifying about what was said in mediation to enforce or deny an oral settlement agreement. So, in order to underscore the importance of mediator confidentiality and to make its application uniform across the State, the drafting committee created and recommended an entirely new paragraph for Section (l). This is the provision we are discussing today.

I set out that provision below in yellow, along with the underlined portions which were added later.

No mediator, other neutral, or neutral observer present at a settlement proceeding shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

Confidentiality and its Limits

I don't think there is any debate today about the importance of confidentiality in the mediation process. The '95 drafting committee thought it important enough that it should be codified. The DRC thought mediator confidentiality important enough that it was included in the DRC's recommended Standards of Conduct. And, the Supreme Court concurred when it promulgated those Standards. The debate today about mediator confidentiality is not whether it is an important value in the mediation process but whether its application should be limited and, if so, under what circumstances.
I know of no formulation of the value of mediator confidentiality that is absolute anywhere in the United States. Whether the limits of mediator confidentiality are set out in statute or rule or whether they have been delineated by state or federal case law, every formulation of mediator confidentiality has been found to have limits.

This thought process is familiar to lawyers who have studied related evidentiary concepts such as the concept of privilege. With the exception of the attorney-client privilege, no privilege has been found to be absolute. There are exceptions to the doctor-patient privilege, and there are exceptions to the priest-penitent privilege. Those exceptions are carved out by statute or case law and are created whenever the value being protected by the privilege comes in conflict with a higher or stronger public value.

The Limits to Mediator Confidentiality in NC

The first limit that the drafting committee placed upon mediator confidentiality was set out in Section (l) of the 1995 statute. Admittedly, one has to infer that limit from the wording, but I don't believe this reading is contested today:

"No mediator …shall be compelled to testify…in any civil proceeding…"

The language is economical, and some may say indirect, but the intent is clear----a mediator may be called to testify in criminal proceedings. It was decided that, while the principle of confidentiality was important, it is not so important that it should shield potential defendants from prosecution for violating the criminal law. The value of preserving public safety outweighed the value of mediator confidentiality to the mediation process. To my knowledge, there is no debate today about whether this has been or should be a limit to the application of mediation confidentiality.

While it is true that the committee reached this conclusion by identifying a higher and competing value, the members also observed that the legislature might have trouble with a formulation of mediator confidentiality that kept mediators from testifying in criminal proceedings. That was true in 1995 and I, for one, am convinced that it is true in the current legislative environment.

The second limit that the committee placed on mediator confidentiality, and one that is not contested today, also dealt with the value of preserving public safety:

"and in proceedings to enforce laws concerning juvenile or elder abuse."

Such proceedings may be criminal in nature, but abuse is also covered in the juvenile law of North Carolina (NCGS 7A). Mediators, then, may testify in those proceedings, but it should be noted that they, and other professionals under NCGS 7A, also a duty to report suspected child abuse. The committee concluded that there were important policy considerations having to do with protection of the youngest and oldest members of our society that should allow mediator testimony in juvenile or criminal proceedings involving either juvenile or elder abuse. Once again, the value of public safety was found to outweigh an important value in the mediation process.

The third limit placed on mediator confidentiality, also not contested today, is found in the following language:

"except proceedings for sanctions under this section,"

This limit was created in recognition of the fact that the matters involved in a hearing on a motion for sanctions are not confidential in nature. In the 1995 legislation, the only thing that participants could be sanctioned for was not attending their court-ordered MSC. The fact that one does or does not attend a meeting generally is not considered to be a confidential act or communication that deserves any protection. Similarly, the failure to pay the mediator's fee (another reason for sanctioning a party as a result of a more recent amendment) is not considered a confidential act or communication.

The fourth limit, the one we are debating today, arose as the committee considered other scenarios in which a mediator's testimony might be sought. Because the MSCs are court-ordered, requiring the participation of lawyers, disciplinary proceedings before the State Bar were discussed as possible scenarios. The discussion occurred first in the context of a disciplinary "hearing", not in the reporting or investigatory phase of the disciplinary process as, years later, we discussed in the context of the Rule 8.3 controversy. So the question in the 1994-95 drafting discussion was whether to exempt mediators from testifying in a Bar disciplinary hearing about what another lawyer said or did in mediation.

The value that the committee identified as competing with the value of mediator confidentiality in that scenario was, once again, protection of the public. It was decided that attorneys who are charged with violating the RPC should not be shielded from damaging evidence that a mediator can provide from the attorney's conduct or communications during mediation any more than they should be shielded from prosecution of the criminal law. Looking to the discussion today and the future application of this section, the value of protecting the public continues to be important, and in my mind controlling, in the question of whether to allow mediator testimony in State Bar disciplinary hearings.

The final value: It occurred to the committee after these other matters had been discussed that some regulatory body would be developed in the future to govern the conduct of mediators and that it would be ironic for a mediator to be denied the opportunity to testify in a proceeding in which his/her own behavior was in question.

That same rationale applied equally to disciplinary proceedings before the State Bar in which a mediator is accused of violating the RPC. So, the committee drafted language to encompass all of the concerns discussed in the previous four paragraphs and added the following exception:

"disciplinary hearings before the State Bar and any agency established to enforce standards of conduct for mediators…"

In one economical clause, the committee made it clear that a mediator could testify in a disciplinary hearing before the DRC, when his/her own conduct is in question, and before the State Bar, regardless of who is being prosecuted for an RPC violation.

The Issue at Hand: This is Not a Slippery Slope

The question about what was done by the drafting committee in 1995 is one thing; the question about what should be done, and what the statute should say, is another. Looking to the future, this current debate is about whether mediators will be exempt from testifying before the State Bar in disciplinary proceedings against a lawyer for violation of the RPC.

Before proceeding with arguments in favor of allowing such testimony under subpoena, let me address one issue. Confidentiality is an important issue for mediators, not because it shields them or gives them protection from prosecution, but because it makes their work more effective.

Because of the importance we give to mediator confidentiality, mediators fear any lessening of that duty. We reflexively suspect that any exception will lead to other exceptions; so that, over time, the duty of confidentiality is watered down by those who do not appreciate its importance. We fear the slippery slope in which the effectiveness of our principle tool is eviscerated.

Well, here's the good news. In the debate we are having today, there is no slippery slope! All the black diamonds have been barricaded and the slope to the bottom is a well-known, groomed, safe and manicured path. And a decision to allow a mediator to testify under subpoena in a disciplinary hearing before the State Bar opens no doors to an avalanche of negative consequences. Why are there no potential negative consequences?

Reason #1: Alice Mine of the State Bar staff has recently confirmed that the State Bar believes mediators can be compelled to testify at State Bar disciplinary hearings. In spite of that fact, no mediator has ever been called to testify in such a hearing, and there will not be a rush to do so if this exception to mediator confidentiality is clarified. The Commission will not be creating any slippery slopes by reaffirming a rule that has guided everyone's behavior for almost 2 decades.

Reason #2: It has been argued that recognition of an exception for State Bar disciplinary hearings will lead to a move to require mediators to report violations of the RPC that

occur, or are learned of, in mediation. We should all be comforted in that regard by the fact that we lobbied the State Bar for a change in Rule 8.3 that would exempt mediators from such a reporting requirement; it passed; and the Supreme Court approved it. There is no duty to report that will adversely affect mediators' behavior during mediation. That slippery slope has vanished.

Reason #3: It has been argued that recognition of an exception for State Bar disciplinary hearings will lead to a move to require mediators to cooperate with State Bar investigators as disciplinary charges are being considered. You should know that Alice Mine of the State Bar staff recently confirmed that the Bar does not believe any attorney has a duty to cooperate with investigators unless the alleged violation is against the attorney him/herself. In other words, the Bar is not looking for that kind of involvement from mediators or attorneys. There is no slippery slope there.

Reason #4: And finally, we should remember that this debate began at our last meeting during a discussion of an Advisory Opinion recommended by the Standards Committee. That AO would prohibit a mediator from talking with State Bar investigators about what was said or done in mediation, thus limiting a mediator's testimony to a disciplinary "hearing" under subpoena. So, any slippery slope that one might perceive in the investigatory phase of State Bar disciplinary proceedings can be closed at this meeting simply by voting to approve the recommended Advisory Opinion.
In summary, there are no possible negative consequences to clarifying Section (l) to say that mediators may be called to testify at State Bar disciplinary hearings. All slopes, slippery or otherwise, have been closed to traffic.

What Value Tips the Scales in Favor of an Allowing Testimony in Disciplinary Hearings?

Some may believe that the rules of the State Bar are administrative only and that there is no public interest being served by enforcing them. I believe that is not the case. Admittedly, there are many kinds of rules and regulations in the RPC and not all of them are of equal importance. But most of the RPC is made up of rules designed to promote the protection of the public and confidence in our public dispute resolution forums, i.e. our courts of law. Included in the RPC are rules dealing with conflicts of interest and their avoidance, rules dealing with truth telling to the courts, rules requiring lawyers not to substitute their own goals for their clients', and rules requiring lawyers to seek advice when advising clients with diminished capacity.

Protection of the public, that's a value that runs throughout the RPC and, in my opinion, overrides the value of mediator confidentiality. Confidence in the integrity of the courts, that's a value that is fundamental to the portion of our government that requires MSCs in the ordinary course of its work. These are important public values, not any of which have to do with protection of the public from criminal behavior.

It should be remembered, however, that disciplinary proceedings before the State Bar may involve violations of the RPC that are based on violations of criminal statutes. How

many reports of attorney misconduct have we heard and read about in the past decade that involve attorney misappropriation of client trust funds or other criminal behavior? Certainly in proceedings in which the source of an RPC violation is the violation of the criminal law, it is clear that the interest of the public is well served by pursuing disciplinary proceedings against an offending attorney and by allowing mediator testimony under subpoena.

I believe that mediators should be available to testify in those hearings even if that testimony is about things said or done in mediation. The values of insuring public protection from an unscrupulous member of the Bar and insuring public confidence in its court system are important public values that should outweigh mediator confidentiality in those hearings as well as in criminal proceedings. These are some of the policy reasons for allowing mediator testimony in State Bar disciplinary hearings.

The Political Problem(s)

This current debate is not an academic one, and the solution is not one that can be written on a clean slate. There are real practical and political dimensions to the decision we make today about seeking legislation that would deny mediator testimony at State bar disciplinary hearings.

Through the years, NCGS 7A-38.1 (l) routinely has been interpreted as allowing mediator testimony in State Bar hearings. Those interpretations have been given in many settings: in hearings before the General Assembly, in mediator trainings, in discussions of the DRC and its committees, and most importantly in discussions with State Bar staff and its Ethics Committee.

As I said previously, Alice Mine has confirmed two things recently: that mediators and attorneys have no duty to cooperate with State Bar investigators and that mediators can only be compelled to testify at hearings under subpoena.
So, if the DRC votes to make 7A-38.1(l) say that mediators may not testify in disciplinary hearings before the State Bar, how will the State Bar react? And, what will we tell them about why we seek a change from the generally accepted understanding of this section? The question inevitably will be asked, why now? What has changed to make this necessary?

This is an important issue for those of us who participated in discussions with the Ethics Committee and staff of the State Bar during the Rule 8.3 controversy. It was clear to us then that we and the State Bar staff read the section as compelling mediators to testify in State Bar proceedings. Alice Mine's recent confirmations that mediators don't have a duty to cooperate with State Bar investigators and that they can be compelled to testify under subpoena should resolve any doubt on that point.

On several occasions, your representatives at those meetings confirmed that our reading of the statute was the same as theirs: mediators can be compelled to testify at hearings before the State Bar. What are we to do with that fact? Will the State Bar oppose any

decision of the DRC that is different from the traditional interpretation because they feel sandbagged by seemingly contradictory behaviors of the Commission?
Shifting political gears from the State Bar to the General Assembly, there are at least two questions that arise as we consider the lobbying efforts that will be required to effect a change in this statute. Rule 8.3 was amended as the result of an intensive campaign to educate and lobby the State Bar. Every legislative effort the DRC or the NCBA has undertaken with respect to mediation has taken an enormous effort. So I ask, who will champion such a change? Who will lead the charge before the State Bar and/or the Legislature? Who will take the time, energy, and effort to find the sponsors, attend committee meetings, and track unforeseen developments to get the result the Commission would want?

More importantly, what is different about this legislature that would make it more likely than the one in 1995 to enact such a change in Section (l)? What arguments can we advance that are different from the diametrically opposite ones we made in 1995? And finally, to bring the State Bar back into the picture, how will we answer the quintessential legislator's question, who is for it and who is against it?
It is worth pondering in this debate whether a change in the generally accepted interpretation of Section (l) will be opposed by the State Bar and whether the Commission will prevail before the General Assembly if it decides that a change needs to be made.

Conclusion

In the final analysis, there are sound public policy reasons for clarifying Section (l) to read that mediators may be compelled to testify in State Bar disciplinary hearings. While mediator confidentiality is an important value in the mediation process and, therefore, in the courts, that value is not absolute and should give way when it collides with stronger, competing values. In this case those competing values are the integrity of the Bar and its members, the enforcement of the criminal law and the protection of the public.
I vote to make it clear in Section (l) that mediators may be compelled to testify in State Bar disciplinary proceedings. There are both substantive and historical/political reasons for doing so.