

Dispute Resolution Commission

Minutes

**Friday, February 1, 2013
NC Judicial Center, Raleigh
9:30 AM**

Members present: Little, A. Anderson, T. Anderson, Bryant, Caldwell, Cash, Clare, Dollar, Farah, Hicks, Jackson, Long, Morgan, Tash and Vincent. Ex-Officio members present: Beason, Ellis, Hayden, Huffman, Laney, Lee, Schafer, and Steelman. Guests and staff present: Doyle, Igou, Nesbitt, Ratliff and Robinson.

Ms. Clare reported for the Standards and Advisory Opinions Committee that the State Bar's Ethics Committee had unanimously adopted a formal ethics opinion on attorney drafting of agreements in mediations involving pro se parties. Ms. Clare noted that a Commission AO on drafting will follow the State Bar's Opinion and her Committee hopes to have a proposal at the next meeting. She next introduced a proposed revision to Standard VII.H (Conflicts of Interest) on mediator giving/receiving of gifts. Justice Jackson asked whether this opinion would prohibit advertising items like pens, pads, etc. The general consensus appeared to be that such small gifts should not be a violation of the Standard. Ms. Clare noted that Ms. Ratliff will need to tell mediators to use their best judgment. Mr. Laney suggested that if the Commission gets a complaint, e.g., a mediator is taking a party to lunch and the caller feels it raises a conflict, Ms. Ratliff should forward a copy of the Standard to the mediator. Ms. Clare noted that it is a slippery slope. She does not want to tell mediators that they cannot send out a pen or a calendar, but she would be uncomfortable doing that. Mr. Little noted that it appears to him this amendment would set up a case-by-case review process. Mr. Farah warned that the further the Commission moves away from a bright line, the more issues it may create. Ms. Dollar commented that her clients would be concerned if they walked into a law office and saw the mediator's calendar hanging in an office. The Commission adopted the proposed revision unanimously. Mr. Beason suggested that staff should respond to mediator inquiries, "If you are bothered enough to make the call, perhaps you should refrain from giving or receiving the gift in question".

Ms. Clare next introduced two additional proposed AO's. Both involved unauthorized practice of law issues. In one situation, an out-of-state attorney appeared for a mediation and the other side objected. In the other situation, a representative of a mom and pop corporation arrived at mediation without legal counsel. Ms. Clare noted that about a year ago, the Committee sent a single AO addressing both situations to Alice Mine. She had reviewed the Opinions and suggested the issues be separated out. Ms. Clare explained that the Committee strongly believes that mediators should not be functioning as attendance police and the Opinions reflect that thinking. She added that recently several situations in which mediators were arguing with parties over attendance issues had come to the attention of the Commission's office. These situations had resulted in impasses and adversarial relationships between the mediator and parties involved. Ms. Clare added that the State Bar had agreed that lawyer mediators would not be assisting in the unauthorized practice of law in the above scenarios merely by conducting the mediation session. Mr. Farah suggested that both Opinions be clarified to unequivocally state that the mediator would not be in violation of Rule 5.5(d) of the State Bar's Revised Rules of Professional Conduct simply for holding the

conference and he and others suggested some rearrangement and wording changes to convey that message. Both Opinions were unanimously adopted with Mr. Farah's suggested change.

Next, Mr. Little called for announcements and asked the Committees to meet following any announcements. Mr. Doyle made an announcement about Gary Friedman's visit and the annual meeting of the NCBA's Dispute Resolution Section. He noted that registration was strong. He added that the NCBA's Foundation had denied a request to fund Mr. Friedman's appearance and presentation, so he would be submitting Mr. Friedman's invoice to the Commission as previously approved at the December meeting. Mr. Little praised Mr. Friedman and encouraged those present to attend.

Mr. Tash reported for the Grievance Committee. He explained the scope of the Committee's mission and distinguished it from that of the Mediator Certification Committee. He noted there had been seven matters before the Committee this quarter and he summarized them. He added that all related to ethical matters reported by applicants on certification applications or by mediators on renewal applications or to matters that applicants/mediators had failed to report and that staff had uncovered during background checks. Lastly, he advised Ms. Clare that the Committee wished the Standards and Advisory Opinions Committee to consider an AO providing guidance to mediators when an appeal is filed in a case ordered to mediation.

Ms. Anderson reported for the Mediator Certification Committee. She first noted that the Committee had denied an appeal of a staff denial. Staff had denied an MSC certification applicant finding that he lacked the 10 years' professional, management, or administrative experience required by MSC Rule 8.B.(2)(c)(ii). Second, she noted that the Committee had discussed the fact that no guidelines had been approved for the 16-hour and 6-hour courses, but decided not to implement any at this time. Lastly, she reported that the Committee would survey all 50 states to learn about their CME requirements, if any, and then, would survey the mediators regarding CME. Mr. Little suggested speaking with the State Bar about how they approve training for credit and explore ways of dovetailing hours.

Judge Cash reported for the District Court Oversight Committee. He observed that the Commission needs to capture more caseload data for FFS programs and expressed concern that a number of districts are not reporting. He added that Ms. Huffman is drafting a survey on reporting with survey results to be returned to Commission staff. He added that CaseWise training was already underway and that Mr. Little would be speaking with the district court judges soon. Mr. Little asked Ms. Huffman to also comment on the CaseWise training sessions presented by Ms. Cole. She reported that four sessions (two MSC) and (two FFS) had been held and that feedback had been positive. A taped Webinar version of the training will soon also be available. Ms. Huffman will get a list of those court staff who attended to Commission staff in the near future. She praised Ms. Cole for her efforts.

In Ms. Gullick's absence, Ms. Dollar reported for the MSC Program Oversight Committee. She distributed a paper template of the new Mediator's Toolbox and noted that the on-line feature will soon be activated. Mr. Little asked Judge Cash's Committee to look at the FFS forms posted. Mr. Little asked those present whether they had any idea of the number of districts in which judges might be willing to write a letter to non-paying parties? Judge Caldwell indicated that he would be willing to survey the judges.

Mr. Little reported for the Executive Committee noting that the Commission had received a subpoena from the State Bar in connection with a certification renewal applicant and had responded. Justice Jackson reported that some legislation has been introduced regarding

denial of licensures and requiring more concrete reasons for denial. Mr. Little added that the AOC will soon be advertising for a new, full-time Deputy Director for the Commission. Mr. Laney asked that members be sent a link to the ad once it is posted. Mr. Little noted that the Executive Committee would be working to introduce proposed changes to Commission and program enabling legislation this session.

The minutes for the December meeting were approved as submitted and there followed discussion about future meeting sites. Mr. Little asked Commission staff to ascertain whether rooms were available at the Shelton Vinyard's location. Mr. Little asked for Ms. Ratliff's office report. As required by the State Ethics Commission, she read into the minutes the names of those members who had completed their annual SEI report and been cleared by the SEC to serve:

Members found to have no actual or potential conflicts: Judge Vincent, Judge Anderson, Judge Caldwell, Judge Morgan, and Justice Jackson

Members found to have no actual conflicts of interest, but had the potential for a conflict: Ms. Anderson, Ms. Bryant, Mr. Cash, Ms. Clare, Ms. Dollar, Mr. Long, Mr. Farah, Ms. Gullick, Mr. Little and Mr. Tash.

Ms. Ratliff added that some vacating and re-shuffling of tenants is expected in the NCJC wing occupied by the Commission. The Commission's space will not likely be much affected. She said that she may be asking the Commission to consider converting its conference room into an additional office since the building manager had advised her that space for a conference room would be available elsewhere in the wing. She noted that the office was receiving few appointment letters and expressed concern that these letters may still be going to court staff. Lastly, she noted that Commission staff had attended Ms. Cole's session on CaseWise and found it helpful.

Mr. Little called for liaison reports. Ms. Ellis reported for the Section thanking the Commission for its support of the upcoming annual meeting. Mr. Little suggested Ms. Robinson send an additional email to certified mediators reminding them of the meeting. Ms. Hayden reported for court staff noting they were pleased with the changes relating to statistical reporting. She noted that she had received a request that AOC-CV-835 be reinstated to facilitate deadline extensions. Lastly, she reported that court staff would like to have more input before rule or other procedural changes are adopted and implemented. Ms. Huffman reported that two new staff had joined her office --Stephanie Nesbitt and Mia Lamotte -- and they would be working with Judge Cash's Committee. Mr. Schafer reported that all IC Rules had now been vetted through the Administrative Procedures Act. Mr. Laney had no report for the federal court. In his capacity as Chair of the ADR Committee, he reported that a community mediation center had proposed the development of a video for the public that would explain the mediation process and its benefits. He asked whether the Commission might be willing to fund or partially fund this undertaking. Ms. Ellis noted that the NCBA has many resources available and Ms. Bryant recommended Sherman Criner's video. Mr. Laney noted it would be important to get input from the Network. Mr. Little asked for volunteers to consider the proposal. The following volunteered: Ms. Anderson, Ms. Bryant, Mr. Laney, Ms. Nesbitt, and Mr. Igou. Mr. Little suggested also recruiting a DA.

Mr. Laney reported for the *ad hoc* District Criminal Court Mediation Committee and noted the Committee was proposing changes to the District Criminal Court Mediation Program Rules to reflect recent statutory changes. He began by noting that G.S. § 7A-38.5 had been revised,

including a new subsection (e) permitting courts to order cases generated by a citizen-initiated arrest warrants to mediation and (f) allowing prosecutorial districts to opt out of mandatory referral. Subsection (a), he added, was also revised to permit centers to charge fees for services. The proposed rule revisions before the Commission were, he added, intended to reflect the new statutory changes. Following some discussion of the rules, Mr. Little said he was concerned that revised G.S. § 7A-38.5 did not provide for the Supreme Court to adopt rules for its implementation. As such, he was concerned that the Court did not have authority to revise the DCC Rules as the Committee proposed. Moreover, he noted it was not clear to him that the revised Rules applied only to programs operating pursuant to G.S. 7A-38.3D and he suggested that should be clarified. Given these concerns, Mr. Laney withdrew the proposed rules to allow further discussion by the Committee.

There being no further business, Mr. Little thanked everyone for coming and adjourned the meeting at 4:30 P.M.

Dispute Resolution Commission Minutes

**May 17, 2013
NC Judicial Center, Raleigh
9:30 am**

Members present: Little, A. Anderson, C. Anderson, Caldwell, Cash, Clare, Dollar, Farah, Gullick, Hicks, Long, McCullough, Morgan, and Tash. Ex-officio members, guests, and staff present: Beason, Ellis, Hayden, Hopkins, Igou, Laney, Marsh, Nesbitt, Rose, Schafer, Ratliff, and Robinson. Mr. Little noted that Judge Steelman, Judge Vincent, and Judge Lee had sent their regrets.

Mr. Little called the meeting to order. He asked everyone to introduce themselves and specifically noted new Commission member Court of Appeals Judge J. Douglas McCullough, new ex-officio member from the TCA's Conference Ellen Rose, and the Commission's new Deputy Director, Harriet Hopkins. Ms. Nesbitt noted that Ms. Huffman had left the AOC and that she would replace her as the AOC's liaison.

Mr. Little presented a plaque on behalf of the Commission to Justice Jackson, whose term had expired, and thanked her for her service. Judge Morgan next administered the oath of office to Judge McCullough and Mr. Little read into the minutes a portion of the SEC's letter to Judge McCullough noting that he had no actual or potential conflicts of interest. Mr. Little noted that he had just learned that the Chief Justice had appointed CDSS Director Diann Seigle to the seat vacated by Ms. Bryant. Thereafter, Mr. Little called for approval of the February minutes and they were approved as submitted. Lastly, Mr. Little reported that Judge Walker was doing much better following his recent hospitalization and noted that he would appreciate cards and calls.

Mr. Little next reported on pending legislation. He noted that legislation is pending that would permit civil actions involving up to \$20,000 to be filed in district court. He added that the NCBA had approved the change, but that the Dispute Resolution Section had not been consulted. He expects the bill will likely pass. Mr. Little added that after the cross over period has concluded that he intends to send copies of all bills relating to mediation to the members of the Commission for review.

Mr. Little called for Committee reports and began with the Executive Committee. He asked the Commission to approve the following expenditures: (1) \$1,818 for three new computers for Commission staff; (2) \$1588.50 for furniture for the new Deputy Director's office (credenza, hutch, and bookcase); and (3) \$1592.00 for eight chairs for the Commission's new conference room. All purchases were approved by separate vote.

Ms. Gullick reported for the MSC Program Oversight Committee. She thanked her Committee members for their input and noted that she particularly appreciated the insights of Ms. Hayden and Ms. Nesbitt. She reported that the Committee now had data on CaseWise reporting compliance for both the MSC and FFS Programs and that several

districts were still not reporting, though the majority have switched over and are using correct codes. There followed some discussion of impediments to reporting. Ms. Gullick noted that her Committee will be following up with superior court districts that are not using CaseWise or the standard codes to report. She added that her Committee is continuing to work on the website's Mediator Toolbox. Judge Caldwell reported that he had been talking with Judge Stephens about collections letters.

Ms. Anderson next reported for the Mediator Certification and Training Committee. She called attention to proposed revisions to the *Guidelines for Interpreting Mediated Settlement Conference Rule 8.B.(2)*. The revisions were unanimously approved. She also reported that her Committee has asked staff to poll other states regarding CME, to draft a report summarizing the information collected, and to prepare an article for the newsletter.

Ms. Clare next reported for the Standards and Advisory Opinions Committee. She first introduced a proposed Advisory Opinion addressing the issue of what a mediator should do upon learning that an appeal has been filed in a case the mediator is assigned to mediate. There followed a short discussion. The issue of confidentiality was raised and it was noted that the mediator should tell court staff only that the case has been referred to mediation and that an appeal has been filed. It was noted these are matters of public record. Mr. Laney called attention to a typo in the case citation. Mr. Little and Ms. Clare believe this Opinion should help both mediators and court staff. The Opinion was adopted with the change noted by Mr. Laney. Ms. Clare also distributed a copy of some proposed revisions to Standard III. She said the Committee was working on this Standard and the matter would likely be on the agenda for the September meeting.

Mr. Tash reported for the Grievance Committee. He said it was extremely helpful to have Judge Caldwell and Judge McCullough on the Committee. He summarized matters currently before the Committee or that were resolved this quarter and asked Ms. Ratliff to follow-up with a written summary for the September meeting. He reminded Commission members that his Committee looks not just at complaints, but at conduct issues arising in the context of certification or certification renewal. He thanked staff for their assistance.

Judge Cash next reported for the FFS Program Oversight Committee. Judge Cash observed that, as a mediator, he really appreciated the Advisory Opinions, that they are helpful and consistent and he thanked Ms. Clare. Judge Cash also referenced the summaries on CaseWise reporting that Ms. Nesbitt and Ms. Lamotte prepared. He noted that it can be difficult to change the culture of a district relating to reporting. He presented a survey instrument that will go to the judges to collect information about dispute resolution and reporting. Judge Cash added that he and Mr. Little will follow-up with judges at their conferences to encourage them to complete the survey and to ensure that their districts are reporting and using CaseWise properly. Judge Morgan was concerned about the inclusion of statutory cites and observed that they might chill responses. Judge Cash noted that concern had been discussed and that responses could not be treated unanimously because the AOC needs to know which districts and staff need assistance. Ms. Nesbitt clarified that the purpose of the statutory cites is to inform, not to punish or embarrass. Judge Cash asked whether the Commission wanted the citations removed? Mr. Little said he felt they might be chilling. Judge Anderson noted

that reporting deficiencies may relate to a lack of resources. He suggested a slight modification to give judges an opportunity to express reporting concerns that relate to a lack of resources. The Committee will strike the statutory cites and tweak the questions consistent with the comments. Judge Cash expressed appreciation for the input and noted the surveys would go out by the end of this month.

Mr. Laney had no report for the District Criminal Court Mediation Committee, but reported for the *Ad hoc* Exploratory Video Committee. He explained that the Committee would be looking into developing an orientation video directed at parties and that it could be a generic video or intended for use in a specific program(s). He noted the Committee had met and would start by surveying centers about their need for such a video.

Mr. Little next called for ex officio reports. Ms. Hayden reported she was happy to see the revised forms and the materials posted in the Tool Box relating to extensions. Mr. Laney had no report for the federal courts. Ms. Marsh reported that some centers are having difficulty getting their district criminal court programs established pursuant to the new legislation regarding citizen initiated warrants. She noted that the Centers have their own certification process. Ms. Nesbitt asked all Commission members to encourage judges and court staff they know to get their caseload statistics in and to remind them that the reporting process has been streamlined. Ms. Rose reported that her Conference had met in February. She said she would reach out to the Trial Court Administrators and encourage them to report. John Shafer reported that some 8,000 cases are referred each year to the IC and that their settlement rate is up. He said that they are seeing more voluntary mediations and reported that the IC has a new chair, Andrew Heath.

Ms. Ratliff gave her office report. She noted that the office was gearing up for the 2013/14 renewal period and thanked Ms. Robinson who has been training her to process renewal applications. She added that the office is excited about Ms. Hopkins' arrival and noted that she will occupy the Commission's conference room and that the Commission has been given a new interior conference room.

Mr. Little next asked about setting additional meeting dates. The annual retreat is set for September 13-14 at Shelton's Vineyard near Dobson and he noted it would start on Friday at 10:00 am. The following meeting is set for December 6. Mr. Little suggested February 21 and May 16 as tentative dates for additional meetings. He then asked for feedback on whether committee meetings should continue at full Commission meetings. The consensus was that committee meetings were a good idea initially with the turnover in membership, but the preference was to return to the traditional format. There being no further business, Mr. Little thanked everyone for coming and adjourned the meeting.

Dispute Resolution Commission

MINUTES

**Fall Retreat
September 13-14, 2013
Dobson, NC**

**Friday, September 13
10:00 AM**

Members present: Little, A. Anderson, C. Anderson, Cash, Clare, Dollar, Farah, Gullick, Hicks, Long, McCullough, Morgan, Seigle, Tash, and Vincent. Ex-officio members and staff present: Ellis, Hayden, Hopkins, Lee, Marsh, Nesbitt, Ratliff, Rose, Steelman, and Turner. Guests present George Doyle and Judge Charles Neaves. Mr. Little noted that Judge Caldwell, Mr. Beason, Mr. Laney, Mr. Schafer, and Ms. Nease Brown had sent regrets.

Mr. Little welcomed everyone and thanked them for coming. He next presented plaques to Judge Morgan and Mr. Tash who had completed their terms on the Commission. He added that he would hand-deliver a plaque to Ms. Bryant who was unable to attend. Judge Morgan administered the oath of office to Ms. Gullick who was re-appointed for a second term. Mr. Little recognized Judge Neaves.

Mr. Little noted that the proposed rule changes would be the primary focus of the meeting. Discussion began with the Commission's Rules. Mr. Little noted that revised Rule VIII provided for establishment of a separate Standards and Advisory Opinions Committee. Rule VIII was approved with minor changes suggested by Ms. Clare and Judge Vincent. Mr. Tash led the discussion on proposed changes to Rule IX which now establishes a separate Grievance and Disciplinary Committee to address complaints and other matters relating to ethics and discipline. Ms. Clare, Ms. Ellis, and Judge Turner expressed concern about the open ended statute of limitations on the filing of complaints (Rule IX.C.(2)(e)). Mr. Little asked for the Grievance Committee to discuss that concern during lunch and report back. Mr. Long asked why Rule IX.C.(3)(a) provided for witnesses to be contacted and notified of a dismissal. Ms. Ratliff explained that mediators whose complaints have been dismissed had asked that any witnesses contacted be notified. The Commission determined to leave the language in with the words, "if feasible" added to the end of the sentence. Rule X establishes the Mediator Certification and Training Committee. Ms. Anderson led discussion on that Rule and suggested that the amendments were technical in nature. Rule X was adopted. Mr. Little noted that Rule XI established other committees. Rule XI was approved with minor changes.

Ms. Gullick (MSC Program Oversight Committee) led the discussion of the superior court Mediated Settlement Conference Rules. She first called attention to Rule 2.C and changes relating to appointment letters. Mr. Little explained that the requirement that

mediators send appointment letters was being removed because it was difficult for court staff to implement. Next, Ms. Gullick discussed changes to Rule 3.A which had been rewritten to read more like its corresponding FFS Rule. Judge Morgan and Mr. Long asked about the “unduly prolonging” language in Rule 6.A. After discussion, it was determined that the issue of unnecessarily prolonging the conference was also discussed in Rule 6.B.(3) and Standard VII.G. Judge Anderson suggested moving the Rule 6.A. prolonging language to Rule 6.B.(3). Mr. Little asked Ms. Gullick’s Committee to consider this proposal during lunch. Ms. Gullick next addressed Rule 8 and changes to the observation requirements. Next, she discussed changes to the Clerk’s Rules and the Farm Rules. She noted that changes to both the Farm and Clerk rules were largely stylistic and intended to track changes to the MSC Rules. Both the Farm and Clerk Rule changes were approved. Ms. Gullick next introduced two proposed, temporary forms. She explained that the *Motion and Order To Withdraw As Mediator* was a new form. The *Consent Order for Substitution of Mediator* was an existing form which was modified slightly. After some discussion, Mr. Little asked Ms. Gullick’s Committee to meet over lunch to consider additional changes to both forms.

Following lunch, Mr. Tash reported that his Committee had determined to suggest a one year statute of limitations on the filing of complaints against mediators. The Commission approved the one year limitation. Judge McCullough explained that the “subject to” language included in the proposal allowed leeway in the event a complaint was filed beyond the one year limit and the Committee felt it was meritorious. Commission Rule IX was adopted, with one dissenting vote cast by Mr. Farah who believes the new statute of limitations will be perceived by the public as too protective of mediators.

Ms. Gullick reported that, after the lunch discussion, her Committee suggested striking the language regarding a mediator not prolonging a conference unduly in MSC Rule 6.A, and to include a reference to the Standards since they address the concern, as does MSC Rule 6.B.(3). The Commission agreed with that change and, thereafter, approved the MSC Rules. Ms. Hopkins was asked to make a corresponding change to other program rules. Ms. Gullick also presented changes to the two forms discussed earlier and they were adopted and approved for posting on the Commission’s website with the understanding that they will be submitted to the AOC Forms Committee at a later time when AOC staff is less backlogged.

Judge Cash (District Court Program Oversight Committee) went over proposed changes to the FFS Rules and noted changes to Rules 2 and 3. There was discussion also about Rule 4.A.(2) and the Commission agreed to delete the last paragraph beginning with, “Ordinarily...” Judge Cash next covered significant changes to Rule 4.B and Rule 8. He noted that the Rule 8 changes were, in part, intended to make this rule better correspond to MSC Rule 8 and make observations more accessible. The FFS Rule revisions were approved. Judge Cash next discussed minor changes to the District Criminal Court Rules and they were approved. Mr. Little suggested that the district criminal court mediation statutes were confusing and duplicative and that an effort to revise and merge them into a single statute might be in order. He noted that Mr. Laney was considering whether to lead this effort and he asked Ms. Marsh to assist Mr. Laney if he agreed to serve.

Mr. Little next called for Committee reports. Ms. Gullick indicated that she had no further report, but she asked Ms. Nesbitt to comment on MSC caseload statistics and Ms. Hayden to comment on some concerns expressed to her about the Program. Ms. Hayden reported that she had received complaints from court staff about mediators not filing Reports of Mediator timely and had also received a complaint from a mediator who learned that a case he had been appointed to mediate had been mediated by another mediator with no notice to him. Mr. Little acknowledged that he hears there are reporting problems, but suggested to Ms. Hayden that if support staff would identify the mediators involved, that the Commission would take action. Lastly, Mr. Little also mentioned that there had been some discussion among MSC mediators about reinserting the partial agreement option in the Report of Mediator. Ms. Nesbitt reported that all but one MSC district was reporting. She noted the backlog of forms AOC is charged with creating or revising as a result of recent legislation.

Judge Cash reported that he had good news about CaseWise reporting and the FFS Program. He noted that efforts by AOC staff and Commission staff to reach out to court and family court staff had been successful and many more districts had begun to report. Ms. Nesbitt clarified that there was still some incorrect reporting occurring and that those situations needed to be addressed. Judge Cash added that Ms. Nesbitt would probably need to do some site visits. Judge Cash next mentioned a new session law that increased the jurisdictional limits of the district courts to \$25,000. He noted that there had been some discussion about incorporating a mediation component into the district court menu. Mr. Little suggested that the Committee may want to explore that idea more.

Ms. Anderson reported that Ms. Ratliff had completed a tentative report on her 49-state survey of CME. Ms. Anderson went over a few highlights in the report and noted that her Committee would be discussing the survey and Ms. Ratliff's report in the future.

Ms. Clare began her report with proposed revisions to the Standards of Conduct. She called attention to changes to Standard III, Confidentiality. The Standard was revised to allow mediators to speak with court personnel about procedural matters with the permission of the parties. Judge Lee asked whether court personnel should inquire as to whether the mediator has permission to speak with the court staff. Mr. Little and others said, "no," it is the mediator's responsibility to worry about permission. Mr. Little suggested that there will need to be an effort to educate mediators about confidentiality and communications with court staff. Standard III was adopted as submitted. Ms. Clare next went on to address the Advisory Opinion Policy. She suggested one change to the document in order to make the Policy consistent with DRC Rules providing anonymity to mediators who request informal advice unless they waive anonymity.

Mr. Little next called for approval of the May minutes. Minutes were approved as submitted. Mr. Little noted that the State Ethics Commission has approved both Ms. Seigle and Ms. Gullick, noting that they have potential conflicts, but no actual conflicts of interest. Ms. Seigle reported that Judge Overby had administered her oath of office. Mr. Little noted it would be re-administered at the December meeting. Mr. Little added

that Richard Ponton has also been appointed to the Commission, effective October 1, 2013.

Saturday, September 14

8:30 AM

Mr. Tash reported for the Grievance Committee, noting that this had been a quiet quarter with only two issues addressed. He briefly described one matter that arose in an application and the second that resulted from a complaint. Mr. Little suggested that he confer with Ms. Clare regarding the matter generated by the complaint and on which the Committee had taken some action. Mr. Little announced that Judge Anderson will serve as the new chair of this Committee.

Ms. Anderson reported for the Video Committee which was charged with exploring whether the Commission should produce or co-produce a video on mediation that could be posted on the Commission's or NCBA's websites or otherwise made available to attorneys or the public. Ms. Ratliff noted that the Wilmington Center was interested in the project. She said she would have the director of that Center call Ms. Anderson. Ms. Anderson then spoke briefly about a Task Force she has been chairing on mediation in the NC federal trial courts. There followed some discussion about discipline and Commission certified federal court mediators. Mr. Little said that he saw no need to notify the federal trial courts in situations where complaints were filed regarding certified mediators' conduct in mediating federal trial court cases, i.e., that such complaints were strictly a Commission matter.

Mr. Little next called for liaison reports. Ms. Ellis stated that the NC Bar Association Dispute Resolution Section's Annual Meeting would be held on February 14th and that she hoped the Commission would be willing to send a notice(s) to certified mediators about the program. Ms. Marsh reported that things were quiet with the Centers. She reported that Centers would be continuing to do Medicaid appeals. Mr. Little asked her whether she had heard any concerns expressed among Center staff regarding the number of statutes addressing district criminal court mediation. She suggested there might be some confusion and that not all centers were necessarily implementing the statutes the same way. Ms. Nesbitt reported that the AOC is still working to get court staff to report mediation statistics using CaseWise. She noted that the number of districts, and especially district court districts, not reporting had really narrowed and she was hopeful that all or nearly all would be reporting soon. She added that she was also encouraged by the chief district court judge survey responses in that nearly all the respondents reported that mediation was having a positive impact in their district. Judge Cash asked Ms. Nesbitt about the kinds of responses she was receiving regarding the recent change in the district court jurisdictional limit. Ms. Nesbitt said that the AOC was not consulted in this matter. Ms. Rose remarked on the cuts facing the judicial department and Judge Smith's fears for the integrity of the courts. Ms. Rose also talked briefly about how the district court districts were handling court appointments. Ms. Marsh mentioned a dearth of observation opportunities and noted that her center is getting many calls about observations. There followed some considerable discussion on the topic of observations and how applicants could best secure opportunities to observe. Judge Morgan suggested

putting notices in the newsletter periodically reminding mediators of the need to cooperate with observer requests. Judge Vincent asked whether the Commission or Section could keep lists of mediators willing to work with observers. Mr. Farah observed that if it is a requirement of certification, that he suggests the Commission should do more to foster accessibility. Deputy Secretary Dollar reported that it is not so simple, that sometimes certification applicants are not willing to travel or aren't available on dates the mediator has available. Judge Steelman said he had no report, but that he would like to do a short presentation at a later meeting on the Court of Appeals Mediation Program. Mr. Little asked Ms. Ratliff to make a note of that request.

Mr. Little then began to discuss legislation. He first mentioned that proposed revisions to N.C.G.S. Sect. 7A-38.2, a bill supported by the Commission, were passed by the House, but the bill faltered in the Senate and was referred to Committee. As such, the Commission will continue to pursue passage during the short session in the spring. Judge McCullough offered to make a contact with Senator Goolsby. Mr. Little next mentioned a bill addressing mediation of disputes involving homeowner associations. He noted the bill provides for voluntary mediation. He said that originally the bill designated the Centers as the provider, but it was expanded to permit other groups to serve. Mr. Little noted that there was also language in the original bill that said that mediation and the drafting of agreements was not the practice of law, but that text was removed. He also noted that there was a Senate bill providing for foreclosure mediation which was not referred to any committee and died. Mr. Little also referred to a newly enacted bill regarding agricultural nuisances which shifts attorneys' fees based upon the outcome of the case, commenting that this could have a chilling effect on litigation in this area. He also referenced legislation which increases the jurisdictional limit of district court (\$25,000) and small claims (\$10,000). He noted that he and others would be meeting with Judge Smith soon to discuss the possibility of creating a dispute resolution menu in district court or at least creating a mediation alternative to district court arbitration. Lastly, Mr. Little noted a provision in House Bill 92, the Technical Corrections bill regarding the drafting of agreements by mediators in employment related matters in state agencies. The provision provides that the drafting or writing of memoranda of understandings or other mediation summaries in these situations does not constitute the practice of law. He said that he does not know what the State Bar or Section thinks of this, but it is a matter which needs to be discussed further and that this is, he believes, a thorny issue. Ms. Marsh asked whether there had been any suits or complaints about agreements drafted by mediators and which are signed by the parties. Mr. Little hopes there can be productive discussions about this issue where all interests can be explored and accommodated.

Lastly, Ms. Ratliff gave her office report. She began by noting that Ms. Hopkins' transition to the Commission's office had been smooth and she was already contributing, including coordinating the effort to get the proposed rule changes before the group today. Ms. Ratliff also noted that the 2012/13 certification renewal period had concluded, but checks were still being processed. Lastly, she discussed budget numbers for FY 2012/13.

There being no further business, Mr. Little adjourned the meeting.

Dispute Resolution Commission

MINUTES

**Friday, December 6, 2013
BB&T Building, Greensboro, NC**

Members present: Little, A. Anderson, C. Anderson, Caldwell, Cash, Clare, Gullick, Hicks, Long, McCullough, Morgan, Ponton, Seigle, and Vincent. Ex-officio members present: Ellis, Hayden, Henderson, Laney, Lee, Marsh, Nesbitt, Rose, and Schafer. Guests and staff present: Hopkins, Igou, Ratliff, and Thigpen. Mr. Little noted that Mr. Beason, Ms. Dollar, Mr. Farah, Judge Steelman, Judge Turner, and Ms. Nease-Brown had sent their regrets.

Mr. Little welcomed everyone. He recognized new appointees to the Commission, Diann Seigle and Robert Ponton, and asked them to introduce themselves. Ms. Seigle, appointed by the Chief Justice, noted that she had served two terms on the Commission previously and is Executive Director of Carolina Dispute Settlement Services based in Raleigh. Mr. Ponton is a Raleigh family lawyer appointed by the State Bar President. Mr. Ponton indicated that he is a strong advocate for mediation, having seen the process work well in his own practice. Mr. Little also recognized Jeff Thigpen, Guilford County Registrar of Deeds and a recently certified mediator and Rick Igou from the Dispute Resolution Section. Mr. Little noted that the State Judicial Council was also meeting today and would be considering the rule revisions recently adopted by the Commission.

At Mr. Little's request, Judge Caldwell administered the oath of office to Ms. Seigle and Mr. Ponton. Mr. Little then read into the record the State Ethics Commission's findings that Mr. Ponton had no actual or potential conflicts of interest. (Ms. Seigle was reported as having no actual conflicts at the September, 2013, meeting.)

Mr. Little called for Committee reports and first asked Judge Anderson to report for the Grievance Committee. Judge Anderson reported this had been a quiet quarter relative to complaints. He noted that the Committee had requested an Advisory Opinion in response to a complaint involving a mediator who had refused to conduct a mediation for an indigent party and that the Opinion was before the Commission today. In a second matter, he reported that the Committee had certified an applicant who had been sanctioned twice by the Judicial Standards Commission in situations that were close in time and involved similar conduct and rule violations. The Committee had concerns about the applicant temperament and the certification letter included a strong warning to the applicant that he familiarize himself with the Standards and Advisory Opinions and adhere to them.

Ms. Clare next reported for the Standards and Advisory Opinions Committee. She noted two proposed Opinions before the Commission today. The first, she explained, related to a mediator who had refused to conduct a mediation for an indigent party in a family financial case. The mediator repeatedly pressed the Wife to pay and when she maintained that she

could not, he contacted the Husband and sought payment of the wife's share from him. Ms. Clare asked whether there were comments regarding the proposed Opinion. Mr. Long noted that claims of indigency are relatively common and becoming more common in family disputes. He noted that represented parties will sometimes claim indigency, which can be problematic for mediators. Lastly, he noted that parties claiming indigency often don't bring their situation to the attention of the court. Mr. Laney suggested that perhaps the rules should provide that parties are to either pay or to submit their petition claiming indigency at the conclusion of mediation. Mr. Little suggested that perhaps mediators should take the form to mediation with them. After discussion, the Commission determined to eliminate the first sentence of the first full paragraph on page 2 of the Opinion providing that if a party fails to follow through, the mediator may proceed to enforce his fee. There will be further discussion later of what a mediator should do if a party does not follow through and file his/her petition. The Opinion was approved.

The second, proposed Opinion gives direction to FFS mediators on drafting in situations where parties are *pro se*. Ms. Clare noted this Opinion has been under construction for a while and explained that the Committee had consulted with the State Bar in developing it. **She reported that the Opinion provides that attorney mediators cannot draft binding contracts for *pro se* parties as this would be the practice of law. Judge Cash asked what the situation would be if only one party was represented? He noted that he thought the outcome would be the same and Mr. Little agreed.** Judge Vincent said that from a practical standpoint, she would like for *pro se* parties to have something in writing. Judge Anderson noted that he uses the AOC approved Memorandum of Order when *pro se* parties appear before him and he believes other judges do the same. Ms. Seigle reported that she is concerned that judges are taking mediator summaries prepared by her office and attaching them to orders. Ms. Clare noted she is concerned about this, too, and assured Ms. Seigle that her Committee is continuing to think about the matter. Mr. Little asked Ms. Seigle whether the parties sign the summaries and she responded, "no". Judge Anderson said that in his district, 50-B court has become the place where *pro se* parties can get relief. He added that serving *pro se* parties is a real challenge. Judge Caldwell suggested that perhaps the Commission should approach the State Bar or NCBA about the larger concerns mentioned by the judges and Ms. Seigle. The Opinion was approved with minor revisions. Judge Lee suggested that the Commission talk with the Judges Conferences regarding what mediators can and cannot do and Mr. Little said he would explore that possibility.

Ms. Gullick reported for the MSC Program Oversight Committee. She reported that her Committee is proposing some forms for inclusion in the tool box. She first called attention to a Mediation Summary. She explained that the Summary was an outgrowth of the Opinion on drafting adopted above. She also called attention to instructions accompanying the form. Mr. Little added that the Summary could be used not just with *pro se* parties, but in situations where parties are not ready to execute a final agreement. Mr. Long suggested adding to the instructions that this form is not to be filed with the court. Ms. Rose suggested that the Summary should be signed by the parties because it gives them a vested interest. Mr. Little responded that that if it is signed, you can be assured that someone will try to treat the document as a contract. Ms. Ellis suggested that she believes the Summary should be in the parties' own hand, because it forces them to think about their agreements. Ms. Gullick

agreed to revise the instructions to note that best practice would be for the parties to complete the form themselves. Ms. Gullick said she would tweak the Summary and distribute it by email for final approval. The Commission voted to add the form to the tool box once the changes are complete.

Next, Ms. Gullick called attention to two agreement templates. One is a fill in the blank template intended for use in simple personal injury kinds of cases. The other will allow parties to reduce various terms to writing. The Commission asked that the AOC formatting be removed from all three of the forms. Mr. Long noted that the latter form will need to have a notary section if it is to be filed in district court, i.e., if the parties intend their agreement to be binding and enforceable, it must be notarized. Ms. Gullick suggested that perhaps there needs to be a separate FFS Agreement form and that perhaps Judge Cash's Committee should develop it. Ms. Gullick said she would take a stab at revising the form to include Mr. Long's suggestions and pass it along to the FFS Program Oversight Committee. Ms. Hicks suggested a stylistic change, i.e., removing the numerals after the boxes. **Ms. Gullick asks whether the Note should be limited to two *pro se* litigants as opposed to a single litigant. The consensus was that the Note should read that the Agreement form is not recommended for use in family cases or in cases where all parties are unrepresented.** Ms. Nesbitt suggested that the forms be labeled as DRC forms and numbered, so it is clear which instructions go with which form. Commission staff was asked to post the Opinions and to advise callers that forms are in the works and that if parties are *pro se*, any document resulting from their mediation should be labeled as a "Mediation Summary".

Ms. Gullick next asked Ms. Nesbitt to go over the MSC caseload statistics with the parties. Ms. Nesbitt says that she is still trying to reconcile some of the numbers being reported and that some reporting is still incomplete which will affect numbers for the year. Judge Caldwell said it is imperative that the Commission do all it can to get the caseload statistics in order. Ms. Nesbitt said that a year from now the numbers will be much better. Judge Caldwell asked about situations where mediators do not file their Reports. Mr. Little responded that the Commission can encourage, warn, and even discipline mediators who fail to report or to report timely in instances where judges or court staff let the Commission know there are problems. Judge Vincent asked about judges being required to report mediators who fail to file their reports.

Next, Judge Cash reported for the District Court Oversight Committee. He stressed the need for AOC and Commission staff to stay in touch with local court staff about caseload reporting. He noted there are still some FFS districts that are not reporting. Judge Cash thinks it might be appropriate for Mr. Little to talk with Chief Justice Parker about those districts. Ms. Nesbitt reported that she has conducted three very successful site visits.

Next Judge Cash called attention to proposed changes to the District Court Arbitration Rules. Given that the legislature has expanded the jurisdiction of district court, he reported that he and Mr. Little had met with Judge Smith to talk about adding a mediation component to the already existing arbitration option available in district court civil cases. Judge Cash

asked Commission members to review the proposed rules and suggested there would likely be additional discussion of them at the February meeting.

Ms. Anderson reported for the Mediator Certification and Training Committee. She first noted that she thinks the time is right to move forward with development of a video for district criminal court mediation. She thinks it would be about a 5 minute video. She added that NCBA staff has agreed to assist with development and taping at no charge beyond reimbursement for mileage and off site meals. She asked for authorization to spend up to \$1,000 on the project. The request was approved.

Ms. Anderson next called attention to the memo on CME and asked for comments from the group. Ms. Gullick favors “soft CME” such as allowing credit to those who allow observers and to those who observe once certified. Ms. Ellis is interested in Webinars about Advisory Opinions, rule changes, etc. Judge Morgan suggested that any group that is certified and subject to regulation should be concerned with continuing education. Ms. Marsh echoed the same concern and noted that community mediators are required to attend ongoing education opportunities. Mr. Little noted this conversation has been going on since 1998. He noted that most certified mediators are lawyers, so it is critical that CLE and CME dovetail. Ms. Clare said she already thinks there are courses that dovetail out there. Ms. Clare said she feels strongly that it is time to move forward with CME. Mr. Little suggested that it may be time to start a dialog with the State Bar and he suggested that Ms. Anderson begin some exploratory talks. Both he and Ms. Clare agree with Ms. Gullick that soft CME is important. Ms. Ellis suggested that the NCBA would be a great source of information as it has years of experience navigating State Bar CLE requirements. Ms. Seigle asked the Commission not to forget about non-attorney mediators and to consider CEU requirements of other professional licensing bodies. Mr. Little and Ms. Ellis suggested starting with the Section. Ms. Anderson will begin that dialog. Mr. Little pointed out that there is still the issue that not all FFS mediators are certified. Ms. Seigle asked whether with time, the family bar might now be less resistant to the notion of certification.

Mr. Little next called for liaison reports. Ms. Ellis reported that the Section’s Annual Meeting will be held on February 14 and she invited all to attend. She asked Ms. Anderson to report on the Federal Mediation Task Force. Ms. Anderson noted that some of the Task Force’s findings will soon be discussed with the federal judges. Ms. Hayden reported that staff was preoccupied with CaseWise and she had no additional report. Ms. Rose noted that family districts have been preoccupied with CaseWise reporting as well. Mr. Schafer reported that over 8,500 cases had been referred to mediation for the 12th straight fiscal year and that settlement rates are upward of 75%. He noted that the Industrial Commission is experiencing some upheaval relative to its rules, including its rules for mediation, now that IC rules are subject to the Administrative Procedures Act.

The minutes for the September retreat were approved as submitted. Mr. Little noted that the next meeting is set for Friday, February 21st in Raleigh with a May 16th meeting also set for Raleigh. There being no further business the meeting was adjourned.