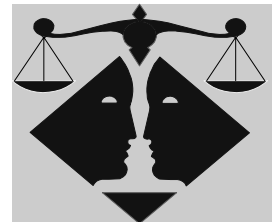


# The Intermediary

*A Bridge between the Dispute Resolution Commission  
and North Carolina's Certified Mediators*



August, 2005

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## *From the Chair*

*by*  
*Judge Sanford L. Steelman, Jr.*

The General Assembly has adopted and Governor Easley has signed legislation creating a new mediation program in North Carolina. N.C. Gen. Stat. § 7A-38.3B provides for mediation of adult guardianship, estate, boundary disputes, and other matters pending before Clerks of Superior Court. A joint task force, established by the DRC and the NCBA's Dispute Resolution Section, is diligently working to craft rules and forms to implement the new program and will be making its recommendations to the DRC at its September 9, 2005, meeting. The Commission thanks Andy Little and Frank Laney for co-chairing this effort. Thanks to their hard work and perseverance, what was only a vision six months ago is a reality today.

The new program is modeled on the existing statutes and rules for the Mediated Settlement Conference and Family Financial Settlement Programs, with some minor differences. The proposed rules provide that mediators who are already certified in district and superior court will be eligible to conduct mediations in all disputes referred by Clerks, except in adult guardianship and estate matters. To be included on the Clerk Program roster, certified mediators will only need to file a short application with the Commission indicating their interest in serving. Certified mediators interested in mediating estate and adult guardianship referrals will need to complete the Clerk Program application and also complete ten additional hours of training. The task force proposes that the training focus on adult guardianship, estate law, the aging process, assessment of physical and mental capacity, family dynamics in the context of caring for an aging family member or responding to the loss of a family member, and financial and accounting concerns in such disputes.

The Commission is looking forward to this new initiative and the opportunity it presents to use mediation as a tool for resolving difficult disputes that can weigh heavily on families -- parents at odds with their children over whether they can still live independently and siblings arguing over the administration and distribution of a parent's estate. The Commission is confident that this new program will be an important addition to the array of dispute resolution options already available in our court system.

Besides considering rules for the new Clerk Program, the Commission will have a number of other important items on its agenda for the September  
*(Continued on next page)*

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*The Commission invites its readers to comment on any articles or any of the information presented in The Intermediary or to write articles for inclusion. Send your thoughts to the editor, Leslie Ratliff, at [leslie.ratliff@nccourts.org](mailto:leslie.ratliff@nccourts.org). We look forward to hearing from you!*

meeting. The Commission will consider recommending that all superior and district court cases be referred to mediation, with cases excluded from mediation only for good cause. The Commission will also consider recommending a rule change to require certification of all mediators serving in court-ordered mediated settlement conference programs. Finally, the Commission will consider recommending to the Supreme Court that a rule be adopted requiring that trial court appointment of mediators be made by a rotation system, without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. The trial judge would retain discretion to deviate from the rotation for good cause. Proposed revisions would require judges to include certified mediators on their lists who do not reside in their judicial district or a contiguous county, if such mediators contact the court, on an annual basis, and express a willingness to accept appointments in the district.

As we began looking at some of these certification and program operation issues, I asked Commission staff to contact other States across the country and inquire about how they qualify their neutrals and operate their programs. The survey results were revealing. The party-pay approach pioneered in States like Florida and North Carolina has caught on across the country. Nearly half the States operate at least some, if not all their programs, on a party-pay basis. A sizeable number of other States are currently considering switching to this mode of operation.

Another evident trend is an increasing emphasis on the qualification of neutrals. Most States have established at least minimal threshold (education and work experience) and training requirements that their neutrals must meet to be included on court rosters. In many instances, training requirements exceed those mandated in North Carolina. A large number of States have adopted a continuing mediator education requirement. A few States have opted for mandatory referral of cases to mediation or arbitration with an opt out provision for good cause. Some have closed their court programs entirely to non-rostered individuals, permitting only trained and qualified neutrals to serve. Several other States have worked towards that end by actively discouraging non-rostered neutrals from practicing or by discouraging parties from selecting them, *e.g.*, denying non-rostered neutrals immunity, subsidizing the fees of rostered neutrals, or making it clear to parties that the State will not respond to them if they employ a non-rostered mediator and then complain that s/he engaged in unethical conduct.

Like North Carolina, many of the States have evolved to the stage where their primary focus is on refining and strengthening existing programs, rather than implementing new ones. I look forward to working with the members of the Commission, the judiciary, the bar, and citizens as we strive to make mediation a better tool for dispute resolution in North Carolina.

*This edition of The Intermediary will focus on the new program for matters referred to mediation by Clerks of Superior Court. Kate Mewhinney's article on page 5 looks at adult guardianship mediation and explores some of the benefits associated with mediating these types of disputes. An article on page 4 explores how the new program will likely differ from our court's other mediated settlement conference programs.*

## **Advisory Opinion Adopted**

The Commission has adopted an advisory opinion that addresses the mediator's responsibility for scheduling mediations. The Commission's Advisory Opinion Policy and archived opinions may be accessed at [www.ncdrc.org](http://www.ncdrc.org). Click on "Standards of Conduct for Mediators", then click on "Advisory Opinion Policy" or "Advisory Opinions".

## **Advisory Opinion of the NC Dispute Resolution Commission**

Opinion Number 08-05

(Adopted and Issued by the Commission on February 11, 2005.)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

### **Concern Raised**

Mediator asks the Commission whether he is obligated under program rules to schedule the mediated settlement conference. He notes that there is a pattern and practice in his judicial district of the plaintiff taking responsibility for scheduling the conference.

### **Advisory Opinion**

The operating rules for both the Mediated Settlement Conference and Family Financial Settlement Programs make it clear that it is the mediator's responsibility, and not the parties', to schedule mediated settlement conferences in cases in which they have been either appointed or chosen as the mediator.

For purposes of the Mediated Settlement Conference Program, Rule 6.B.(5), which specifies mediator duties, is controlling:

It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

For purposes of the Family Financial Settlement Program, Rule 6.B.(5) reads almost identically.

There are two reasons why the Supreme Court placed the responsibility for scheduling on the mediator. First, the General Assembly intended for the mediated settlement conference programs to operate with minimal administration on the part of court personnel and with no appropriation of tax dollars. Thus, the mediated settlement conference program uses professionals who are paid directly by the parties for their services as mediators and for their administrative services in scheduling mediations and reporting the results to the court. In accepting cases ordered to mediation by the court, a mediator agrees both to serve as a case manager for the court and as a facilitator of negotiations between the parties at the settlement conference.

*(Continued on next page)*

*(Advisory Opinion Number 08-05 continued)*

Secondly, from a practical standpoint, the mediator, and not the parties, is in the best position to ensure that cases are scheduled timely. The parties themselves may not be motivated to hold their mediation within the time limits set by the court. In addition, *pro se* parties may have little or no awareness of program rules or the mediation process. Therefore, responsibility for the administration and scheduling of the settlement conference was placed on the mediator, not the parties. Recent rule changes emphasize this administrative duty of mediators by requiring that they file reports even when the parties settle their case prior to mediation.

The Commission has learned that there is a pattern and practice developing in which mediators defer to the parties in matters of scheduling. We can imagine instances in which the parties schedule mediation and do not need the assistance or prompting of a mediator to comply with the directives of the court. However, ultimate responsibility for scheduling rests with the mediator.

A mediator who fails to assume responsibility for scheduling his or her conference within the deadlines set out by the court fails to fulfill one of his/her major obligations as a mediator. As such, s/he may be subject to discipline by the courts that appoint and supervise him/her and by the Commission that is charged with regulating the conduct of mediators as set out in the Standards of Conduct and the Rules of the Supreme Court.

A mediator's obligations under the Rules of the Supreme Court and the Standards of Conduct are (1) to facilitate the parties' negotiations in a mediated settlement conference and (2) to schedule that conference and report its results to the court in a timely fashion. Under these guidelines the mediator is as much a case manager as s/he is a negotiations facilitator.

## **Clerk Mediation Program Established**

The General Assembly has now adopted legislation to establish a program for mediation of matters referred by Clerks of Superior Court. N.C. Gen. Stat. § 7A-38.3B provides that matters in which the Clerk has exclusive or original jurisdiction, including adult guardianship, estate and boundary disputes, are eligible for referral. Matters falling under Chapters 45 and 48 of the General Statutes, those in which Clerks' jurisdiction is ancillary, and certain special proceedings, such as foreclosures and name changes, may not be referred to mediation. The new legislation largely tracks the statutes that established the superior and district court mediated settlement conference programs.

The task force assembled by the DRC and the NCBA's Dispute Resolution Section that drafted the statute has been hard at work this

summer developing rules and forms to implement the new program. The Rules will be submitted to the DRC for consideration at its meeting scheduled for September 9 in Raleigh. While the proposed rules also borrow heavily from those in use in the other mediated settlement conference programs, there are some significant differences regarding attendance at mediation; the need for the Clerk, in some instances, to approve agreements; and the apportionment of mediator fees.

The statute and draft rules give the Clerk broad authority to order attendance at mediation sessions. Clerks may order the attendance of named parties; interested persons, *i.e.*, persons with a right, interest, or claim in the matter; non-party participants, *i.e.*, any other person or entity the Clerk identifies as possessing useful information about the

dispute; and fiduciaries or entities who serve as fiduciaries. This broad authority is rooted in the experiences of trainers working in other parts of the county who suggest that it is important for mediators serving in estate or adult guardianship programs to be more focused on "in-take" issues than those working in other arenas. For example, in estate cases a mediator may need to question the parties for the purpose of identifying heirs that may not have been brought to the Clerk's attention or given notice of the mediation. In adult guardianship cases, the neighbor of an elderly respondent may have more information about the respondent's capacity to care for herself than do her adult children living in other cities or even other States. The mediator may want to ask prior to, and even at, the mediation about others who

*(Continued on Page 10)*

## “THE MEDIATOR” — Coming Soon to a Guardianship Case Near You?



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Reprinted from “Elder Law” — newsletter of the NCBA Elder Law Section

Readers are surely familiar with mediation, now a common part of the litigation process. In mediation, parties are brought together and helped to seek a resolution on their own. The goals are to reach a compromise and, in some circumstances, to allow the parties to preserve their relationship. As a mediator, I have told parties that this is their chance to hammer out a solution that they can live with, rather than one side coming out the “winner” and the other side the “loser.” These benefits of mediation will soon be available to families in the guardianship arena.

During the fall of 2004, an array of stakeholders were gathered under the leadership of Andy Little, then Chair of the N.C. Dispute Resolution Commission<sup>2</sup>, and Frank Laney, then Chair of the N.C. Bar Association’s Section on Dispute Resolution. Clerks of Court, representatives of the Section, and other interested parties were invited to a series of meetings.

The goal was to draft legislation and rules to empower the Clerks to order mediation in cases within the jurisdiction of their offices, such as guardianship, estates, boundary disputes, and partitions. The original impetus was to permit mediation in incompetency/guardianship cases, but the process evolved to grant authority to the Clerks over a wider range of cases.

### “The Case of the Feuding Sisters”

Consider this story –

An eighty year old widow has become mentally impaired. She has eight living adult children, and four are daughters who live near her. When one daughter petitions to become her mother’s guardian, her three sisters appear at the hearing before the Clerk of Court. The daughters, unfortunately, do not get along. During the adjudication hearing, the petitioner, frustrated by her sisters’ criticisms, drops her request to be the guardian. This leaves the Clerk, who has allocated an hour for the hearing, with accusations flying across the room. Without the time or mandate to work through the disagreements, the Clerk appoints a public agency to serve as the widow’s guardian of the person.

Is there a better approach? Perhaps. Mediation would provide this family with a clear process for airing their concerns and aiming for consensus. The widow would have had a good chance that one of her own daughters – instead of a stranger - would handle decisions, based on their long relationship and mutual caring. Mediation might have resulted in one family member being selected, however grudgingly, to serve as the guardian. Instead, the ward is now one of dozens in the caseload of a busy employee at the Department of Social Services (DSS). Family members will have a hard time reaching the DSS worker, and their frustration levels are likely to rise. Most importantly, the ward is not likely to get the personalized attention that family members often will provide.

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<sup>1</sup> Mewhinney is the Managing Attorney of The Elder Law Clinic, of WFU School of Law. She is a Certified Superior Court Mediator, and is Certified as an Elder Law Attorney by the National Elder Law Foundation.

<sup>2</sup> The Dispute Resolution Commission (DRC), under rules set forth by the N.C. Supreme Court, certifies mediators and regulates mediator conduct.

## Advantages of Mediation in Guardianship

**Advantages for Family Members:** In mediation, family members are encouraged to be frank, especially in one-on-one sessions with the mediator. At the same time, they are reminded of the weaknesses in their positions. Slowly, they are nudged towards compromise. Parties are given time to “vent”, a process that can take more time than even an informal guardianship adjudication provides.

**Advantages for the Respondent:** For the mildly impaired person who risks being declared incompetent and being placed into a nursing facility, she may see that compromise will allow her more options. She may agree, for example, to in-home services which previously had been refused. He may allow a family member or a disinterested agency to monitor his financial dealings. Rather than facing expensive litigation and the costs and stress of expert witnesses, the family can be helped to find a solution that everyone can work with.

In Forsyth County, where I practice, the hearing is moved to a courtroom when there are large numbers of witnesses. The formality of the courtroom can intimidate parties, especially the impaired person. Being in a courtroom also allows spectators to attend. This public airing of personal details is not appealing to most families.

## The National Scene: Mediation on the Increase

**The Pioneers:** Adult guardianship mediation was pioneered by the Center for Social Gerontology (TCSG), a Michigan group. TCSG has broadened the use of mediation to include cases in which caregivers for older persons are encountering difficulties in making decisions with and for older persons, particularly when a number of family members are involved. The group worked on pilot projects in Michigan, Georgia and Vermont to use mediation in caregiver situations, under a grant from the federal Administration on Aging.

**National Focus:** At two national conferences on guardianship reform, one in 1988 and one in 2001, mediation gained increased attention. The recent conference, called Wingspan, was co-chaired by our own Frank Johns, from Greensboro. Delegates from several national organizations met for several days of focused discussions on six topics. The topic most relevant to this article was “diversion and mediation” of guardianship matters.

As the group facilitator on the “diversion and mediation” topic, I came away from the conference committed to helping bring mediation into this part of our elder law practices. More importantly, the conference delegates voted to recommend that:

- ◆ Information be available at courthouses on mediation as an alternative to filing for guardianship;
- ◆ Specific training for guardianship mediators be developed; and
- ◆ Standards be developed on:
  - ◆ which issues would be appropriate for mediation,
  - ◆ participants in the mediation,
  - ◆ use and role of legal representatives, and
  - ◆ procedures to maximize self-determination of individuals with diminished capacity.
- ◆ Further study take place on the availability and affordability of mediation services, focusing on several identified aspects.

Stetson L. Rev. Vol. XXXI, pp. 598-600.

## Concerns about Guardianship Mediation

Not all guardianship cases are suitable for mediation. The parties’ positions may already be too polarized, for example. Or, as in many cases, there is no dispute as to the need for a guardian or as to who should be appointed guardian. Similarly, the urgency of the situation may demand the immediate appointment of an interim guardian, because the proposed ward’s health or assets are at risk. Some are concerned that, without an advocate, the impaired person would be at a severe disadvantage in mediation. And even with an advocate, the person may give up valuable legal rights that would have been preserved by the traditional adversarial adjudication.

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## Plans to Train Mediators

Many mediators will not be familiar with some of the concepts that arise in a typical guardianship or probate dispute. They will need training on medical terminology, types of health care facilities, and legal standards of capacity. It will be helpful for them to know, for example, the capacity requirements for an adjudication of incapacity, as well as for testamentary capacity and capacity to execute a power of attorney. Although powers of attorney are not directly at issue in a guardianship or caveat proceeding, these documents are often a part of family tussles over the assets of an impaired adult.

Mediator training is expected to take place this year. Curricula are being drafted.

## Conclusion

Attorneys who handle elder law issues should monitor the progress of the mediation proposal. Guardianship mediation promises to offer our clients a more comfortable way to resolve family disputes.

## To Learn More: Resources and Articles

The Center for Social Gerontology: [www.tcsg.org](http://www.tcsg.org) – 2307 Shelby Ave., Ann Arbor, MI 48103.

N.C. Dispute Resolution Commission: <http://www.nccourts.org/Courts/CRS/Councils/DRC/Default.asp>.

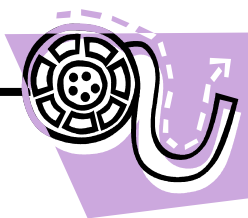
Alternative Dispute Resolution in North Carolina, JR Clare, LP Roundtree, EP Manley, eds., 2003; NC Bar Foundation and NC Dispute Resolution Commission.

Dispute Resolution Section of the NCBA: <http://disputeresolution.ncbar.org/> .

Wingspan, The Second National Guardianship Conference: Recommendations - <http://www.naela.com/pdf/Recommendations.pdf>.

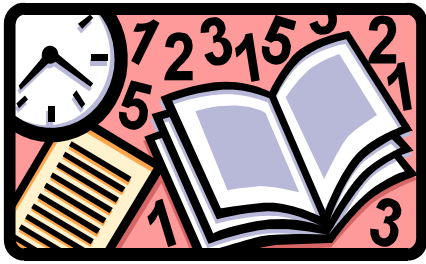
“Is the Use of Mediation Appropriate in Adult Guardianship Cases?” Mary F. Radford, *Stetson L. Rev.*, Spring 2002, Vol. XXXI, No. 3, p. 611. [The entire issue of the law review is about aspects of the Wingspan Conference and guardianship reform. See <http://www.law.stetson.edu/lawrev/backissues.htm> ]

*The Intermediary thanks Kate Mewhinney for submitting this article and for providing a list of additional resources which interested mediators may access. The Commission also thanks Ms. Mewhinney for her work in helping to design this new program.*



## Mediation Enters Popular Culture

*The Intermediary* understands that a new film this summer features two divorce mediators who “crash” weddings looking for potential dates. *The Wedding Crashers* is apparently doing very well, attracting large audiences and receiving positive reviews. Rated “R”, the film stars Owen Wilson and Vince Vaughn. With a film already in theaters, *The Intermediary* anticipates that a sitcom or perhaps a reality series featuring mediators can’t be far behind!



## *Upcoming Mediator Certification Training*

### **SUPERIOR COURT TRAINING**

**Beason & Ellis Conflict Resolution, LLC:** 40-hour superior court mediator training course, November 16-20, 2005, in Durham, NC. For more information or to register, call (919) 419-9979 or (866) 517-0145 or visit their web site: [www.beasonellis.com](http://www.beasonellis.com).

**Carolina Dispute Settlement Services:** 40-hour superior court mediator training course, November 14-18, 2005, in Raleigh, NC. For more information or to register, contact Diann Seigle at (919) 755-4646, Ext.25. Web site: [www.notrials.com](http://www.notrials.com).

**Intercede Mediation/ADR Services:** 40-hour superior court mediator training course, none scheduled at this time, TBA. (A Mecklenburg County Bar, 26th Judicial District CLE Course. For information, call (704) 375-8624 or go to [www.meckbar.org](http://www.meckbar.org).) Web site: [www.intercedemediation.com](http://www.intercedemediation.com).

**Mediation, Inc:** 40-hour superior court mediator training course, September 21-25, 2005, in Raleigh, NC. For more information or to register, contact Thorns Craven at (800) 233-5848 or (336) 777-1477 or visit their web site: [www.mediationincnc.com](http://www.mediationincnc.com).

### **FAMILY FINANCIAL TRAINING**

**Atlanta Divorce Mediators, Inc:** 40-hour family mediation training course, October 6-10, 2005, in Atlanta, GA; October 20-24, 2005, in Murphy, NC; November 2-6, 2005, in Atlanta, GA. For more information, contact Dr. Elizabeth Manley at (404) 378-3238 or (800) 862-1425. Web site: [www.mediationtraining.net](http://www.mediationtraining.net).

**Carolina Dispute Settlement Services:** 16-hour family mediation training course, September 22-23, 2005, in Raleigh, NC. See above for contact information.

**Mediation, Inc:** 40-hour family mediation training course, November 2-6, 2005, in Raleigh, NC. See above for contact information.

### **6-HOUR FFS/MSC COURSE**

(Covers North Carolina legal terminology, court structure, and civil procedure)

**Professor Mark W. Morris:** 6-hour course, August 20, 2005, in the Triangle area (exact location TBA). To pre-register online, go to [www.nccourts.homestead.com](http://www.nccourts.homestead.com).

**Community Mediation Center of Cape Fear, Inc. (Wilmington):** 6-hour course, September 10 and November 12, 2005, in Wilmington, NC. For more information or to register, contact John J. Murphy at (910) 362-8000 or e-mail at [johnm@wemediate.net](mailto:johnm@wemediate.net). Web site: [www.wemediate.net](http://www.wemediate.net).

**Judge H. William Constangy (Charlotte):** For more information, contact Judge Constangy at (704) 807-8164.



## CME and Training Opportunities

**Mediation, Inc.** is presenting an advanced mediation training course, "Getting Past Impasse: Settling Insured Claims," on September 30, 2005, in Hickory, NC. For additional information, call (800) 233-5848 or (336) 777-1477 or visit [www.mediationincnc.com](http://www.mediationincnc.com). **Mediation, Inc.** will also be presenting advanced negotiations seminars; visit their web site for more information.

**Atlanta Divorce Mediators, Inc.** is presenting Advanced Divorce Practicum Training on August 24-25 and December 8-9, 2005, in Atlanta, GA. For additional information, call (404) 378-3238 or (800) 862-1425 or visit [www.mediationtraining.net](http://www.mediationtraining.net).

**The Better Business Bureau** offers training for mediators and arbitrators. An arbitrator training session will be held on September 14-15, 2005, in Raleigh, NC. Applications can be completed online at [www.dr.bbb.org](http://www.dr.bbb.org) (click on Training). You may qualify to become a volunteer arbitrator for the BBB Auto Line program and other consumer/business disputes for the Better Business Bureau.

**2nd Annual ACR-NC Chapter Meeting**, September 7, 2005, UNC School of Government in Chapel Hill, NC. Wayne Blair, UNC Ombuds Chair will speak and Andy Sachs will conduct a facilitation workshop. Contact Deborah Isenhour at (919) 612-4986 or [Deborah@gutsinc.com](mailto:Deborah@gutsinc.com) to register.

**The NC Bar Association** is presenting "Perils and Pitfall in ADR: A Family Law Perspective", September 16, 2005, Sheraton Hotel, Chapel Hill, NC. Contact the NC Bar Foundation at (919) 677-8745 or (800) 228-3402 or visit [www.ncbar.org/CLE](http://www.ncbar.org/CLE).



### Judge Carroll Deploys To Iraq

Chief District Court Judge and Commission member Judge John J. Carroll, III, has received orders to deploy to Iraq. He is a Lieutenant Colonel in the Judge Advocate General's Office of the U.S. Army Reserves, having left active duty in 1992. Judge Carroll serves on the bench of the Fifth Judicial Circuit, which is comprised of New Hanover and Pender Counties, and was appointed a member of the Commission by Chief Justice Lake in October of 2004. Currently, Judge Carroll is in Texas receiving training before his unit is shipped overseas.

The Commission thanks Judge Carroll for his courageous service and looks forward to his safe return. The Commission asks that all mediators keep Judge Carroll; his wife, Charlene; and their four children in their thoughts and prayers.



**NEXT  
COMMISSION  
MEETING**

The next meeting of the Dispute Resolution Commission is scheduled for Friday, September 9, 2005, in Raleigh, NC. An agenda for the September meeting will be posted at [www.ncdrc.org](http://www.ncdrc.org) two weeks prior to the meeting. All mediators are welcome to attend, but the Commission asks that you contact its office and let staff know you will be present, so that seating is assured.

(Continued from Page 4)

may know relevant or even crucial information. In adult guardianship cases there may also be accessibility or participation issues to consider in scheduling a conference. Is the elderly respondent in a wheel chair? Is the building in which the mediation is to occur surrounded by curbs or lacking a wheel chair ramp? If the respondent is on medication, is s/he more alert and better able to participate in mediation at certain times of the day?

Recognizing that estate and adult guardianship disputes may pose more "participation" issues than in other established programs, the task force is also proposing a revision to the Standards of Professional Conduct for Mediators. If adopted by the Supreme Court, revised Standard VIII will place a responsibility on mediators to insure that the interests of persons who are absent or unable to participate fully in the mediation, but who will be impacted by any agreements reached, be considered by those who are present and participating

The new Clerk Program will also differ from other programs in that in some disputes mediators must submit agreements reached in mediation to the Clerk for his/her approval. Agreements reached in estate and adult guardianship matters are among those that, by law, must be reviewed by the Clerk. In these matters and others requiring the Clerk's approval, mediators will be required to attach any agreement reached to their Report of Mediator. These agreements are not binding on the Clerk, but may be offered into evidence at the hearing on the matter and may be considered by the Clerk in making his/her decision.

When the Clerk is, by law, required

to approve an agreement, it will also be in the Clerk's discretion to determine how to apportion the mediator's fee.

Lastly, the new program will differ from existing mediated settlement conference programs in that some of the time frames will be tighter, including the time frame for filing a Report of Mediator.

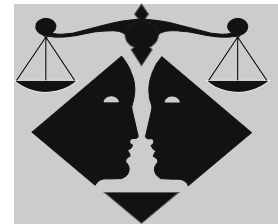
Proposed rules provide that any mediator who is already certified in either superior or district court will be eligible to mediate disputes referred by Clerks, except adult guardianship and estate matters. Interested mediators will need only complete a short application which will require them to indicate the counties in which they wish to serve. Mediators interested in conducting mediations in adult guardianship and estate cases will need to complete both the application and a ten-hour course focused on adult guardianship and estate cases. The Commission's office will notify all certified mediators once the Rules are approved by the Supreme Court and an application form is available.

Once Rules are finalized, the Commission will also begin accepting applications from trainers who wish to be certified to provide the 10-hour course in estate and adult guardianship training. It is anticipated that the training will focus largely on topics like estate and adult guardianship law, family dynamics, assessing physical and mental capacity, and financial and accounting concerns in the administration of estates and in guardianships. The Commission will post contact information for such training programs on its web site and in this newsletter as they are approved. The Commission's web site can be visited at [www.ncdrc.org](http://www.ncdrc.org).

If the Commission approves the proposed rules for the Clerk Program at its September meeting, they will likely be forwarded to the Court that same month. Once the Court has approved them, copies of the Rules will be distributed to all certified mediators by e-mail.

## Thanks!!!

The DRC expresses its sincere appreciation to Andy Little and Frank Laney who chaired the Task Force that drafted the statute and proposed rules for the new Clerk Mediation Program. The DRC also thanks the Clerks and members of their staffs who attended task force meetings or made comments on drafts. Lastly, the Commission acknowledges the members of the Task Force who worked many hours to craft a statute and proposed rules.



*The Commission has now completed its certification renewal period for fiscal year 2005/06 and would like to thank those of you continuing your service to the courts and litigants of this State. The MSC and FFS Programs have been and will continue to be successful because of your efforts. The Commission would also like to thank those of you who, for whatever reason, are not continuing. The DRC is grateful for your contributions to date.*

## **New Faces, Folks We Won't Forget**

The DRC welcomes two new members this quarter. Chief Justice Lake has appointed Martha H. Curran to fill a newly created seat on the Commission. The new seat, established in tandem with the new Clerk Mediation Program, is to be filled by a Clerk of Superior Court. Ms. Curran is Clerk in Mecklenburg County. Her term was effective on August 4, 2005. Robert F. (Bud) Siler, President of the North Carolina State Bar, has appointed Warrenton lawyer, Julius Banzet, III, to serve on the Commission. Mr. Banzet replaces C. Randall Isenhowe of Sigmon, Sigmon & Isenhowe, in Newton. Mr. Isenhowe, who was also a State Bar appointee, served two terms on the Commission. Both Ms. Curran and Mr. Banzet will serve three-year terms.

Two members of the Commission will be returning for second terms. Chief Justice Lake has re-appointed Judge Sanford L. Steelman, Jr., of the Court of Appeals, and Sherman Lee Criner, a Wilmington mediator and lawyer. Judge Steelman, who hails from Weddington, currently serves as the Commission's chair. Mr. Criner chairs the Commission's Mediator Certification and Training Committee. Their new terms, which are effective October 1, 2005, will run through September 30, 2008.

Two new ex-officio members joined the Commission this summer: Jon Harkavy, who has been elected Chair of the NCBA's Dispute Resolution Section, and Jody Minor, the new Executive Director of the Mediation Network of North Carolina. In addition, the DRC lost an ex-officio member this summer, Mark Van Der Puy, of the Adminis-

trative Office of the Courts. Mr. Van Der Puy, who also served as staff to the Standing ADR Committee of the State Judicial Council, has left court administration to pursue a career in financial planning.

## **New Prelitigation Mediation Program Established**

The General Assembly has adopted new legislation which provides for mandatory prelitigation mediation in territorial disputes between certain electric power suppliers, including electric membership corporations (coops) and municipalities that own, operate, or maintain their own electrical systems. The statute requires those involved in such disputes to mediate them in lieu of commencing a civil action subject to the provisions of G.S. 117-10.3 or G.S. 160A-331.1.

The statute provides for prelitigation mediation to be initiated by the filing of a request for mediation with a Clerk of Superior Court. The request will be treated as a special proceeding in the superior court. Those parties to the dispute may select a mediator. If they cannot agree or take no action, the Clerk will appoint a mediator from the judicial district's list of certified superior court mediators. At the conclusion of mediation, the mediator is required to prepare and file with the Clerk a certificate stating the date on which the mediation was concluded and the general result. If an agreement is not reached at mediation, the dispute must be submitted to binding arbitration. The arbitrator shall be a member of the Public Staff of the NC Utilities Commission.

The statute contains a waiver provision allowing parties to waive prelitigation mediation by informing the mediator in writing of their refusal to participate. When the parties waive prelitigation mediation, the dispute goes directly to binding arbitration at the NC Utilities Commission.

Rules to implement the new program are now being drafted. The Commission is tentatively scheduled to review those rules at its November meeting.

### **Brochures Available**

The DRC's office has new tri-fold brochures available for the superior and district court mediated settlement conference programs. The brochures describe the mediation process and the role of the mediator. Copies are available at no charge through the Commission's office. Family Financial Settlement Rule 6.B.(6) requires mediators to distribute the family brochure to parties or their attorneys prior to the conference. A brochure is also being prepared for the new Clerk Mediation Program. Proposed Clerk Rules also require mediators to distribute a brochure prior to mediation.

### **MOVING**



The DRC's office will be relocating to new quarters prior to the end of August. The new office will be located in the AOC's Anderson Drive facility off Six Forks Road in Raleigh. The office will notify mediators of new telephone and fax numbers as soon as they are available.