

The Intermediary



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

July, 2008

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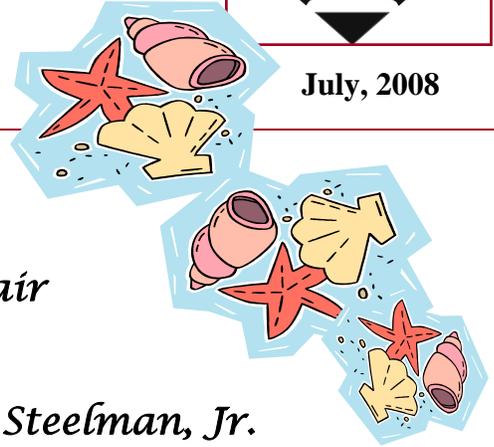
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From the Chair

By

Judge Sanford L. Steelman, Jr.



A few weeks ago you should have received an e-mail from the Commission's office. That e-mail requested your comment on proposed changes to our Supreme Court's Standards of Professional Conduct for Mediators. I hope that you will take a moment to read the Standards and to reflect on the changes highlighted. Then, please relay your thoughts to the Commission. (If you no longer have the e-mail, the proposed revisions are posted for comment on the Commission's web site are www.ncdrc.org.)

These proposals mark the first effort by the Commission to systematically review the Standards since their inception in 1998. The work was principally done by an *Ad Hoc* Committee established by the Commission to review not only the Standards, but the Supreme Court's Rules for the Dispute Resolution Commission which set forth the procedures by which the Standards are enforced. The Commission's Standards, Discipline, and Advisory Opinions Committee, working in conjunction with the North Carolina Bar Association's Dispute Resolution Section, addressed Standard III separately. The work of both Committees is reflected in the draft that was recently distributed to all certified mediators for comment. In addition to certified mediators, the Commission is seeking comment from a number of organizations, including: the North Carolina State Bar, the North Carolina Bar Association, the North Carolina Association of Defense Attorneys and the North Carolina Academy of Trial Lawyers.

The review of the Standards took about two years to complete. The Commission has wrestled with some new concepts and concerns. For example, what does a lawyer or therapist mediator do when the ethical obligations he/she must observe in his/her profession conflict with his/her ethical duties as a certified mediator? This question will undoubtedly arise in the future. Other issues that were addressed during this review process were initially raised by certified mediators who felt that the Standards fell short in providing them with the guidance they needed in certain situations.

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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. We look forward to hearing from you!

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Since our certified mediators are the ones who will be most impacted by the proposed changes, the Commission hopes you will take the opportunity to make your views known. We believe the proposed changes will strengthen our State's mediated settlement programs and clarify your ethical obligations. In reviewing the Standards and proposed changes, please bear in mind that, mediation is still a relatively new concept that has only recently become institutionalized in our courts. Our programs, your role as mediator and these ethical standards are still very much a work in progress. We are all still learning and doubtless additional adjustments will be needed in the future as we continue to work to make the mediation process more effective. Our immediate goal, with your help, is to insure that you and your colleagues have the guidance that you need to make sound ethical judgments in this new and evolving field.

I look forward to hearing from you and anticipate your thoughtful comments.



Important Notice!

The Commission continues to receive calls and letters from judges and court staff expressing their dismay that mediators are not filing their Reports of Mediator timely or meeting deadlines for completion of conferences. Whether a mediator is party-selected or court-appointed, that mediator is the case manager for purposes of any mediations assigned to him or her and it is the responsibility of that mediator to insure that each case is promptly scheduled for mediation, that the mediation is completed within the deadline set by the court, and that his or her Report of Mediator is timely filed. Please remember:

- ◆ **Mediated settlement conference programs are intended to expedite settlement of cases. If deadlines for completing conferences are not met, then settlement is not being expedited.**
- ◆ **Mediated settlement conference programs are intended to help judges and court staff manage their caseloads. If Reports of Mediator do not arrive timely, courts do not have the information they need to manage efficiently or to schedule judicial time effectively.**

Mediators can help our programs operate more effectively by doing the following:

- ◆ **Do not accept a case for mediation if you are already booked out beyond the deadline set for completion of the mediation.**

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- ◆ **Once you have received a referral, start the scheduling process immediately. Do not wait until the deadline for completion is drawing near.**
- ◆ **Try to discourage parties from requesting extensions of a scheduled conference date unless there is good cause for a postponement.**
- ◆ **If you have made a concerted effort to schedule a date for mediation and a party or attorney refuses to cooperate with you, it is your responsibility to go ahead and set a date for the conference, to send notice, and, to report on attendance.**
- ◆ **Take a copy of the Report of Mediator with you to all your conferences and get in the habit of filing it out at the table after an agreement is signed or impasse declared. Complete Reports of Mediator in their entirety and get any signatures that you need from parties or attorneys. If the mediation is not held near the courthouse or will likely conclude after 5:00 p.m., bring along an envelope and stamps and mail the Report on your way home or back to the office.**
- ◆ **Make sure that all the information that you supply to the court in your Reports of Mediator is correct. Do not report cases settled if the agreement is not reduced to writing and signed.**

The Commission has asked the Administrative Office of the Courts to begin supplying it with data identifying cases where Reports of Mediator were not filed and to name the mediators assigned to those cases. Commission staff will notify the Commission's Standards, Discipline and Advisory Opinions Committee of chronic offenders and discipline may result. Again, the Commission reminds all mediators that our mediated settlement conference programs are intended to be part of the solution, not part of the problem; but they can be only as effective as the mediators who serve them. Please make sure that, however unintentionally, you are not acting in ways that undermine the mission or operations of our court-based mediated settlement conference programs.



Rule Changes On The Way!

The North Carolina Supreme Court has adopted changes to the Mediated Settlement Conference, Family Financial Settlement and Clerk Mediation Program Rules effective October 1, 2008. The Commission's office will distribute copies of the revised Rules to all certified mediators by email well in advance of the October 1st date. (Copies will be mailed by US Mail to those mediators who have not supplied the Commission's office with an e-mail address.) The revised rules will be accompanied by a short summary of the changes. Additional copies of the new rules will be available through the Commission's office and posted on the Commission's web site at www.ncdrc.org (click on individual programs and select program rules).

In order to implement the revised rules, there will need to be some minor changes to program forms. The Commission hopes to also have revised forms available by October 1st and will notify mediators when they are ready for use. Forms can be accessed on the Commission's web site. (Click on "Forms" at the top of the screen and then from the "Category" box, select "Mediated Settlement/DRC". Search for the form by name or number.)

The Commission reminds all mediators that it is their responsibility to be familiar with current program rules and to use current forms. If you have not received a copy of the revised rules by September 15, 2008, please contact the Commission's office at (919) 890-1415.

Annual Renewal Period Ends, But Some Are Not Re-Certified

The Commission's annual mediator certification renewal period for Fiscal Year 2008/09 was pushed to mid-May this year to accommodate staffing issues in the Commission's office. *The Intermediary* is now pleased to report that Sharon Laue, who was absent for knee surgery, has returned, is back to her full schedule and is busy processing renewals.

Though the Commission is still experiencing a few "bugs" in its new on-line renewal process, renewal flowed more smoothly this year than last. The Commission hopes to implement Phase III, the final component of its effort to move from manual to on-line certification renewal, in the next year or two. Phase III will involve incorporation of a payment feature into the on-line certification renewal application. When Phase III is complete, mediators will have the option of paying certification fees by credit card or possibly by electronic funds transfer after they have completed and submitted their renewal application. Mediators who chose to continue to pay by check will be able to print an invoice after they complete their application and click the "submit" key, and then mail their check along with that invoice.

Currently, mediators receive their invoice separately from their on-line application and are asked to submit their checks via US mail. Unfortunately, many mediators complete one part of the process and mail in their checks, but fail to follow-through and submit their completed, on-line renewal applications. Staff cannot renew a certification until they have received both the check and completed on-line application. The Commission hopes that a more fully integrated on-line renewal process, which does not allow for payment until after the application is submitted, will help to correct this situation.

If you do not shortly receive a letter from this office indicating that your renewal is complete, that may very well mean that we have yet to receive your completed on-line renewal application. If you still have the e-mail from this office containing the link to the renewal application, please complete your application as soon as possible and submit it to this office. (The sender's email address would appear as drcmediators@ncccourts.org.) If you can't find the email in your inbox, please check your spam or junk folders. (If you practice in a large firm, one person in your firm may be assigned to collect and review the spam. You will need to check with that person.) If you still don't see it, contact the Commission's office and ask staff to re-send the e-mail with the link to the renewal application.

The Commission and its staff appreciates that some mediators may not be particularly internet savvy and may not be accustomed to working on-line. Some have told this office that they wish we would return to using paper applications. It is not possible to do that if the Commission is to keep its staffing at the current level and avoid substantially increasing certification fees. (Please remember that the Commission is receipt supported by certification fees and does not receive tax dollars.) Presently, there are some 1,700 certifications outstanding. A staff of three part-time individuals cannot manually process that much material and still keep up with the other responsibilities involved in operating the Commission's office. Moreover, the Commission has sought to use its web site to post on-line lists as well as biographical information about mediators. The Commission cannot maintain this information on-line if it must enter it manually.

Again, if you not done so already this year, please promptly submit your on-line renewal application so that Commission staff can complete your re-certification and transfer your updated information to the Commission's website. On August 15th, we will begin to de-certify those mediators who have not submitted both their renewal application and check. In the future, please complete and submit your renewal application promptly, and when it become available, consider using the on-line payment feature. Prompt responses help conserve certification fees and permit the Commission to stretch its revenues further which benefits all mediators.

Web Site Update



The Commission wants to thank all those certified mediators who have completed and submitted biographical information for the Commission's web site at www.ncdrc.org. The Commission is charged by G. S. 7A-38.2 with certifying mediators. Making biographical information about those mediators accessible to the public is an important aspect of fulfilling that charge. Providing such information to the Commission is also a way for mediators to let lawyers and the public know about particular experience or skills they may have. Mediators may supply biographical information during the renewal process or they supply it by contacting Commission staff and requesting a link to their "on-line profile".

The Commission has added a "Ctrl + F" key word search function to its Advisory Opinion archive posted at www.ncdrc.org. To read or to research opinions, click on "Mediator Ethics" and then click on "Advisory Opinions".

Commission Adopts New Advisory Opinion

The Dispute Resolution Commission has adopted new Advisory Opinion #08-14 pursuant to its Advisory Opinion Policy. The Commission encourages all mediators who are facing an ethical dilemma or who have a question about rule interpretation to contact the Commission's office and request guidance. If time is of the essence, a mediator may seek immediate assistance from Commission staff over the telephone or by e-mail. Mediators may also request a written opinion from the Commission. Written Advisory Opinions carry the full weight of the Commission. To view the Advisory Opinion Policy, go to www.ncdrc.org and click on "Mediators Ethics" and then click on "Advisory Opinion Policy". Previously adopted Opinions are archived on the web and may be searched using your keyboard's "Ctrl + F" function. The full text of the new Opinion follows.

08-14

Advisory Opinion of the NC Dispute Resolution Commission Opinion Number

(Adopted and Issued by the Commission on May 16, 2008)

N.C. Gen. Stat. §7A-38.2(b) provides, "The 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 ethical 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

The North Carolina Bar Association Dispute Resolution Section's Pro Bono Committee asks whether a certified mediator may hold him or herself out as willing, if voluntarily selected, to mediate without charge or at a reduced charge for parties represented by legal service organizations for the indigent. The Section reports that legal aid organizations have asked the Section to assist it in identifying and assembling a panel of mediators who are willing to volunteer their services to assist their clients. The Section believes it is important for mediators to be involved in efforts to serve those who are unable to pay, and it asks the Commission whether mediators, consistent with program rules and the Standards of Professional Conduct for Mediators, may volunteer to work pro bono or at reduced fees in such cases and in other disputes in which one or more of the parties are, or appear to be, indigent.

Advisory Opinion

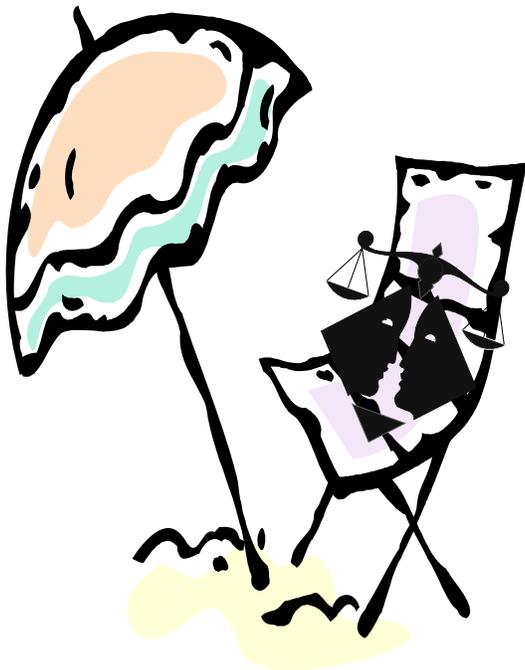
North Carolina's mediated settlement conference programs were designed to be "party-pay," meaning that the parties would directly compensate the mediator for his or her services. The party pay system has served our programs, courts and citizens well in that a cadre of talented mediators has developed over time and mediated settlement is now widely available in all our judicial districts. Though the party pay concept has been fundamental to the establishment, expansion and success of our programs, the Commission has always been mindful that, in creating a system funded by the parties, it has an obligation to insure that those who lack funds are not denied services. To that end, the original program rules provided that mediators participating in court-based programs must make their services available to indigent parties without charge. To reinforce this notion, applications for mediator certification require applicants to expressly agree to waive their fees with respect to indigent parties.

The Commission has never wavered in its commitment to those the court has determined are unable to pay and fully expects that all mediators, likewise, will take their obligation toward indigent parties seriously. Nevertheless, the Commission appreciates the desire of legal aid organizations to identify and assemble a panel of mediators who have expressed a particular willingness to work with their clients. Therefore, consistent with program rules and the Standards of Professional Conduct for Mediators, mediators may assist the clients of organizations providing legal services for the indigent, and other indigent clients, by agreeing to mediate their disputes, if voluntarily selected, without charge or at a reduced rate, under the following guidelines:

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1. A mediator may waive his/her fees, in whole or in part, for one or all parties to a dispute even if the resolution of the dispute generates funds for the indigent client. Consistent with Standard VII D, a mediator can not condition waiver of the fee upon the outcome of the dispute or case nor decide to assess a previously waived fee once a settlement in favor of the indigent party has been mediated.
2. Waiver in whole or in part for one or all parties does not require a court determination of indigency.
3. Consistent with Standard II, if the mediator agrees to waive a fee in whole or in part for one party, that fact must be disclosed to the opposing party as soon as practicable before the mediation. The purpose of the disclosure is to avoid any appearance of partiality.
4. If a mediator has a personal policy of waiving all or a portion of his/her fee for an indigent client, the mediator shall make that policy known to the other party(ies) before the parties negotiate whether the entire fee will be paid by parties other than the indigent client. An attempt to negotiate or shift the fee to other parties under these circumstances appears to give the mediator a stake in the settlement and engenders the perception of partiality.
5. A mediator may make it known to a legal service organization that the mediator is willing, if designated, to mediate without charge or at a reduced charge for the clients of legal services organizations for the indigent. The mediator's name may appear on a panel of available mediators for legal services. However, a mediator who has agreed to serve at no charge or a reduced charge is under no obligation to mediate a dispute in which s/he is selected, particularly if s/he has been called upon to mediate without charge on numerous occasions.



Whether you are relaxing at home or traveling to an exotic Caribbean Island, the Commission wishes you a safe and memorable summer.

Mediator Substitution Requests Become A Problem For Court Staff

Court staff have expressed concern to the Commission that increasing numbers of requests for substitutions of court-appointed mediators are becoming burdensome. Parties in superior court cases are given twenty-one days to select a mediator (MSC Rule 2.A). If they fail to take action within that time frame or report they cannot agree on a mediator, the Senior Resident Superior Court Judge or his/her designee makes an appointment (MSC Rule 2.C). Court staff complain, that days or weeks after such appointments are made, they often hear from attorneys requesting the substitution of another mediator. In such instances, court staff have not only expended time making the original appointment, but have to complete paperwork to effect the requested substitution.

MSC Rule 7.C. provides that if the court approves a substitution, the parties are to pay the court-appointed mediator a one time, per case administrative fee of \$125.00. (There is an equivalent provision in the FFS and Clerk Rules.) In practice, mediators frequently agree to waive payment of this administrative fee. Court staff have also reported that, on occasion, they have had situations where attorneys reported that a mediator had waived his/her fee, when, in fact, the mediator had not done so.

The requirement that an administrative fee be paid when a substitution is requested was intended to serve two purposes. First, it was designed to protect mediators who suddenly found themselves with an unexpected hole in their schedule or who had sometimes expended considerable time contacting parties about scheduling only to be told their services would not be needed. Second, and perhaps more importantly, it was intended to deter requests for substitutions. Although the Commission understood that there would be situations where substitutions were necessary; it also recognized the importance of holding such requests to a minimum if court staff were not to be burdened.

In an effort to address this situation and relieve the burden on court staff associated with processing requests for substitution, the Commission recommended that program rules be revised to require parties seeking a substitution to provide proof to the court that they have, in fact, paid the administrative fee to the court-appointed mediator, before the court may grant the request. The Supreme Court agreed with the recommendation and revised the MSC, FFS and Clerk Mediation Program rules accordingly effective October 1, 2008.

In addition to requiring proof of payment, the Commission has developed a new, standardized form for *Substitution of Mediator*. The Commission hopes the form will help minimize staff time involved in processing such requests as well as call attention to the new requirement to submit proof of payment. This draft form is currently before the AOC Forms Committee. Once it has been approved, it will be posted on the Commission's web site.

Mediators can help court staff with this growing problem by advising attorneys of the rule change effective October 1, 2008, and alerting them to the new form. Prior to October 1, 2008, court-appointed mediators can also assist by alerting attorneys to the problem that exists and, in accordance with current program rules, insisting on payment of the administrative when they are asked to step aside. The Commission and court staff will be grateful for the assistance.

AOC Works to Refine Program Statistics

Administrative Office of the Court staff have been working hard to revise and refine efforts to collect and report caseload statistics for the Mediated Settlement Conference and Family Financial Settlement Programs. Once the new reporting categories are in place, they hope to generate data that will help judges and the Dispute Resolution Commission more effectively support and manage these programs. In addition, they are designing and implementing a system to collect information on referrals to the Clerk Mediation Program.

The Commission appreciates the efforts of AOC staff and those of court staff who routinely collect and report data on cases referred to mediation. It is a big job and one that is essential for monitoring program performance.

Mediators can help the AOC and court staff with data collection by making sure that their Reports of Mediator are submitted timely and by reporting cases that are mediated voluntarily, before being ordered to mediated settlement.



Upcoming Mediator Certification Training

SUPERIOR COURT TRAINING

Beason & Ellis Conflict Resolution, LLC: 40-hour superior court mediator training course, November 5-9, in Chapel Hill. For more information or to register, call (919) 419-9979 or (866) 517-0145 or visit: www.beasonellis.com.

Carolina Dispute Settlement Services: 40-hour superior court mediator training course, August 11-14, in Durham; September 8-12 in Raleigh; and January 2-6, 2009, in Durham. For more information or to register, contact Diann Seigle at (919) 755-4646, Ext.25. Or visit: www.notrials.com.

Mediation, Inc: 40-hour superior court mediator training course, August 18-22, in Asheville. For more information or to register, call (800) 233-5848 or (919) 967-6611 or visit : www.mediationincnc.com.

FAMILY FINANCIAL TRAINING

Atlanta Divorce Mediators, Inc: 40-hour family mediation training course, August 21-25; October 2-6, and December 4-8, in Atlanta, GA; for more information, contact Dr. Elizabeth Manley at (404) 378-3238 or (800) 862-1425. Web site: www.mediationtraining.net.

Mediation, Inc: 40-hour family mediation training course, October 15-19, in Raleigh. See above for contact information.

6-HOUR MSC COURSE

(Covers North Carolina legal terminology, court structure, and civil procedure. Required for MSC/FFS Certification.)

Professor Mark W. Morris: 6-hour course, August 16, 2008 at the NCCU School of Law. To pre-register online, go to www.nccourts.homestead.com.

The ADR Center: 6-hour course, September 26, 2008, in Wilmington. For more information or to register, contact John J. Murphy at (910) 362-8000 or at johnm@theadrcenter.net. Web site: www.theadrcenter.net.

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

16-HOUR SUPPLEMENTAL MSC/FFS TRAINING

Carolina Dispute Settlement Services: 16-hour Family Financial Supplemental Training course, September 18-19 in Raleigh. For additional information or to register, contact Diann Seigle at (919) 755-4646, Ext. 25. Web site: www.notrials.com.

Mediation, Inc: 16-hour Family Financial Supplemental Training course, October 17-19, in Chapel Hill. 16-hour Superior Court Supplemental Training course, October 20-22, in Raleigh. For additional information or to register, call (800) 233-5848 or (919) 967-6611.

CLERK TRAINING

The ADR Center: Clerk Training Course on November 6-7 in Wilmington. For additional information contact John J. Murphy at (910) 362-8000 or visit www.theadrcenter.net

Mediation, Inc: Mediation, Inc., is now offering a taped Clerk Mediation Program training on DVD. To purchase a copy of the DVD call (800) 233-5848 or (919) 967-6611 or visit : www.mediationincnc.com.

Any mediator trainer who is offering programs that are not mentioned above should contact Commission staff at (919) 890-1415.



UPCOMING COMMISSION MEETINGS

The next meeting of the Dispute Resolution Commission is scheduled for **Friday, August 15th in Greensboro beginning at 10:00 A.M.** An agenda for this meeting will be posted at www.ncdrc.org two weeks prior to August 15th. The Commission has also scheduled the following, upcoming meetings:

- ◆ Friday, November 7 and Saturday, November 8 in Blowing Rock;
- ◆ Friday, February 13 in Raleigh; and
- ◆ Friday, May 8 (location to be determined).

All mediators and interested members of the public are welcome to attend meetings, but the Commission asks that you contact its office in advance and let staff know you will be present so that adequate seating for all guests can be assured. Also, if staff know you are attending and have your address, you will be mailed directions, parking information and handouts two weeks prior to the meeting. If you have an issue or concern that you would like to raise with the Commission, please let staff know so that time for any comments you wish to make can be built into the agenda. If, rather than attending a meeting, you prefer to relay your comments or concerns by letter or email, please do so at least 30 days before an upcoming meeting, so that your correspondence may be reviewed by the appropriate subcommittee.

Minutes from the most recent Commission meeting are posted on the Commission web site at www.ncdrc.org.

The Commission encourages certified mediators to take an interest in its work and welcomes your attendance and participation.

Commission Supports *Pro Bono* Effort

At the end of May, all certified mediators should have received an email from the NCBA Dispute Resolution Section soliciting volunteer mediators to serve on a new *pro bono* panel. Members of the panel have agreed to conduct mediations for Legal Aid clients for free or at a reduced rate. The panel is part of NCBA Past-President Janet Ward Black's 4-All initiative aimed at securing assistance for those who cannot afford the cost of litigation and for whom justice is out of reach. Attached to that e-mail was a copy of a Commission adopted Advisory Opinion addressing ethical issues relating to fee waiver (see page 5 of this newsletter).

The Commission congratulates the Section and particularly the Honorable Melzer "Pat" Morgan, Andy Little, Frank Laney, Professor Mark Morris, Diann Seigle, and former Section Chair Lynn Gullick for their work on this important project.

In difficult economic times, many will not be able to afford the services of a lawyer or mediator, though their legal needs may be great. The Commission encourages certified mediators, whether attorneys or not, to rise to Ms. Black's challenge and accept the Section's call to serve on this panel. Please consider volunteering!