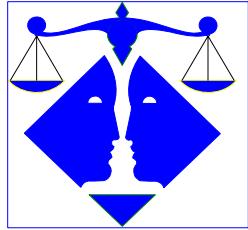


The Intermediary

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



July, 2010

Volume 9, Issue 1

Commission Members

Judge W. David Lee, Chair
Superior Court Judges Office
P.O. Drawer 829
Monroe, NC 28111-0829

Dawn Bryant
2300 Rexwoods Drive, Suite 120
Raleigh, NC 27607

Jacqueline "Jackie" R. Clare
1011 Vance Street
Raleigh, NC 27608

Jessie M. Conley
224 Harrill Street
Statesville, NC 28677

The Hon. Martha H. Curran
Clerk of Superior Court
P.O. Box 37971
Charlotte, NC 28237-7971

N. Victor Farah
P.O. Box 390
Raleigh, NC 27602-0847

Edward C. Hay, Jr.
137 Biltmore Avenue
Asheville, NC 28802

Wayne Huckel
3520 Kylemore Court
Charlotte, NC 137 Biltmore Avenue
Asheville, NC 28210

N. Lawrence "Larry" Hudspeth, III
P.O. Box 1393
Jacksonville, NC 28541-1393



From the Chair

by
Judge W. David Lee

Commission members have been busy the past few months attending workshops presented by the State Ethics Commission (SEC) and completing their Statements of Economic Interest (SEI's). This year, for the first time, Commission members were required to report under the State Ethics Act. For those members of the Commission who are not elected officials or who have not previously served on a covered Commission or Board, it was a new experience. I understand that in the past, members of other Commissions have sometimes resigned rather than submit to what they judged to be a time consuming and invasive process. I am pleased to report that no one on this Commission balked in the least and that no conflicts were found by SEC personnel who reviewed the SEI's filed by Commission members.

This experience brought into focus how often issues relating to ethics, and especially mediator ethics, have come before the Commission in recent years. Understandably, in the Commission's early years, the focus was on getting a framework of program rules, forms, and procedures in place so that mediators could be certified and the Mediated Settlement Conference Program (there was only one program back then!) could operate effectively. During those years, the functional equivalent of our Program Oversight Committee was swamped as members debated rules and made changes, sometimes substantial ones, as they learned more about mediation and what worked best for our mediators and programs. During this same period, I understand that the Committee which addressed ethics matters was much less active.

Over the last few years, the emphasis has shifted. Our Program Oversight Committee still remains busy looking at operational issues, many of which were brought to its attention by mediators. In addition, the Commission established two *ad hoc* committees in the recent past to develop new programs, the first crafted rules for the Clerk Mediation Program and the second rules for the District Criminal Court Mediation Program. But, now, as much as

(continued on page 2)

Judge Barbara Jackson
N.C. Court of Appeals
P.O. Box 888
Raleigh, NC 27602-0888

J. Anderson "Andy" Little
P.O. Box 16205
Chapel Hill, NC 27516

Judge Ann E. McKown
Durham County Courthouse
6th Floor, Suite 656
201 E. Main Street
Durham, NC 27701

Judge Michael R. Morgan
Wake County Courthouse
P.O. Box 351
Raleigh, NC 27602

Professor Mark Morris
523 Elm Street
Raleigh, NC 27604

Gary Tash
3305 Healy Drive
Winston-Salem, NC 27103-1406

Judge Joseph E. Turner
Guilford County Courthouse
P.O. Box 3008
Greensboro, NC 27402-3008

Commission Staff

Leslie Ratliff, Executive Secretary
Sharon Corey-Laue, Admin. Asst.
Maureen M. Robinson, Admin. Asst.
P.O. Box 2448
Raleigh, NC 27602-2448
Tele. (919) 890-1415
Fax. (919) 890-1935

Web Address: www.ncdrc.org



anything else, matters relating to ethics occupy our time.

Just before I became Chair, an *ad hoc* Committee was established for the purpose of conducting a review of the Standards of Professional Conduct for Mediators and redrafting them to reflect the more than a decade of actual experience we now had with dispute resolution in North Carolina. Judge Sanford Steelman, who then served as the Commission's Chair, agreed to lead that effort. During my time as the Commission's chair, we have spent hours debating the State Bar's request that the Commission comment on State Bar Rule 8.3 and the apparent conflict that exists between it and the Commission's own Standard III. (Rule 8.3 requires a mediator who is also a lawyer to report unethical conduct involving a lawyer participant which the mediator learns about during a mediation session. Standard III, on the other hand, mandates confidentiality in all but the narrowest of circumstances, *i.e.*, a statute requires the report or public safety is at issue.) To learn where that discussion has led, see Ms. Ratliff's article beginning on page 3. The Commission's Standards, Discipline and Advisory Opinions Committee (SDAO Committee) is now very active, helping mediators to better appreciate their ethical obligations and, on rare occasions when they don't, stepping in to protect the public and to insure the integrity of our programs. The SDAO Committee also recently re-visited and re-wrote the Commission's rules for investigating and hearing complaints from the public regarding mediator conduct.

I think that this new focus on ethics is largely a reflection of our growing sophistication relative to the mediation process. Commission staff is fielding increasing numbers of calls from mediators raising sometimes subtle questions about ethics and the mediation process and asking for guidance. As capable as most of our certified mediators are — I don't know that they would have spotted some of these issues in the early days of our programs. The Commission has also seen an increase in the number of complaints filed by the public regarding mediator conduct. Certainly, with four active programs and over 1,700 certifications outstanding, complaints are to be expected. However, it is also clear that the public in general has become a more astute consumer of mediation services.

I am pleased that we are all — Commission members, lawyers, court officials, mediators and the public — thinking about and struggling with what I believe are coming of age issues for the mediation process and our programs. I would expect that trend to continue and for the Commission to stay busy with ethics-related matters. If the Rule 8.3 experience is any guide, it will be challenging work!♦

TABLE OF CONTENTS

Rule Revisions.....	pg 3
New Advisory Opinion.....	pg 7
DRC Welcomes New Member....	pg 8
Commission Members Return....	pg 9
Going Native.....	pg 10
CME Opportunities.....	pg 10

DRC Website Organized.....	pg 11
Certification Renewal Underway....	pg 11
Ethics Logs Report.....	pg 12
Caseload Statistics Forms.....	pg 13
Ad Hoc Clerk Mediation.....	pg 14



Program Rule Changes Adopted

(A version of this article appeared in the December, 2009, edition of *The Intermediary*. It is being republished here now that the proposed rule changes have been adopted by the Supreme Court.)

The Dispute Resolution Commission recommended and the Supreme Court adopted revisions to mediated settlement conference program rules, the Standards of Conduct and the Commission's operating rules on February 10, 2010. The effective date of the new rules was March 1, 2010. Copies of the revised rules were emailed to all certified mediators in March and are posted on the Commission's website at www.ncdrc.org. The Commission asks that all mediators familiarize themselves with the new rules before mediating further. A summary of the changes follows:

Rewards to MSC, FFS, and Clerk Program Rules

Likely to be of most interest to certified mediators is an increase in the rate that court appointed mediators may charge for their professional services. Mediated Settlement Conference, Family Financial Settlement Conference, and Clerk Rule 7.B. all provided for a \$125.00 cap on the hourly rate which court appointed mediators could charge for their professional services. The rules also provided for a \$125.00 one time, per case administrative (case scheduling) fee. (Court appointed mediators may not charge for mileage, windshield time, or lodging.) Revisions to these program rules adopted by the Court increased both the hourly rate and the one time, per case administrative fee to \$150.00. The Commission cautions mediators that the new rates apply only to cases referred to mediation on or after March 1, 2010. In cases referred prior to March 1st, mediators must still charge the old rate.

Shortly after the new rules were adopted, a revised Report of Mediator reflecting the new rates was posted on the court's website at www.nccourts.org as well as the Commission's website at www.ncdrc.org. In reporting on cases referred to mediation prior to March 1st, please line through the new rate on the current form and insert the old rate.

Given the current economic situation in North Carolina, the Commission appreciated that this was a difficult time to raise fees on parties who were ordered to participate in court ordered mediated settlement conferences. However, the Commission also recognized that this is only the second increase in mediator fees since the inception of the superior court's Mediated Settlement Conference Program in October of 1991, nearly twenty years ago.

In addition to the fee increase, MSC, FFS and Clerk Rule 5 were revised to provide that any person required to pay a portion of a mediator's fee who fails to do so without good cause, shall be subject to the contempt powers of the court. Following notice and a hearing, monetary sanctions including, payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference, may be imposed in a written order which states findings of fact and conclusions of law. These rule changes are intended to reflect and to reinforce amendments to program enabling legislation which occurred last year and that allow for sanctions to be imposed on parties who fail to pay. Previously, legislation had provided for contempt to be imposed only in situations where a party failed to attend.

(continued on page 4)

The Commission has developed forms to assist with fee collection. (See Motion and Order for Show Cause Hearing, AOC-CV-815 and Order of Contempt For Non-Payment Of Mediator's Fees, AOC-CV-816 (MSC and FFS mediations) and Motion and Order for Show Cause Hearing, AOC-G-305T816 and Order of Contempt for Non-Payment of Mediator's Fees, AOC -G-307T (Clerk Program mediations).

Revisions to Standards of Conduct

The Standards of Professional Conduct for Mediators were first adopted by the Supreme Court in 1998. Since their initial adoption, there has been piece meal revision of individual standards, but no comprehensive review of these rules as a whole or of their impact on practicing mediators, *i.e.*, a review of how well the Standards were holding up to real life situations. Since the Standards had been in place now for more than a decade and several mediators had recently expressed concerns about some aspects of the Standards and their impact on mediator practice, the Commission determined that it was time for a comprehensive review. Judge Sanford Steelman, then Chair of the Commission, established an *ad hoc* Committee to undertake this assignment and chaired the effort himself.

Many of the changes the Commission recommended and the Court has now adopted are in the nature of fine-tuning only, but others are substantial. Revisions to Standard II.C., for example, clarify that when a party objects to a mediator's serving on the grounds of lack of impartiality, the mediator need not step aside immediately, but may discuss the matter with the party(ies). However, if the party continues to object following discussion, the mediator should decline to serve or withdraw.

Changes to Standard III clarify that mediators can tender copies of agreements reached in mediation to referring entities in instances where a statute mandates such tender. This change was largely intended to address referrals from Clerks that involve guardianship or estate matters. Clerks are, by law, required to review such agreements.

Revisions to Standard IV.C. provide additional guidance to mediators in determining whether a party has consented to mediation such that the conference may proceed. It provides that in making the determination, the mediator may consider the issues in dispute and whether any modifications or adjustments could be made to facilitate the party's participation. Such circumstances as whether the party has been accompanied by a supporting individual, such as a spouse or child, and whether he or she is represented by counsel may also be considered. This new language is intended in part to address situations that are likely to arise in guardianship mediations where a frail, ill or medicated individual may be a participant.

Revisions to Standard VII.C., which addresses conflicts of interest, clarify that not only a mediator, but his or her professional partners or co-shareholders are prohibited from advising, counseling or representing mediation parties in future matters concerning the subject of the dispute, an action closely related to the dispute or that is an out growth of the dispute. Conversely, a mediator who is a lawyer, therapist or other professional is prohibited from mediating a dispute in instances where the mediator or his/her professional partners or co-shareholders has advised, counseled or represented the parties in any matter concerning the subject of the dispute or that is an action closely related to the dispute, a preceding issue in the dispute or an out growth of the dispute. It was also clarified that such conflicts arise only in situations where the mediator, his partner, co-shareholder, or staff has engaged in substantive conversations with a party to the dispute. The revisions define the term "substantive conversations" as conversations that go beyond the discussion of general or administrative issues and include conversations in which a party has disclosed information that he or she might expect to remain confidential. Changes to Sections E. and F. of that same Standard prohibit mediators from using not only information gained, but also relationships formed during a mediation for their own personal

(continued on page 5)

gain or advantage. This particular revision was a response to a situation brought to the Commission's attention by a Clerk. The Clerk had ordered a mediation of an estate matter where the parties were arguing over who should serve as the estate's Administrator. During the course of the mediation, the mediator agreed to serve as the Administrator. The Commission was principally concerned about how the public might perceive such an arrangement, *i.e.*, that the mediator could be viewed as having manipulated the mediation process and the parties for his/her own financial gain. In response, the Commission recommended the change in Standard VII.E. and issued an Advisory Opinion (#08-15) discouraging such conduct. In addition to the conduct noted above, a similar situation was brought to Commission's attention involving a certified family financial mediator who agreed to serve as the parties' Parenting Coordinator, a position for which he would have been compensated and that might involve making decisions for the parties.

At the same time the *ad hoc* committee, under Judge Steelman's direction, was reviewing the Standards, the Commission's Standards, Discipline and Advisory Opinions Committee tackled an additional ethics issue brought to its attention by the NC State Bar. The State Bar had asked the Commission to comment on a conflict between Standard III, which addresses confidentiality, and Rule 8.3 of the State Bar's Rules of Professional Conduct. Rule 8.3 requires attorneys to report a colleague whom they know has committed a Rule 8.3 violation, *i.e.*, a serious ethical violation that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness to practice. Rule 8.3 would require a report even if the attorney was acting as a mediator when he learned about the conduct in question. Standard III, on the other hand, requires mediators to protect the confidentiality of all information communicated to them during a mediation. The only exceptions to that mandate involve situations where public safety is at issue, *e.g.*, a credible threat by one mediation participant to maim or kill another or a statute requires the report, *e.g.*, G.S. 7A-301, which mandates the reporting of child abuse or neglect. After debating the issue for some three years, the Committee recommended to the Commission that it ask the State Bar to consider creating an exception to exempt attorney-mediators from reporting Rule 8.3. violations when they become aware of the violations during the course of conducting a mediation. The Commission accepted the Committee's recommendation and the matter is now scheduled to be heard by the Ethics Committee of the State Bar this month. In requesting the exemption, the Commission affirms the importance of confidentiality and neutrality to the integrity and success of the mediation process as well as the importance of having mediators focused on the mediation process as opposed to policing the conduct of participating attorneys.

As noted above, the Commission devoted significant time and attention to the conflict between Standard III and State Bar Rule 8.3 and to how that conflict could best be resolved. The Commission recognizes that this particular conflict, as well as the larger issue of what happens when a mediator's ethical responsibilities bump up against the ethical requirements of some other group or profession to which he or she also belongs, has significant ramifications for the practice of mediation and is largely unexplored territory. The Commission felt it was extremely important to look very carefully at the issue and to make a thoughtful recommendation to the State Bar.

Revisions to Commission's Rules

Given that the Commission devoted a good deal of time this past year to conducting a comprehensive review of the Standards of Professional Conduct for Mediators, it only made sense to also undertake a review of the Rules for the Dispute Resolution Commission. Those Rules not only provide for the Commission's operations but also establish procedures for enforcing the Standards and for addressing ethical issues that arise in the context of certification and certification renewal applications. Former Commission Chair Judge Steelman charged the Standards, Discipline and Advisory Opinion Committee with undertaking this task. In particular, that Committee's Chair, Professor Mark Morris, wanted to explore whether the formal investigative and hearing procedures set forth in Rule VIII of the Commission Rules should be supplemented with some more informal alternatives. Most of the revisions to the Commission's Rules adopted by the Court are in the nature of fine-tuning. Only Rule VIII was substantially re-written.

(continued on page 6)

Rule VIII provides a framework for addressing issues relating to character or conduct that come before the Commission either in the form of complaints filed by the public regarding mediator conduct or in the context of applications for certification or certification renewal. Revisions to this Rule preserve the formal investigative and hearing procedures already provided for, but also incorporate some less formal and less adversarial options for addressing complaints and issues raised in applications. These options are, the Commission believes, more in keeping with the ideals of conflict resolution.

The revisions provide for Commission staff to, in some instances, have the option of suggesting conciliation to a complaining party and his/her mediator. That option would be available in instances where staff believes that the complaint involves a misunderstanding between the mediator and the complaining party, raises best practices concerns rather than rule violations, or involves technical or minor violations of the rules or Standards. Staff cannot require a mediator or a party to participate in conciliation, but, if they are willing, an opportunity is created for the mediator and the party to discuss their concerns and, hopefully, resolve them. If conciliation is successful, a mediator will avoid having a formal complaint filed against him or her and the party may gain a deeper understanding of the mediation process and feel better about his or her participation in that process. Theoretically, conciliation could work in many of the complaints heard by Commission staff. One of the more common complaints, for example, involves the notion of pressure applied to parties to settle. A party may mistake a mediator's efforts to get him or her to think realistically with an effort to force a settlement. Conversely, a mediator may not understand that an elderly party or one on medication, who is physically and emotionally taxed by a marathon mediation session, may feel pressured into signing.

Staff refers complaints that appear to have merit to the members of the Standards, Discipline and Advisory Opinions Committee. Under the former rule, that Committee could either dismiss a complaint or impose sanctions. Under the new rule, the Committee, like staff, has some new tools at its disposal. If the complaint involves professionalism or best practices issues, the Committee may, if it elects to do so, send one or more of its members out into the field to counsel with the mediator and to offer suggestions to help him or her avoid similar complaints in the future. The Committee may also elect to refer the matter to the Chief Justice's Commission on Professionalism which has agreed to assist the Commission. In instances where the Committee is concerned that a mediator's conduct or the conduct of an applicant for certification or certification renewal reflects significant concerns about his or her mental stability or mental health, suggests a lack of mental acuity or the presence of dementia, or suggests problems with alcohol or substance abuse, the Committee may refer the matter to the North Carolina State Bar's Lawyer Assistance Program for evaluation and possible treatment. In the event that the applicant or mediator is a non-attorney, the revised rules provide for the Commission to refer him or her to an appropriate physician or mental health practitioner.

In revising Rule VIII to include these options in the Commission's Rules, the Court was, in essence, codifying at least one practice that had evolved informally. Committee members have on at least two occasions met informally, once with a mediator, and in the other case with a trainer, to discuss best practices concerns. In both situations, the Committee felt the issues raised should not simply be ignored, but acknowledged that they did not rise to the level of rule violations.

Anyone with questions about the changes, should contact the Commission's office at (919) 890-1415. Copies of the revised rules and forms are posted on the Commission's website at www.ncdrc.org. ♦

Commission Adopts New Advisory Opinion

The Dispute Resolution Commission has adopted new Advisory Opinion #10-16 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. If time is not a factor, mediators may request a written opinion from the Commission. Written Advisory Opinions carry the full weight of the Commission and are issued when the Commission believes that a question and the Commission's response may be of interest to the wider mediator community. 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 Opinion was distributed by e-mail to certified mediators immediately following its adoption and the full text also appears below:

**Advisory Opinion
NC Dispute Resolution Commission
Opinion Number 10-16**

(Adopted and Issued by the Commission on February 26, 2010)

N.C. Gen. Stat. §7A-38.2(b) provides, “[t]he administration of mediator certification, regulation of mediator conduct, and certification 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

During the course of a mediated settlement conference in an equitable distribution action, the certified mediator learned, in a confidential private session with the wife and her attorney, that they intentionally had not disclosed to her husband and his attorney the existence of a valuable marital asset. After exploring the consequences of continued non-disclosure with the mediator, the wife and her attorney told the mediator that they would not reveal the asset to the other side and they reminded the mediator of her duty under Standard III to keep the matter of the non-disclosed asset confidential. Inquiry was made to the Commission as to whether the mediator should continue to serve as mediator under these circumstances.

Advisory Opinion

Standard VIII addresses the mediator's duty to protect the integrity of the mediation process. The Standard provides that, “A mediator shall...take reasonable steps...to limit abuses of the mediation process.” Section B. provides that, “If a mediator believes that the actions of a participant...jeopardize conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.”

Parties to an equitable distribution action are required by N.C. Gen. Stat. §50-21(a) to prepare an inventory affidavit setting out their assets and liabilities; and, in addition, they are required to do so by many of the district courts' local rules. This fact creates a different set of expectations for settlement negotiations with respect to truth telling and disclosure of information than those that exist in other negotiations. Parties, or their attorneys, who intentionally hide assets in the mediation of an equitable distribution claim, or who do not disclose them upon becoming aware of their existence, are violating state statutes and/or orders of the court.

(continued on page 8)

(continued from page 7)

It is an abuse of the mediation process for the offending party and/or attorney to negotiate a settlement of an equitable distribution claim based on such a violation; and a mediator who knows of such violations of statutes or orders would be participating with the parties in violating those disclosure requirements if s/he facilitates a settlement of the action. Thus, it would be a violation of the mediator's duty to facilitate a resolution of that action.

When a mediator learns of the intentional non-disclosure, it is best practice for the mediator to engage the offending participant in private conversation about the consequences of that party's decision. If the party persists in non-disclosure, the mediator must terminate the session and, if the party's decision remains the same, withdraw from the mediation altogether.

In withdrawing from the mediation, the mediator shall not violate the mediator's duty under Standard III, Confidentiality. A simple statement such as, "A dilemma exists that prohibits me from continuing", with no further explanation or elaboration, should suffice to end the mediator's participation. ♦

WELCOME



Commission Welcomes New Member

The Commission welcomed its newest member, Dawn Bryant, to its May meeting. Ms. Bryant was appointed by Chief Justice Sarah Parker to serve out the unexpired term of Commission member Terri Masiello which runs through September 30, 2011. Ms. Bryant is an experienced attorney and mediator. She joined the staff of Carolina Dispute Settlement Services (CDSS), a community mediation organization, after she retired from a twenty-eight year career as in-house counsel with the City of Raleigh Police Department. While with the Department, she specialized in working on matters relating to employment, civil liability, criminal law and procedure, Constitutional law and contract law. She currently serves as CDSS' Director of Education and Clinical Services.

Ms. Bryant is a graduate of both UNC-Chapel Hill (a bachelor's degree in International Studies) and North Carolina Central University (a J.D. with honors). Ms. Bryant is an avid volunteer and has served as President of Child Care Resource and Referral of Wake County, President of the Fred A. Olds P.T.A., and was a founding member and currently chairs the Wake County Domestic Violence Task Force. Ms. Bryant also served as President of Mediation Services of Wake County, the predecessor organization of CDSS. She is certified by the Commission to conduct mediations in superior court, family financial and district criminal court cases. Ms. Bryant's husband, Steven F. Bryant, is a lawyer with the NC Attorney General's office and they have two children. "Ms. Bryant has a great deal of energy and will be a tireless worker on behalf of certified mediators and our mediated settlement conference programs", observed the Commission's Chair, Judge W. David Lee, who welcomed her to the May meeting and administered her oath of office.

Ms. Bryant will serve on the Commission's Standards, Discipline and Advisory Opinions Committee. Among its duties, that Committee reviews complaints filed against mediators by the public and character and conduct issues that arise in the context of applications for certification or certification renewal. ♦



Commission Members Return

At the Commission's May meeting, the oath of office was administered to the following Commission members who were appointed to second terms: Senior Resident Superior Court Judge W. David Lee (Monroe), Chief District Court Judge Joseph E. Turner (Greensboro), District Court Judge Ann E. McKown (Durham), Jessie M. Conley (Statesville) and N. Lawrence "Larry" Hudspeth, III (Jacksonville). All the re-appointments were made by Chief Justice Sarah Parker with terms running through September 30, 2013. In addition to serving a second term as a member, Judge Lee was re-appointed as the Commission's Chair.



(At the Commission's May meeting, Judge David Lee (far right) administers the oath of office to (from left to right) Larry Hudspeth, Jessie Conley, Dawn Bryant, Judge Ann McKown, and Judge Joe Turner.) (All photos in this edition of The Intermediary are courtesy of Commission staff member, Maureen M. Robinson.)

Commission Meetings

The Commission meets quarterly. Meetings, generally scheduled on Friday, are moved about the State in an effort to facilitate attendance by certified mediators and others who are interested in the mediation process and programs. The upcoming meeting, scheduled to be held in Carthage, North Carolina, on September 17-18 is the Commission's annual retreat. Anyone wishing to address the Commission or to simply attend the meeting, is welcome to do so. Please contact the Commission's office at (919) 890-1415 to insure that seating is available and to obtain additional information.



GOING NATIVE

by

Leslie Ratliff

No doubt many mediators reared in the South, as well as those who have come here to escape cold Northern winters, like to garden. Perhaps you are one of those folks who derive tremendous satisfaction, and even joy, from watching hydrangeas and butterfly bushes bloom or from cooking with basil and cilantro you grew yourself.

You might be wondering, what has gardening got to do with dispute resolution? Well, a few weeks ago I was surprised to encounter conflict resolution principles and lingo in a book about gardening. In Bringing Nature Home (Timber Press, 2007), Professor Douglas W. Tallamy writes about a principal called “reconciliation ecology”. (The principle and term apparently originated with an early ecologist, Michael L. Rosenzweig – so early, in fact, that he says he had difficulty explaining to his family that ecology was not a branch of internal medicine!) Dr. Rosenzweig’s early research led him to realize just how much of the earth’s land surface had been altered or utterly compromised by humans and how little was left in its natural state. Echoing Professor Rosenzweig’s research and bringing matters close to home, Professor Tallamy writes that humans have taken or modified for their own use 95 to 97 percent of the land in the lower 48 states. With so much land changed, and the little that is left in its natural state fragmented, both scientists argue that many of our native insects, song birds, reptiles and smaller mammals will eventually, perhaps in the not too distant future, face mass extinction. Trying to reclaim some of this modified land for these threatened creatures will not be enough, they insist, and, is not a practical or realistic solution anyway.

Reconciliation ecology, they believe, holds at least a partial answer to the problem. As defined by Professor Rosenzweig, reconciliation ecology, “...is the science of inventing, establishing and maintaining new habitats to conserve species diversity in the places where people live, work and play”. Perhaps it could more simply be called the “science of co-existence”. What this principal suggests is that if humans modified their living spaces enough to take into account the habitat requirements of their fellow creatures, they could help create a win/win situation such that many of those creatures could survive and perhaps even thrive and humans could continue to benefit from the bio-diversity that has characterized life on earth for so long. In Bringing Nature Home, Professor Tallamy explains what a critical role gardeners must play if the changes that need to take place are to occur.

Professor Tallamy suggests that the single most important key to practicing reconciliation ecology is to insure that what you are growing in your yard, if you have one, or in the container pots on your doorstep, if you don’t, is native. If it isn’t a native, he cautions, don’t set it out in the first place or if you have already planted it, consider replacing or partially replacing it with an original. If it “volunteered” and invaded your yard under its own steam, yank or dig it out. Professor Tallamy suggests starting with an inventory of your yard. You don’t need, he says, to spend hours researching whether something is a native or not, you just need to look. If you don’t see any insect damage, then it probably isn’t native and if native insects can’t or won’t eat it, they will be absent and, consequently, unavailable as a food supply for those feeding higher up the chain, such as our threatened song birds. To help make his point, in Bringing Nature Home, Professor Tallamy includes photographs contrasting perfectly intact Bradford pear leaves with those of native and partially eaten back cherry and red maple leaves.

My own quick tour and inventory revealed just how many things growing in my yard were anything but native. I had really never noticed before how perfectly intact the leaves of my English ivy, nandina and liriope appeared. Incidentally, all three have escaped into the wild and, like the Bradford pear mentioned above, are now considered invasive in some quarters and a threat to native vegetation.

(continued on page 11)

In addition to what I had set out myself, there were the “volunteers”. Among the invaders that had established themselves in my yard were: autumn olive, microstegium (Japanese stilt grass), sericea lespedeza and Japanese honeysuckle. I did a little better with my trees most of which showed at least some evidence of having served as a snack for an array of insects and birds. The exceptions were the many mimosa seedlings (silk trees), all volunteer, and the lone Japanese maple which I planted. As far as I could tell, the maple appeared to be hosting only a single insect, the invasive Japanese beetle! Although some native birds will eat Japanese beetles, in many instances that is not the case with exotics. I was surprised to learn that because they did not co-evolve with them, many birds, according to Professor Tallamy, either cannot or will not eat invasive insects. Perhaps these specialized feeders do not even recognize these insects as a food source! The Asian woolly adelgid may be a case in point. This insect has been able to devastate hemlock trees in North Carolina’s mountains, in part, if not largely, because our native birds aren’t eating it.

Professor Tallamy stresses how critical it is to plant native grasses whenever possible as well as native flowers, shrubs and trees. Our native insects, birds and mammals have co-evolved with those species and only they can truly provide the food and shelter these creatures require. Of course, in “going native”, Professor Tallamy, acknowledges that gardeners will have to “lower” their standards in some instances. A native black cherry or white oak tree will never bear the beautiful, profuse blooms of an ornamental cherry or the exotic foliage of a Japanese maple, but will feed a host of insects, birds and mammals. We will also have to learn to accept leaf and other damage as a positive sign that we are contributing to the web of life rather than reaching for the pesticide. It won’t be easy. I love my nandina (my grandmother used it as a foundation plant and it surrounded her home in Arkansas) and the microstegium that I yanked out just days ago already shows signs of regrouping.

I encourage you to read [Bringing Nature Home](#) or to visit NC State’s wonderful website, “Going Native” at www.ncsu.edu/goingnative or the North Carolina Botanical Garden’s website at www.ncbg.unc.edu. These web sites can help you to identify invasives and to learn where to buy natives. And, if your yard isn’t already a haven for North Carolina’s indigenous insects, birds, reptiles and small mammals, consider taking some action to make it that way, if only by removing the invasive volunteers. It will provide you with a wonderful opportunity to take conflict resolution theory and practice to a whole new level, a level where the very survival of our fellow creatures is at stake. ♦

Certification Renewal Underway

The mediator certification renewal period for FY 2010/11 is well underway. As always, the Commission appreciates the contributions that mediators made to our court system this past fiscal year and is grateful for all who will continue their service in the new year. North Carolina’s programs enjoy a national reputation for excellence and the credit for that reputation rests squarely with our mediators.

The Commission reminds all mediators to renew by August 31, 2010, to avoid a service charge that will be imposed after that date. Late renewals place an administrative burden in Commission staff. This fee is designed to encourage mediators to renew promptly and to help the Commission control personnel expenses.

Because the Commission believes it is not enough to simply maintain a list of names, it has been working hard to make biographical information about certified mediators available to the public through its website at www.ncdrc.org. The Commission encourages mediators to help with this effort and asks all mediators who have not already done so, to take a moment during this renewal period to complete or to update their mediator profile. While most work, admittedly, comes through word of mouth, Commission staff do receive requests from attorneys to help them locate mediators with specific skills or experience. Such callers are referred to the key word search function available on the Commission’s website. The key word search scrolls completed profiles looking for matches. If your profile isn’t completed, you won’t be included in such searches. The Commission also reminds mediators that they may use their renewal password to update their contact availability and biographical information at any time day or night.

(Continued on Page 13)



Upcoming Mediator Certification Training

SUPERIOR COURT TRAINING

Beason & Ellis Conflict Resolution, LLC: 40-hour superior court mediator training course, July 28 - August 1, 2010, in Chapel Hill, and October 13 - 17 in Charlotte. For more information or to register, call (919) 419-9979 or (866) 517-0145 or visit their web site: www.beasonellis.com.

Carolina Dispute Settlement Services: 40-hour superior court mediator training course, August 11 - 15, 2010, at NCCU in Durham. For more information or to register, contact Dawn Bryant at (919) 755-4646 or visit their web site: www.notrials.com

Mediation, Inc: 40-hour superior court mediator training course, August 4 - 8, 2010, in Asheville, October 13 - 17, 2010, in Raleigh. 16-hour superior court mediation course, August 6 - 8, 2010, in Ashville, and October 15 - 17, 2010, in Raleigh. For more information or to register, call (888) 842-6157 or (919) 967-6611 or visit their web site: www.mediationincnc.com.

FAMILY FINANCIAL TRAINING

Atlanta Divorce Mediators, Inc: 40-hour family mediation training course, July 26 - 30, 2010, in Atlanta, GA; October 14 - 18, 2010, in Atlanta, GA; October 19 - 23, 2010, in Hendersonville, NC; and December 6 - 10, 2010 in Atlanta, Ga. For more information, contact Melissa Heard at (707) 778-7618. Web site: www.mediationtraining.net.

Carolina Dispute Settlement Services: 16-hour family mediation training course, August 24 - 25 and November 16 - 17, 2010, in Raleigh. See above for contact information.

Mediation, Inc: 40-hour family mediation training course, November 9 - 13, 2010, in the Raleigh-Durham area. 16-hour family mediation course, November 11 - 13, 2010, on the Raleigh-Durham area. 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 17 and 28, 2010, in Durham. To pre-register online, go to www.nccourts.homestead.com.

The ADR Center (Wilmington): 6-hour course. For more information or to register, contact John J. Murphy at (910) 362-8000 or e-mail at johnm@theADRcenter.org. Web site: www.theADRcenter.org.

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

Mediation, Inc: 6 hour course July 24, and September 18, 2010, in Raleigh. See above for contact information.

(continued on Page 13)

(continued from page 12)

CME and Training Opportunities

Atlanta Divorce Mediators, Inc. is presenting “Advanced Training: Domestic Violence Issues in Mediation” on November 8-9, 2010, in Atlanta, GA. “Advanced Divorce Practicum Training” on August 4-5, 2010, and December 13 - 14, 2010, in Atlanta, GA; “Trouble Shooting for Experienced Mediators, on August 20, 2010, in Hendersonville. For additional information, call (707) 778-7618 or visit www.mediationtraining.net.

North Carolina Bar Association’s Family Matters: 2008 Basics of Family Law DVD. Contact Carroll Herndon at the NCBA to purchase the DVD set, (919) 659-1440 or (800) 228-3402. You may also contact the Commission’s office at (919) 890-1415. The Commission has a set of DVDs available to loan on a first-come, first-serve basis.

North Carolina Bar Association CLE Programs: 31st Annual Estate Planning & Fiduciary Law Program on July 22 - 24, 2010, in Kiawah Island, SC; “Isn’t there a Case About That? (50 Critical Family Law Cases to Know)” on September 10, 2010, in Greensboro; “Accidents Happen (2010 Basics of Worker’s Compensation)” on October 1, 2010, in Cary. “2010 Estate Planning and Probate Law Survey Course” on October 5 - 6, 2010, in Cary; “The Modern Family (2010 Basics of Family Law)” on November 11 - 12, 2010, in Cary. For more information, please contact the NC Bar Association (800) 228-3402 or visit www.ncbar.org.

The ADR Center: “Ethical Dilemmas for Mediators”, on October 29, and December 10, 2010, in Wilmington. “Substance Abuse & Mental Health Concerns”, on August 27 and December 3, 2010, in Wilmington. For more information, please contact John Murphy at the ADR Center (910) 362-8000.

(Continued from page 11)

Certification Renewal Underway

The Commission encourages all mediators to complete at least three hours of Continuing Mediator Education (CME) annually and thanks those who have faithfully complied. To help mediators obtain CME credit, the Commission has posted information on its website. Visit the site to see a list of Commission member’s favorite books on dispute resolution and a listing of some of the best dispute resolution websites and blogs.

Again, the Commission thanks mediators for their dedication and service.♦



DRC Website Reorganized



In response to suggestions from certification applicants and mediators, the Commission has re-vamped its website located at www.ncdrc.org. The new web site uses subheadings to separate program materials from information relating to certification. According to Commission staff, applicants, in particular, were having a hard time locating the material that they needed to apply and to understand the certification process given the volume of material posted.

Material relating to ethics, complaints, and continuing mediator education has also been aggregated under a separate subheading. Another new sub-heading provides contact and limited information about other dispute resolution programs operating in North Carolina.

The Commission relies heavily on its website to help conserve staff time and to hold the line of mailing and other expenses.

The Commission invites mediators to visit and to provide suggestions for further improvements. ♦

Ethics Log Report

The Commission has adopted an Advisory Opinions Policy which sets out a mechanism for mediators to get advice from the Commission or its staff on ethical dilemmas they may face or rule interpretation questions they may have. Mediators may request a formal written Advisory Opinion from the Commission (the Policy and Opinions adopted to date are posted on the Commission's website) or if time is of the essence, they may seek an informal oral or e-mail opinion from Commission staff. Commission staff treat informal requests for assistance confidentially but log them in so that there is a record of the call or email in the event a complaint should later be filed against the mediator. Following is a sampling of recent entries in the Ethics Log:

Entry #1 -- Mediator mediated the dissolution of a professional practice some four years ago. The mediation impasse and the matter remained in dispute. Mediator was recently contacted by counsel for the parties and asked whether he could arbitrate some outstanding bills relating to the practice which were the only impediments left to settlement. Mediator says that he understands that Advisory Opinion #08-15 (adopted on 11/07/08) prohibits him from acting as an arbitrator in a case he mediated earlier. The parties have asked him to contact the Commission to inquire about the possibility of a waiver to arbitrate.

Response -- Mediator was advised that AO #08-15 is not applicable to this situation. The Opinion applies to situations where the mediator becomes a fiduciary. An arbitrator is a neutral and not a fiduciary. Mediator may arbitrate the matter.

Entry #2 – Mediator explains that the defendant failed to attend a mediation though his attorney and the plaintiff and plaintiff's counsel were present. Mediator asks how she should complete her Report of Mediator – should she report that there was an impasse or that the conference was not held due to the defendant's failure to appear?

Response – Mediator was advised that the matter should be reported as an impasse and those in attendance noted. The mediator should not put herself in the position of determining whether someone failed to appear.

Entry #3 – A mediator conducted a mediation involving a home owners' association and multiple parties. A number of the named defendants appeared *pro se* including several married couples. Mediator asked whether a *pro se* husband and wife would each owe an individual share or would be treated as one unit owing a single share?

Response – Mediator was advised that under MSC Rule 7.F. a pro se husband and wife would each owe a share of the fee, so they would pay two shares between them, i.e., the rule creates no exception for married couples. Staff suggested that if the mediator felt that was an unfair result, he could raise the issue at the end of the mediation and see whether the parties were willing to agree to some over division of the fee.

Entry #4 – Mediator conducted a mediation involving a corporation. The corporation had no lawyer but an officer, who was not an attorney, filed an answer and had also filed motions to compel discovery. An out-of-state adjuster approached the officer about whether the adjuster could attend by phone to avoid the time and expense of travel. The officer said, "no". Adjuster, in turn, told mediator that he would not participate in the mediation if the corporation was not represented by a lawyer. Mediator asked how he should handle the situation.

Response – The mediator's duty is to hold the conference regardless of whether a party is or is not attending properly. If the adjuster raises the issue at mediation, the mediator should advise him to bring the matter to the attention of the court.

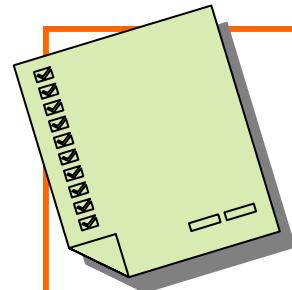
Entry #5 -- Mediator explained that a new party had been brought into a case just before a mediation was scheduled to occur. The new party's attorney was a Georgia lawyer who is not licensed in North Carolina, but who wanted to

participate. Mediator asks whether he can allow the Georgia lawyer to participate?

Response – The mediator's job is to mediate for those who appear. If a party raises an objection to the Georgia lawyer, the mediator can try to discuss and resolve it with them, but if that cannot be done, the mediator should advise the party to raise his/her concern with the court.

Entry #6 – Mediator mediated a dispute which impasse. Later, the parties agreed to refer the matter to a three member arbitration panel. The parties each selected an arbitrator and the two arbitrators have now selected the mediator to serve as the third panel member. Mediator asks whether AO #08-15 bars him from serving as an arbitrator?

Response – As noted above, AO #08-15 bars a mediator from assuming the role of fiduciary in a case s/he mediated earlier. An arbitrator is a neutral, not a fiduciary so the AO does not apply. The mediator may serve as a panel member, but only after he has first contacted the parties to insure that they have not objections.♦



Caseload Collection Instruments Revised

At its May meeting, the Commission voted to revise the forms which court staff use to report caseload statistics for the MSC and FFS Programs. The information reported by court staff is largely collected from the *Reports of Mediator* that mediators file with the court following a referral of a case to mediated settlement.

The most significant change to the forms was to include a new column that provides for the reporting of cases “Settled Prior To Or During Recess Of ADR”. In the past, a case settled prior to mediation would have most likely been reported in the “Disposed Without Session” column, even though the mediator explicitly reported it as settled pre-mediation. Anecdotal information coming to the Commission suggests that many cases are settling very early in the litigation process with mediated settlement serving as a catalyst. In effect, mediation has removed the stigma that once prevented attorneys from calling one another and talking settlement very early in the life of a case. The new column is intended to record that phenomena and to acknowledge mediation’s effect as a catalyst.

The Commission has also heard that many cases settle within a week of impasse as the dialogue begun there continues to unfold. Unfortunately, from a records keeping standpoint, there is no way to capture such settlements easily or to attribute them to the mediation process without following up with attorneys and/or parties. There is simply insufficient staff available with the court to perform that function.

The Commission encourages all mediators to file their Reports of Mediator timely with the Court. These Reports are critical to helping judges manage their caseloads and to measuring and demonstrating program performance. The Commission thanks mediators who are diligent in performing their case management responsibilities and also thanks court staff for their hard work in extracting data from the Reports and submitting it to AOC officials.

Work to revise the forms was undertaken by an *ad hoc* Committee chaired by ex-officio Commission member Alisa Huffman.

Court staff began using the new caseload reporting forms with the start of the new fiscal year, July 1, 2010. Anyone wishing to view caseload statistics for the MSC and FFS Programs may visit the Commission website’s at www.ncdrc.org. To view current or archived yearly caseload reports, click on “MSC or FFS Program Information” and then click on “Program Statistics”.♦

Section Committee to Look at Clerk Program

The NCBA's Dispute Resolution Section has appointed an *ad hoc* committee to explore why the Clerk Mediation Program is not being used more extensively by Clerks. The effort is being chaired by attorney-mediator William F. Wolcott of Asheville. Two members of the Dispute Resolution Commission, Andy Little and Dawn Bryant, also serve on the committee. The committee will look at concerns that Clerks have about the mediation process or the program's design as well as consider ways to address those concerns. The committee is also considering establishing a small pilot program to look more closely at how the mediation process works in the kinds of matters that come before Clerks.

Establishment of a Clerk Mediation Program was first authorized by the General Assembly in May of 2005. Rules implementing the Program became effective March 1, 2006. Unlike other mediation programs where the participation of parties is mandatory, Clerks have discretion whether to require mediation in a dispute.

When the program was initially established it was assumed that mediation would work well in many of the disputes before Clerks, including estate and guardianship matters, because those disputes involved family members. However, over time, the number of referrals expected has not materialized.

The Commission appreciates the Section's leadership in this matter and looks forward to hearing the Committee's suggestions.♦

HAVE

A

GREAT

SUMMER!!!



The Commission wishes all certified mediators a safe and enjoyable summer and hopes you will return from your vacations rested and ready to mediate!



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