

The Intermediary

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



From the Chair
By Judge W. David Lee

It is hard to believe that the Mediated Settlement Conference Program is now 20 years old! Some of us who have been around for a while remember when some attorneys still confused mediation with meditation and all lawyers thought that offering to negotiate or discuss settlement anywhere but the courthouse steps signaled a weak case. A lot has changed since 1991 when the pilot MSC Program was launched.

The pilot legislation provided that the MSC Program was, "...established to facilitate the settlement of superior court civil actions and to make civil litigation more economical, efficient, and satisfactory to litigants and the State." During the pilot period, The North Carolina Bar Association was instrumental in helping to raise funds to retain UNC-Chapel Hill's Institute of Government (now School of Government) to study whether the Program met the goals set forth in its enabling legislation.

In 1995, the Institute submitted its evaluation to the AOC. Professor Stevens H. Clarke, who led the study, and his colleagues, Elizabeth D. Ellen and Kelly McCormick, found that the Program worked. They reported that mediation reduced the filing-to-disposition time in contested cases by about seven weeks and that litigants liked the process and believed it was a good way to handle their cases. Based on the Institute's evaluation and positive

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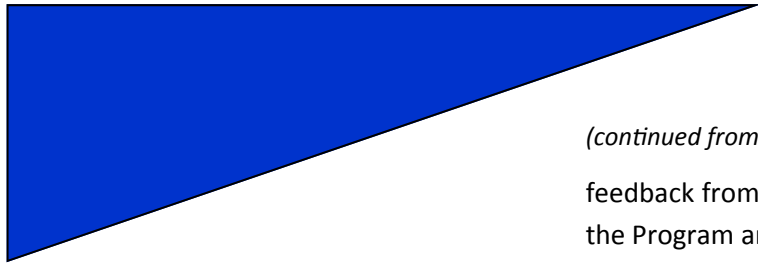
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feedback from judges, the General Assembly elected to both continue the Program and expand it statewide.

Recently, the Commission was offered an opportunity to further evaluate the Program, albeit on a much smaller scale. The Commission asked four UNC-Chapel Hill MPA students under the direction of Professor Gordon Whitaker: Dayne Batten, Meghan Boyd, David Goldberg and Davena Mgbeokwere, to look at whether the Program and mediation process were, in fact, responsible for more settlements than reflected in the data being captured by local courts and the AOC. To read what the students found, see Ms. Ratliff’s article on page 11 of this newsletter.

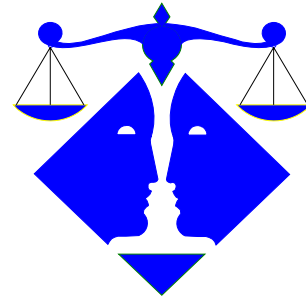
I think it is important that we continue to study the mediation process and to evaluate the results of our Program. We may all be confident that mediation works and often hear anecdotal evidence that confirms our view, but that is no substitute for the hard numbers and periodic evaluation that, I believe, we owe parties who are required to participate in this process often at considerable personal expense.

I encourage all of you to read Ms. Ratliff ‘s article about the new study and to spend some time reflecting on how far this Program and those of us involved with it have come. Not only do we no longer confuse mediation with meditation or avoid settlement discussions, but in only twenty years what was once a small pilot Program, has become an integral part of our court system and the work that all of us do as judges, lawyers and mediators. I can only imagine what may happen over the next twenty years! ♦

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Commission Adopts New Advisory Opinions



The Dispute Resolution Commission has adopted new Advisory Opinions #'s 12-21 and 12-22 pursuant to its Advisory Opinions 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, mediators 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 Opinions Policy, go to www.ncdrc.org and click on "Mediator Ethics" and then click on "Advisory Opinions Policy". Previously adopted Opinions are archived on the web and may be searched using your keyboard's "Ctrl + F" function. These Opinions were distributed by e-mail to certified mediators immediately following their adoption and the full text also appears below:

Advisory Opinion of the NC Dispute Resolution Commission

Opinion Number 12-21

(Adopted and Issued by the Commission on January 27, 2012)

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

Mediator was court appointed to mediate a superior court case. The attorneys asked him to review some documents prior to and in preparation for the mediated settlement conference. Mediator asks whether he may charge for his time in reviewing these documents.

Advisory Opinion

Program Rules

Mediated Settlement Conference Program (MSC) Rule 7.B. provides that: "...the parties shall compensate the mediator for mediation services...." The term "mediation services" is not defined in either the MSC Rules or the MSC Program's enabling legislation.

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However, beginning with the drafting committee for the MSC Pilot Program in 1990-91 and continuing through present day discussions of the Commission, the term has referred to conversations and activities that further the mediation process, including reviewing documents and discussing the case with attorneys. For that reason, the drafting committee and Commission made recommendations to the North Carolina Supreme Court, and the Court decided, there would be no prohibition against *ex parte* conversations prior to the conference, although the requirement to disclose the fact of those consultations at the beginning of the conference was added in 1995 in the interest of promoting mediator impartiality.

The Commission considers the activities of reviewing documents and talking with attorneys to be “mediation services” and understands that mediators engage in those activities to become more conversant with the issues in dispute. (Note: When a mediator is court appointed, the term “mediation services” does not include fees associated with travel to or from the location of the conference, including fees for mileage, lodging or food expenses. When a mediator is party selected, the term “mediation services” may include charges for travel time, mileage, lodging, food and other travel related expenses agreed upon between the parties and mediator in advance of the conference.)

Family Financial Settlement Rule 6.A(2) takes a different approach to the issue of pre-mediation private conversations. It provides that the mediator may not confer with the parties in advance of the mediation without the explicit consent of the parties. If that consent is sought and given, however, the answers to the questions this opinion addresses are the same as those for superior court mediators.

Standards of Professional Conduct for Mediators

It is impossible in this short space to discuss all the scenarios in which a mediator may need to decide whether to charge for time spent preparing for mediation. Most of those decisions, in reality, will not be answered by reference to the program rules or the Standards of Professional Conduct for Mediators, although questions about the mediator’s impartiality may arise from time to time. Note that Standard II provides that, “ a mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.”

Business Decisions

Most of the questions about whether to bill for mediation services that occur before the conference commences will be made by mediators with an eye to doing what makes good business sense. In the face of a unilateral request to review documents, the Commission suggests that mediators seek and obtain permission of all parties involved before going forward. Making a decision to review documents and charge without all parties’ consent almost ensures that there will be controversy when the final invoice is issued. The mediator’s credibility almost certainly will suffer under those circumstances.

The Commission believes this is so even when one party offers to pay for all of the mediator’s charges in connection with document review. Without notice and agreement from the other side, no mediator who is frequently chosen by the parties would choose to charge and collect fees under those circumstances.

The Commission strongly suggests that court-appointed mediators not charge for routine review of documents and short conversations with attorneys about the nature of the case. This is particularly true if those conversations occur during the scheduling process. Review of case summaries or briefs of up to 15-30 pages would fall under that caution as well.

Beyond those levels of preparation, most mediators who are selected by the parties on a routine basis would charge for preparation only if they first sought and received permission to do so by the parties. However, even where the document review requested by one party or another is extensive, many mediators still choose not to charge for that time and describe it as a “loss leader,” a cost of doing business. The Commission urges

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court-appointed mediators to take the same approach, particularly if they wish to develop a practice in which they seek to be selected by the parties.

In adopting this Opinion, the Commission recognizes that the North Carolina Industrial Commission's mediation rules provide that Industrial Commission appointed mediators are to be paid for mediation services "at the conference" which would necessitate a different response to this inquiry.

Advisory Opinion of the NC Dispute Resolution Commission

*** Please see the Commission's Note to AO 12-22 on Page 6 of "The Intermediary". ***

Opinion Number 12-22
(Adopted and Issued by the Commission on January 27, 2012)

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

Defendant's attorneys in a high profile products liability case contacted the Commission. They explained that a mediated settlement conference had been held in the case. The parties had not been able to reach a final agreement. However, an offer was on the table at the time the mediation impassed, and they anticipated that negotiations would continue in the near future. Defendant's attorneys stressed that confidentiality was important to their client given that there were a number of potential plaintiffs who had not filed suit. Following the mediation and much to their client's distress, the plaintiff's attorney spoke with the press and revealed the amount of the settlement offer on the table.

Defendant's counsel stated that they understood that mediation was a confidential process. They asked whether plaintiff's counsel had, in speaking with the press, violated any statutes or rules governing the Mediated Settlement Conference Program. Though they did not single out the particular mediator who conducted their conference, they complained that, if mediation is not a confidential procedure, mediators are generally misleading attorneys and their clients on that point. They insisted that during opening sessions of conferences they had attended, it was routine for mediators to provide assurances that mediation is a confidential procedure and that "what is said in mediation stays in mediation."

Advisory Opinion

Under the following analysis, plaintiff's counsel did not violate any statutes or rules in revealing the tentative settlement offer to the press, and it is clear mediators should not make assurances of confidentiality where none exist.

There is much confusion among mediators about the subject of confidentiality. The duty of confidentiality is found in Standard III of the Standards of Conduct for Certified Mediators. It places a duty of confidentiality on certified mediators and no one else involved in the mediation process. A mediator would certainly be in violation of Standard III if he or she spoke to the press or public regarding a settlement offer.

However, mediators should be mindful that parties and their counsel are free to talk to the press or public about statements or conduct occurring during their mediation, including the fact and content of any offers to settle. Thus, mediators should be careful not to suggest or imply that the situation is otherwise and should avoid statements like "everything that goes on in mediation stays in mediation." Such statements are inaccurate and misleading.

Mediators' statements about confidentiality should make it clear that it is the mediator and not the parties who has a duty of confidentiality. After being notified of the limited confidentiality rules, if the parties indicate that confidentiality among the parties is an issue, then it would be the best practice for the mediator to explore whether the parties wish to negotiate a confidentiality agreement to govern their conduct during and after the mediation. If no such agreement can be reached, then the parties may go forward in mediation armed with a clear understanding that their subsequent negotiations will not be treated as confidential by the parties themselves.

Much of the confusion about the subject of confidentiality comes from the fact that mediators must explain both confidentiality and inadmissibility to the parties at the beginning of the process. Mediators often confuse one for the other or wrongly call both of them "confidentiality."

Inadmissibility is addressed in the Mediated Settlement Conference Program's enabling legislation, N.C.G.S. § 7A-38.1 (l), which provides that "evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section" shall be inadmissible in any proceeding in the case being mediated. This provision deals only with the inadmissibility of evidence in a court proceeding and affords no broader confidentiality protections. Inadmissibility and confidentiality are separate and distinct concepts, and mediators should be careful, accurate, and not misleading in explaining them to the parties.

Though the question before the Commission in this opinion relates to the Mediated Settlement Conference Program, similar enabling legislation and rules characterize the Family Financial Settlement, Clerk, and District Criminal Court Mediation Programs. Note, however, that Clerk Program Rule 6.B(4)(b) requires mediators to submit agreements reached in mediation to the clerk for review in guardianship, estate, and other matters which may be resolved only by order of the clerk. Also note that other court-ordered mediation programs may have confidentiality requirements that do apply to the parties, attorneys, and mediator. For example, the Mediation Program for the United States Court of Appeals for the Fourth Circuit requires that all participants not divulge the communications in mediation to anyone (see 4th Cir. R. 33). ♦

***** Commission's Note to AO 12-22 *** The adoption and distribution of this Advisory Opinion has apparently caused some confusion in the mediator community. The Commission wishes to clarify that this Opinion is not the result of any recent revisions to Standard III or a new interpretation of that rule. Standard III has, since its inception, been applicable only to the conduct of the mediator and prohibits only the mediator, and not the parties or their attorneys, from disclosing information communicated during a mediation, either directly or indirectly, to non-participants. Standard III does not prohibit a party or his/her attorney from speaking to the public or press about what occurred at mediation. If parties wish to preserve confidentiality between and among themselves, they should ask their mediator for assistance in discussing the issue and reaching an agreement on confidentiality at the beginning of their mediation. ♦**

In addition to requesting formal, written Advisory Opinions from the Commission, mediators may also seek guidance from Commission staff via telephone or e-mail. Mediators often exercise this option when time is of the essence. If staff cannot answer a question, an effort will be made to involve a Commission member or members. While informal guidance from Commission staff does not carry the full weight of the Commission, staff logs in inquiries, making a record of the question asked or dilemma described and noting the guidance offered. Entries in the log remain confidential unless a complaint is later filed against a mediator by a party or attorney. In that event, the Commission will consider the inquiry and the fact that the mediator acted conscientiously and sought help in evaluating the dilemma and responding appropriately. ♦



Commission Welcomes New Member

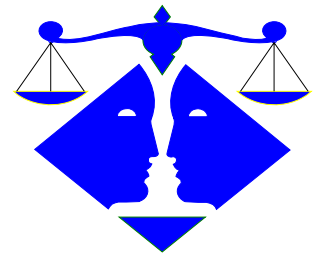
Chief Justice Sarah E. Parker has named Susan A. Hicks to serve as a member of the North Carolina Dispute Resolution Commission. Ms. Hicks is Clerk of Superior Court for Moore County and resides in Cameron. Commission members serve three-year terms. Ms. Hicks will take her oath of office as a Commission member on May 11, 2012.

Commission Chairman W. David Lee noted that he is pleased to have Ms. Hicks join the Commission. "Susan is known for being a hard worker and this is a very active Commission. We will put her talents to good use and I have no doubt that she will be fully engaged and a thoughtful contributor."

Ms. Hicks was first elected Clerk in Moore County in 2009 and has held the position since. She served as both an Assistant and Deputy Clerk before her election to the top position. Ms. Hicks holds Associate Degrees in Business Administration and Office Systems Technology from Randolph Community College. Ms. Hicks currently chairs the AOC's Civil Forms Subcommittee and is a member of the Full Forms Committee. She is the second Clerk to serve on the Commission and replaces Martha Curran, Clerk of Superior Court for Mecklenburg County.

In addition to Ms. Hicks, Judge Lee will also administer the oath of office to two Commission members who have been re-appointed for a second term, Dawn Bryant and Jacqueline "Jackie" Clare, both of Raleigh.

2012/13 Certification Renewal Period Fast Approaching



The Commission's office will begin mailing renewal information to certified MSC and FFS mediators in early June. That information will direct those wishing to renew their mediator certification(s) to the Commission's website and its on-line renewal application.

Though much remains the same — the fee is still \$140.00 for a single certification and mediators must complete an on-line renewal application — mediators who have renewed previously will notice a few changes to the process this year. First, the on-line renewal application has been shortened and streamlined. In particular, mediators will notice a difference in the Continuing Mediator Education (CME) portion of the form where they will be asked to provide less detail about their CME activities.

Second, mediators will be asked to indicate on the CME portion whether they had had any observers at their mediations and if not, to explain why not. The Commission added these inquiries in light of complaints from certification applicants to the effect that they are having a difficult time arranging for the observations they need to satisfy certification requirements. These applicants report that mediators often do not return their calls or advise them that they have a "no observer" policy. Mediators who do allow observers report being inundated with requests. The Commission wants to encourage all mediators to pitch in and help insure that observation opportunities are available for those seeking certification.

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Upcoming Mediator Certification Training



Upcoming Mediator Certification Training

Superior Court Training

Beason & Ellis Conflict Resolution, LLC: 40-hour superior court mediator training course. For more information or to register, call (919) 419-9979 or (800) 517-0145 or visit their web site:

www.beasonellis.com.

Carolina Dispute Settlement Services: 40-hour superior court mediator training course, June 11 - 15, 2012, in Raleigh. 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, May 22 - 26, 2012, in Raleigh, August 14 - 18, 2012 in Charlotte, and October 9 - 13, 2012 in Raleigh. For more information or to register, contact Andy Little at (919) 967-6611 or (888) 842-6157, or visit their web site at www.mediationincnc.com.

Family Financial Training

Success Consulting and Mediation, formerly Atlanta Divorce Mediators, Inc.: 40-hour family mediation training course, May 18-22, 2012, in Montgomery, AL, and July 11-15, 2012, in Atlanta, GA. For more information, contact Melissa Heard at (770) 778-7618 or visit their web site at www.mediationtraining.net.

Carolina Dispute Settlement Services: 16-hour family mediation training course, June 27 - 28, 2012 in Raleigh. See above for contact information.

Mediation, Inc: 40 hour family mediation training course. See above for contact information.

6-Hour Training

Mediation Inc: 6-hour training course. See above for contact information.

Professor Mark W. Morris: 6 hour course. For more information or to register on-line, visit

www.nccourts.homestead.com.

The ADR Center (Wilmington): 6 hour course, May 4, and September 21, 2012. For more information or to register, contact John J. Murphy at (910) 362-8000 or email johnm@theADRcenter.org, or visit their web site at www.theADRcenter.org.

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

CME OPPORTUNITIES

CME and Training Opportunities

Success Consulting and Mediation, formerly Atlanta Divorce Mediators, Inc., is presenting “Basic Mediation Skills” on June 4-8, 2012, July 30-August 3, 2012, and September 24-28, 2012 in Atlanta., GA; “Domestic Violence” on June 29-30, 2012, and August 10-11, 2012, in Atlanta, GA; and “Advanced Mediation Skills” on August 21-23, 2012 in Atlanta, GA. For additional information, call (770) 778-7618 or visit www.mediationtraining.net.

NC Bar Association is presenting “No Dispute About It: Dispute Resolution is Here to Stay” (2012 Dispute Resolution Sections Annual Meeting) (Video) on May 31, 2012, in Winston Salem. For additional information, call (919) 677-8745 or (800) 662-7407 or visit www.ncbar.org/CLE.

NC Bar Association is presenting “It’s a Small World After All” (2012 Family Section Annual Meeting) (Video) on June 15, 2012 in Asheville; June 28, 2012, in Hickory; June 29, 2012 in Rocky Mount; July 10, 2012, in Cary; and July 13, 2012, in Manteo. For additional information, call (919) 677-8745 or (800) 662-7407 or visit www.ncbar.org/CLE.

NC Bar Association is presenting “Mental Health and Substance Abuse: A Family Disease” on June 22, 2012, in Wilmington. For additional information, call (919) 677-8745 or (800) 662-7407 or visit www.ncbar.org/CLE.

The ADR Center is presenting a “Basic Mediation” seminar On June 21 - 22, 2012, in Wilmington. This seminar is intended to introduce participants to the field of conflict resolution. The seminar covers communication skills, negotiation, conflict theory, cause of conflict, alternative dispute resolution methods, and mediation. Participants can expect a highly interactive seminar to make this training informative and entertaining. For additional information, call (910) 362-8000 or visit www.theADRcenter.org.

The ADR Center is presenting “Advanced Mediation” seminar on September 28, 2012, in Wilmington. This advanced seminar is intended to assist the experienced practitioner in enhancing their skills. This six hour seminar focuses on more complicated dynamics that present themselves at the mediation table. Participants can expect to build on their professional experiences and those of their colleagues. For additional information, call (910) 362-8000 or visit www.theADRcenter.org.

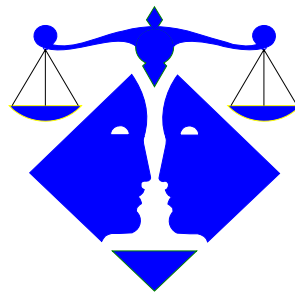


Commission Staff Member Retires

Long time member of the Commission's staff, Sharon Corey-Laue, will retire this year after fourteen years of dedicated service to North Carolina's courts, mediators and the Commission. Ms. Laue started with the Commission on January 16, 1998, and will work through August 31 of this year.

Ms. Ratliff, who directs the Commission's office, noted that Ms. Laue had proven herself indispensable many times over the years. "Sharon has always been very comfortable with technology and was instrumental in helping this office design and develop its website and its on-line renewal application. Because the staff here has always been so small and the mediation programs grew so fast, we often spent time brainstorming ways that we could use technology as a substitute for more hands. Sharon's contributions were invaluable." In addition, Ms. Ratliff cites Sharon's reputation for good service. "In fourteen years, I have heard nothing but compliments from mediators and the public about Sharon — how responsive and pleasant she is."

Ms. Laue will be honored for her service at the upcoming May 11, Commission meeting. Commission Chair W. David Lee noted that, "Sharon will be missed. She had been part of the Commission's team almost since its inception." The Commission invites mediators who have worked with Sharon over the years and would like to do so, to call or e-mail (Sharon.L.Corey-laue@nccourts.org) their good wishes for her retirement.



Congratulations, Sharon!

And thanks for fourteen years of dedicated service to North Carolina's courts, mediators and the Dispute Resolution Commission. We wish you a happy and healthy retirement for years to come!

MPA Students Evaluate MSC Program

Last fall, UNC-Chapel Hill's Masters in Public Administration (MPA) Program issued a request for proposals (RFP) from governmental agencies interested in having student help with research projects, including program evaluations. In response to this RFP, the Commission submitted a proposal asking for students to assist it in evaluating the superior court Mediated Settlement Conference Program. Specifically, the Commission asked for student assistance in digging below the numbers reported in the Administrative Office of the Courts' annual Mediated Settlement Conference (MSC) Statistical Report to determine whether any hard evidence existed to show that the MSC Program actually settled more cases than reflected in the column labeled, "Resolved with ADR Conference". The Commission proposed that the students focus their research on two columns appearing in the MSC Statistical Report. (A copy of the MSC Statistical Report for FY 2010/11 can be found on pages 16 and 17 of this edition of *The Intermediary*):



- 1) **"Not Resolved with ADR Conference" Column:** In this column, Court staff report cases that impasse in mediation. They derive this information from Reports of Mediator. Since many cases that impasse in mediation later go to settle without the need for a trial, the Commission wondered whether mediation played any role in expediting these additional settlements. For example, if there were offers on the table at the time of impasse, did parties sleep on them and then change their minds in the coming days after mediation? Or, in the alternative, were all the cases reported as "impassed" in mediation simply settling on the court house steps as they might have done had the process never occurred.
- 2) **"Disposed without ADR" Column:** In this column, court staff report cases that they understand have been closed, but there is no record that, though ordered, a mediation was ever held. Typically, an attorney has advised staff that the case has been dismissed and no Report of Mediator is forthcoming. The Commission wondered whether, at least some of these cases were, in fact, being mediated and the mediators involved were simply failing to follow-up and file their Reports of Mediator timely, if at all, with the court.

The Commission believed that by surveying attorneys involved in the cases reported in these columns, the students could learn whether evidence existed to show that the MSC Program actually played a larger role in expediting the settlement of cases than reflected in the numbers reported in the MSC Statistical Report. Specifically, would attorneys say that mediation played a role not only in bringing about but expediting the ultimate settlement of cases that initially impassed at mediation? Would they also report that cases filed in the "Disposed without ADR" column were, in fact, mediated and that mediation played a role in their settlement as well?

The Commission's proposal was selected for study and four MPA students agreed to undertake the research: Dayne Batten, Meghan Boyd, David Goldberg, and Davena Mgbeokwere. They met with Commission and AOC staff throughout the winter in a collaborative effort to collect data and design surveys.

Due to limitations in the availability of data in many judicial districts, the students narrowed their research to four judicial districts: 8A (Lenoir Co.), 10 (Wake Co.), 11B (Johnston Co.), and 18 (Guilford Co.) These particular districts were selected because they kept good data, including using AOC prescribed codes in entering their data, and were representative of both urban and more rural districts. Once the districts were selected, the students used the AOC's CaseWise Program to identify case names, numbers and attorneys for each districts' entries in the two targeted columns "Not Resolved with ADR Conference" (the impasse column) and "Disposed without ADR".

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In addition to isolating the data they needed, the students set about designing two surveys. One survey asked attorneys to report whether mediation played any role in the final outcome of their cases that impasse at the table, but later went on to settle short of trial, and, to indicate how quickly these settlements occurred. This survey was sent to 774 lawyers. Of that number, 392 replied for a response rate of 51 percent. The second survey asked lawyers about the outcome in their cases categorized by court staff as "Disposed without ADR" and specifically whether those cases were mediated and if so, what was the outcome. That survey was sent to 706 attorneys. Of that number 310 completed and returned the survey for a response rate of 44 percent.

When survey outcomes were tabulated, the students determined that it appeared clear that the MSC Program is, in fact, making a greater contribution to case settlement than the Statistical Report suggests. Most telling, 74 percent of lawyers asked about their cases which impasse in mediation, but later went on to settle, responded that they strongly agreed (25 percent), agreed (33 percent) or somewhat agreed (16 percent) that the mediation process contributed to the final settlement of their case. Almost 10 percent of respondent lawyers reported that their case settled in less than two weeks of mediation with an additional 18.6 percent reporting that their cases settled within two to four weeks and 26.2 percent reporting settlement within four to eight weeks, i.e., just under 53 percent of cases were reported settled within eight weeks of impasse. Narrative responses supplied by attorneys and recorded as part of the evaluation shed some light on why attorneys believed that mediation ultimately contributed to settlement post-impasse. Attorneys responding to this survey were also asked whether the mediator followed-up with them post-impasse. Of those who responded to the question, 24.1% reported that they heard from the mediator post-impasse. Of that number 78.3% reported that the follow-up was helpful.

In addition, it appears that some settlements are not being captured and reflected in the Statistical Report because mediators may be failing to file or to timely file their reports of mediator with the court. Of the attorneys responding to the survey asking about cases categorized by court staff as "Disposed without ADR", 11.2 percent reported that a mediated settlement conference was, in fact, held in their case. Moreover, the attorneys reported that 58.1 percent of the cases that were mediated, had settled at the mediation.

The students concluded both surveys with an open ended question: "Please use this space to share any other comments you may have about the superior court Mediated Settlement Conference Program:" The responding attorneys were prolific and the students' final report includes several typed page of comments. Most were complimentary of the MSC Program, but a minority sighted shortcomings.

In sum, this research strongly suggests that the MSC Program is responsible for expediting settlement of far more cases than those captured in the "Resolved with ADR Conference" column of the Statistical Report in that:

- ◆ 74 percent of lawyers asked about their cases which impasse in mediation, but later went on to settle, responded that they believed that the mediation process contributed to the final settlement of their case. A substantial number of these settlements, almost 53 percent, were reached within eight weeks of the mediation
- ◆ Of the attorneys responding to the survey asking about cases categorized by court staff as "Disposed without ADR", 11.2 percent reported that a mediated settlement conference was, in fact, held in their case and that just over 58 percent of those cases settled at mediation.

Mediators can take away from the survey that they are doing a good job. Not only are they settling cases at the conference, but even when an impasse results, many lawyers report that their mediator's efforts, in

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fact contributed to an eventual settlement often within days or weeks of the conference. Narrative comments provided by lawyers were often effusive in their praise of mediators and the MSC Program. Though mediators are clearly doing a good job of settling cases, the survey suggests that there is still room for improvement. Specifically, at least some mediators need to do a better job of fulfilling their case management responsibilities. At least some successful mediations are not being captured by court staff because mediators failed to file their Reports of Mediator timely, if at all.

The Commission deeply appreciates the hard work of: MPA students Dayne Batten, Meghan Boyd, David Goldberg, and Davena Mgbeokwere in conducting this research and reporting their findings. To read their full study go to www.ncdrc.org and from the screen click on: “UNC-CH MPA Student Research Project on the MSC Program”. ♦

Pop Culture & Mediation

An illustration featuring a film strip on the left, a megaphone in the center, and musical notes on the right, all rendered in a light blue, stylized font.

Mediation in the newspaper, on television, on the web and in your community. . .

After Elaine and Kramer agree to mediate their dispute, Jerry details the necessary qualities of a mediator: “Of course, it would have to be someone who hasn’t heard the story before. Someone who is unencumbered by any emotional attachment. Someone whose heart is so dark, it cannot be swayed by pity, emotion, or human compassion of any kind.” (pg. 220).

Any fans of the television sitcom, *Seinfeld*, still out there? If so, they may want to check out : <http://cojcr.org/vol11no1/197-234.pdf>. Attorney Paul Devendorf has written a scholarly (and often amusing) article, “YADA, YADA, YADA: SEINFELD, THE LAW AND MEDIATION” which appears on page 197 of volume 11.1 of the *Cardozo Journal of Conflict Resolution*. Mr. Devendorf writes about how the exaggerated characters in *Seinfeld* and the conflicts they created or encountered not only entertained, but arguably shaped viewer attitudes toward our legal system and lawyers. In the conclusion to his piece, Mr. Devendorf postulates that: “*Seinfeld* portrays the entire system of formal law as clumsy and ineffective. In so doing, *Seinfeld* has artfully contrasted the failings of formal legal processes with the benefits of mediation”, *Seinfeld*, he writes, “...advocates the use of mediation techniques as a preferred method for individual members of society to resolve their own disputes.” (pg. 234). And, to think they told us it was a show, “about nothing”.

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California Dreamin — Stockton Battles Back



Stockton, California has fallen on hard times. Its residents are more likely to face foreclosure than those living in any other city in America and Forbes magazine ranked Stockton No. 1 in its 2011 list of “most miserable cities” in America. Gang violence is a problem and, most recently, the city is struggling with whether it will have to file for bankruptcy. In an effort to fight back against this abysmal tide, one of Stockton’s most venerable institutions, the Stockton Symphony, commissioned Israeli composer Avner Dorman to compose a new piece that it hopes will address the cities longstanding cultural and racial divides and get the residents of Stockton pulling together to bring their city back from the brink.

Dorman proposed writing a piece based on a popular Israeli fairy tale called “Uzu and Muzu from Kakaruzu”. It is the story of two brothers driven apart by a silly argument. They erect a wall down the center of their house and over the years their descendants come to believe that monsters live on the other side. Years later a curious boy climbs the wall only to find there are no monsters on the other side, just a family not unlike his own. Dorman’s proposal was accepted and eventually some 7,000 fourth and fifth grade students attended performances of the piece in November of 2011. Symphony official Jane Kenworthy explained that this age group was targeted because they wanted to reach these kids before they could be targeted by gangs.

In addition, the symphony co-sponsored art and writing contests with the local museum and newspaper, focusing their efforts on themes of conflict resolution and unity (climbing over walls) whether those walls represented racial or class divisions. The symphony gave free tickets to performances to anyone attending a forum where community problems, the need for unity and conflict resolution were discussed.

While Stockton’s problems are big and will not be readily solved, the symphony believes that if it can help restore unity in a city struggling with racial and class divisions and get more people thinking about their commonalities and their community as a whole, they have better chance of eventually succeeding.

Law Schools Embrace Dispute Resolution

Increasing numbers of US law schools are training students not just to be good trial attorneys, but good conflict resolvers. U.S. News and World Report recently published its 2012 rankings of the top law school dispute resolution programs:

- #1 — Pepperdine (Malibu, CA)
- #2 — Harvard (Cambridge, MA)
- #3 — Hamlin (St. Paul, MN)
- #4 — University of Missouri (Columbia, MO)
- #5 — Ohio State (Columbus, OH)

It is astounding to note the level of commitment these schools have made to dispute resolution. For example, the Straus Institute at Pepperdine University School of Law, offers two tracks of training: professional training programs and academic programs in dispute resolution including a Certificate, a Master's (M.D.R.), and an LL.M. Efforts at Straus reach even beyond its law school. In 2004, the Straus launched the Undergraduate Certificate in Conflict Management, a joint enterprise between Straus and Pepperdine's Seaver College.

The Straus Institute offers more than 35 different courses in dispute resolution, including: negotiation,
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mediation, arbitration, labor, entertainment dispute resolution, dispute resolution ethics, cross cultural conflict, and psychology of conflict. Courses offered at Straus are taught by the ten full time Pepperdine professors, 22 local adjuncts, and 35 adjuncts and visiting faculty from around the world.

In 2007, Straus acquired the world's leading dispute resolution library from the American Arbitration Association (AAA), consisting of more than 24,000 titles. The AAA library includes titles on subjects ranging from international arbitration to consumer disputes and health law to the history and growth of public and private dispute resolution practices in the U.S. and abroad.

It is particularly amazing to contemplate that the Straus Institute was founded in 1986 — a mere 26 years ago! One often hears it suggested that, “mediation has sparked a “sea change” in the way lawyers practice law. It appears the process may have also be working a sea change in the way lawyers are trained.

In coming issues of *The Intermediary*, we will look at what some North Carolina law schools are doing in the dispute resolution arena and how their grads are using these skills.

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2012/13 Renewal Period

Third, certified mediators who wish to receive court appointments to mediate in judicial districts in which they do not reside or which do not lie in a county contiguous to their district of residence, must send an annual letter advising such districts of their interest in receiving court appointments. **Individual letters are to be addressed to the court officials designated in MSC Rule 2.C or FFS Rule 2.B, but mailed to the Dispute Resolution Commission's office at P.O. Box 2448, Raleigh, NC 27615.** Letters must be received before August 31, 2012, and may be sent with an applicant's renewal fees or mailed separately.

The Commission is making this change principally because it was burdensome for court staff in some districts to keep up with the letters. In asking for individual letters to be addressed to court officials, but mailed to the Commission, the Commission hopes to encourage mediators to think carefully in selecting the districts they wish to serve and to remember that they need to be aware of local mediation rules. Mediators should be mindful in designating districts, that court appointed mediators cannot be reimbursed for their mileage, hotel or other travel expenses.

The Commission thanks all certified mediators for their efforts this year on behalf of North Carolina's programs, courts and citizens and invites all to continue their service and renew their certifications for FY 2012/13. Any questions about certification renewal may be addressed to the Commission's office at (919) 890-1415.

Commission Meetings



All mediators are reminded that Commission meetings are open to the public. If you wish to be present, please let Commission staff know so that seating is assured. The next regularly scheduled meeting is the Commission's fall retreat scheduled for September 14-15 at the Crowne Plaza in Asheville. Information about Commission meetings and minutes are regularly posted on the Commission's website at www.ncdrc.org. From the menu on your left, click on “Missions and Operations”, then, from the next menu, select “Meeting Information”.

MSC PROGRAM STATISTICS July 1, 2010 - June 30, 2011

Districts	Cases Entering Mediated Settlement Conference			Total Cases Pending	Resolution of Cases Attending ADR Conference				Cases Not Attending ADR Conference					
	Begin Pending	Ordered to MSC	Ordered or Submitted to Other Settlement Procedure		Resolved with ADR Conference	Reported Settled prior to or during ADR recess	Not Resolved with ADR Conference	Ordered Removed from ADR	Disposed without ADR	Cases Completing Process	End Pending			
1	92	148	9	249	63	50%	24	19%	40	31%	3	32	162	87
2	188	80	0	268	16	30%	16	30%	21	40%	0	49	102	166
3B	457	179	0	636	67	44%	17	11%	67	44%	0	9	160	476
4A	304	102	0	406	29	63%	0	0%	17	37%	0	22	68	338
4B	0	109	0	109	22	63%	0	0%	13	37%	1	2	38	71
5	830	393	0	1,223	66	57%	0	0%	50	43%	3	253	372	851
6A	18	14	0	32	6	86%	1	14%	0	0%	0	23	30	2
6B	42	53	0	95	45	100%	0	0%	0	0%	0	0	45	50
7A	283	126	25	434	16	28%	32	55%	10	17%	4	9	71	363
7B	91	179	0	270	50	38%	38	29%	44	33%	1	15	148	122
7C	37	28	0	65	15	47%	6	19%	11	34%	3	5	40	25
8A	31	43	1	75	10	63%	0	0%	6	38%	3	17	36	39
8B	211	249	1	461	49	47%	10	10%	46	44%	5	179	289	172
9	90	127	0	217	54	62%	10	11%	23	26%	0	42	129	88
9A	33	38	0	71	7	64%	1	9%	3	27%	7	4	22	49
10	365	957	0	1,322	326	58%	21	4%	217	38%	25	386	975	347
11A	88	197	3	288	68	35%	78	40%	48	25%	2	0	196	92
11B	157	449	0	606	63	48%	21	16%	47	36%	7	186	324	282
12	74	374	0	448	121	34%	167	47%	65	18%	34	0	387	61
13A*	229	66	0	295	17	50%	2	6%	15	44%	0	32	66	229
14	288	367	0	655	122	52%	37	16%	75	32%	1	146	381	274
15A	109	129	0	238	32	30%	26	24%	50	46%	7	0	115	123
15B	209	209	4	422	62	49%	25	20%	40	31%	8	84	219	203

16A	18	40	0	58	6	35%	3	18%	8	47%	1	6	24	34
17A	44	66	1	111	21	39%	12	22%	21	39%	4	6	64	47
19A	114	162	0	276	45	42%	21	19%	42	39%	2	40	150	126
19B	77	150	0	227	63	38%	41	24%	64	38%	4	5	177	50
19C	82	130	0	212	38	37%	24	23%	41	40%	1	21	125	87
19D	320	109	2	431	29	46%	9	14%	25	40%	4	24	91	340
20A	63	78	0	141	26	33%	25	32%	27	35%	0	7	85	56
20B	90	220	0	310	88	57%	9	6%	57	37%	1	24	179	131
21	986	350	5	1,341	130	50%	38	15%	90	35%	0	16	274	1,067
22A	724	253	48	1,025	76	48%	23	14%	61	38%	0	48	208	817
22B	417	112	0	529	41	47%	17	20%	29	33%	2	7	96	433
23	39	113	0	152	40	50%	9	11%	31	39%	3	20	103	49
24	141	127	0	268	48	44%	14	13%	46	43%	2	19	129	139
25A*	0	57	0	57	4	29%	0	0%	10	71%	0	3	17	40
25B	200	173	1	374	35	21%	94	57%	36	22%	9	0	174	200
26	630	1,557	45	2,232	430	36%	330	28%	440	37%	8	204	1,412	820
27A^	200	170	0	370	49	36%	28	20%	60	44%	2	32	171	199
27B	81	132	3	216	49	53%	6	7%	37	40%	0	22	114	102
28	395	230	6	631	146	74%	20	10%	30	15%	7	20	223	408
29A	62	109	0	171	17	71%	0	0%	7	29%	4	21	49	122
29B	173	141	2	316	37	37%	44	44%	18	18%	4	18	121	195
30A	124	105	0	229	17	44%	0	0%	22	56%	12	78	129	100
30B	161	102	0	263	24	39%	0	0%	37	61%	0	4	65	198
TOTAL	9,367	9,302	156	18,825	2,785	45%	1,299	21%	2,147	34%	184	2,140	8,555	10,270

* District reflects Jan-Jun 2011 only

^ District adjusted begin pending number after local audit.

Data not available for districts :: 3A, 13B, 16B, 17B, 18