

# The Intermediary



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

November, 2007

Volume 6, Issue 1

## Commission Members

Judge Sanford L. Steelman, Jr., Chair  
NC Court of Appeals  
P.O. Box 888  
Raleigh, NC 27602

Julius E. Banzet, III, Esq.  
Banzet, Banzet & Thompson, P.L.L.C.  
P.O. Box 535  
Warrenton, NC 27589

Jessie M. Conley, Esq.  
Pressly Thomas & Conley, P.A.  
224 Harrill Street  
Statesville, NC 28677

Sherman Lee Criner, Esq.  
The Worker's Compensation  
Law Firm  
P.O. Box 7275  
Wilmington, NC 28406

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

Edward C. Hay, Jr.  
Pitts, Hay & Hugenschmidt, P.A.  
137 Biltmore Avenue  
Asheville, NC 28801

Wayne Huckel  
Kennedy, Covington, Attorneys at Law  
214 North Tryon Street  
Charlotte, NC 28202

N. Lawrence Hudspeth, III, Esq.  
Law Offices of Lana S. Warlick  
P.O. Box 1393  
Jacksonville, NC 28541-1393

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



*From the Chair*

*by*

*Judge Sanford L. Steelman, Jr.*

About a year ago, the Executive Directors of three community mediation centers approached the Dispute Resolution Commission. They requested that the Commission assist them in developing uniform certification criteria for mediators working in district criminal court. They reasoned that rules with potential statewide application, providing for certification and regulation, would lend credibility to efforts to mediate district criminal court cases and encourage more judicial districts to consider this option. The Commission appointed an *ad hoc* committee chaired by Frank Laney to study the issue. The committee recommended that the Commission move forward with this project and was authorized to begin the process of drafting proposed legislation and rules to provide for statewide certification of district criminal court mediators.

Committee members received input from judges, district attorney personnel, center directors and others involved in the mediation of criminal cases in district court. During those discussions, it became apparent that there were other issues that could be addressed. Most notably, no rules existed for mediating these cases and there was a lack of uniformity in how services were provided in various districts. Given this situation, the committee determined not only to draft certification rules, but to create a framework for more consistent program operations and service delivery.

This past summer the General Assembly enacted G.S. 7A-38.3D establishing certification criteria for district criminal court mediators. This fall the Supreme Court adopted rules implementing the new legislation. Those rules set both requirements for certification and establish a framework for the delivery of mediation services in district criminal court.

This is not a new program. For years, community mediation centers have been assisting district courts by mediating criminal cases and reporting the results. By establishing certification criteria and operating rules and insuring mediator accountability, the Commission hopes to strengthen mediation in the district criminal courts and to encourage districts that have not yet authorized this type of mediation to do so.

*(Continued on page 2)*

Judge Ann E. McKown  
Durham County Courthouse  
201 E. Main Street  
Durham, NC 27701

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

Professor Mark W. Morris  
523 Elm Street  
Raleigh, NC 27604

Diann Seigle  
Carolina Dispute  
Settlement Services  
P.O. Box 1462  
Raleigh, NC 27602

Gary Tash  
Tash and Kurtz, PLLC  
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](http://www.ncdrc.org)

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

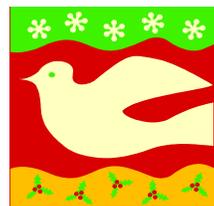
Some *Intermediary* readers not familiar with district criminal court may be surprised at the concept of mediating disputes involving criminal charges. After all, why would a complaining witness want to sit down and talk with a defendant who may have intentionally caused them harm? Mediation can, in fact, be an important tool for resolving such disputes. Certain types of district criminal court cases closely resemble civil disputes such as neighborhood conflicts. Rather than deal with the complexities of the civil courts, parties resort to the criminal courts to resolve their disputes. Many of these disputes are characterized not by intentional wrongdoing, but by misunderstandings and miscommunications. Cross-warrants are common. Mediators are able not only to address the immediate dispute, but may also be able to encourage the parties to think about and discuss the underlying relationship issues that triggered their conflict. Once communication channels are opened, it may be possible not only to resolve the current dispute, but to enable the parties to avoid future conflicts.

The new *Rules Implementing Mediation In Matters Pending In District Criminal Court* provide for voluntary participation at both the program and referral level. The Chief District Court Judge, the District Attorney and the local community mediation center must all agree to make mediation available in district criminal court. Once a program is established, the judge and the district attorney must agree on which cases to refer and the prosecuting witness and defendant must be willing to participate in mediation.

The Commission looks forward to working with judges, district attorneys and community mediation center staff and volunteers in formalizing existing efforts and in expanding district criminal court mediation to districts where it has not previously been available. I invite you to read this latest edition of the *Intermediary* to learn more about criminal district court mediation and other Commission activities and projects.

## *The Dispute Resolution Commission*

### *And Its Staff*



*Wish All Certified Mediators and Their Families*

*A Happy Holiday Season!*

## *New Faces at the DRC*



This fall the terms of a number of Commission members expired and their replacements were named. Judge Steelman and his colleagues on the Dispute Resolution Commission welcome and would like to introduce to you their new colleagues: Wayne Huckel, Judge Ann McKown, Judge Michael Morgan, Professor Mark Morris, and Gary Tash. All were appointed to three year terms effective September 30, 2007:

**Wayne P. Huckel** — Mr. Huckel is a partner at Kennedy Covington in Charlotte. His practice is focused primarily on construction litigation, professional malpractice defense, personal injury, products liability and insurance litigation. Mr. Huckel was certified as an MSC mediator in 2006 and also serves as an arbitrator. Mr. Huckel attended Davidson College and holds his law degree from New York University. Mr. Huckel was appointed by Chief Justice Sarah Parker.

**Judge Ann E. McKown** — Judge McKown is a district court judge serving District 14 (Durham County) where she presides over the district's Environmental Court. She received her undergraduate degree from the University of North Carolina at Chapel Hill and her law degree from Wake Forest. Prior to her appointment to the Bench, Judge McKown practiced law for some 15 years and was an Assistant District Attorney. Judge McKown was appointed by Chief Justice Sarah Parker.

**Judge Michael R. Morgan** — Judge Morgan is a superior court judge in District 10 (Wake County). He has also served as a district court judge, as an administrative law judge for the Office of Administrative Hearings, and as an assistant attorney general. He is a graduate of Duke University and North Carolina Central University School of Law. Judge Morgan was appointed by Chief Justice Sarah Parker. Judge Morgan is returning to the Commission, having served previously as a member from 1999-2004.

**Professor Mark W. Morris** — Professor Morris serves on the faculty at North Carolina Central University School of Law where he has taught torts, contracts, administrative law, workers' compensation, remedies and employment law. In addition to his teaching responsibilities, he supervises the law school's Alternative Dispute Resolution Institute. Professor Morris is a certified mediator and an author who has written widely on tort liability, risk management and governmental immunity. Professor Morris is a graduate of the University of North Carolina at Chapel Hill and North Carolina Central University School of Law and holds an LL.M. from Harvard Law School. He is admitted to the bar in Florida and North Carolina. Professor Morris was appointed by Governor Michael Easley.

**Gary B. Tash** — Mr. Tash is a partner at Tash & Kurtz in Winston-Salem where his practice is devoted entirely to family law. He is a board certified family law specialist and has been a fellow in the American Academy of Matrimonial since 1999. He is a graduate of the University of Virginia and Wake Forest University School of Law. Mr. Tash was appointed by State Bar President Steven D. Michael.

To see photos of new members taken at the Commission's November meeting, please turn to page 5.

### *Commission Expands*

This past legislative session, the General Assembly adopted revisions to G.S. 7A-38.2 adding a new seat to the Dispute Resolution Commission and bringing the total number of Commission members to 16. The revised legislation specifies that the new member is to be a certified district criminal court mediator who is affiliated with a community mediation center. G.S. 7A-38.2 was revised in conjunction with the enactment of new G.S. 7A-38.3D which provides for the Supreme Court to establish criteria for the certification of district criminal court mediators and to adopt program rules for the referral and mediation of district criminal court matters. According to Frank Laney, who chaired the *ad hoc* Committee that drafted the new rules, the seat will not be filled until the Commission has had an opportunity to begin certifying district criminal court mediators next year.

## Pro Bono/Volunteer Mediation Opportunities

By: Judge Melzer (Pat) Morgan

DRC certified mediators have a special opportunity to increase pro bono participation with Legal Aid of North Carolina (LANC) and its sister organizations.

LANC has 24 offices and several state-wide projects, including the Environmental Poverty and Mortgage Foreclosure Projects, and the Farm worker Unit. LANC has sister organizations, such as Pisgah Legal Services in Asheville, Legal Aid Society of Northwest North Carolina (now consolidated with LANC), and Legal Services of Southern Piedmont. Each office has occasion to file suit in state superior court, before the Industrial Commission, or in federal court. For example, the Farm worker's Unit handles worker's compensation, breach of employment contracts, and wage and hour claims. When a Legal Aid or Legal Services office files suit they need to name a mediator. From there arises your opportunity to help.

The N. C. Dispute Resolution Commission has an interest in seeing that mediators get paid for their work. However, settlements and recoveries for Legal Aid or Legal Services clients are often not large. If the settlement is small, paying a mediator reduces the justice which the client feels they have received. Significantly, Legal Aid and Legal Services lawyers may be hesitant to contact mediators whom they would like to select because of the distinct possibility that the client will have difficulty paying. In the end their client may petition the court to be designated an indigent. If a litigant is represented by a legal services organization, or by a private attorney working under the auspices of a legal services organization, that person is specifically deemed to be indigent. G. S. 1-110 (a)(4) and (5) But the process of a judge determining whether a litigant can pay for the mediator's services under Rule 7 D comes after the successful conference or trial.

N. C. Bar Association President Janet Ward Black's bold initiative 4All seeks increased participation by North Carolina lawyers with Legal Services offices. 4All points out that only 2 in 10 North Carolina lawyers currently volunteer to handle cases at no charge for Legal Aid of North Carolina.

Last year, the N. C. Bar Association's Momentum 2010 set a specific target to increase the number of volunteer lawyers on rolls of North Carolina Legal Services offices by 10% each year for the next five years.

The invitation is to all mediators, not only to lawyers who are members of the N. C. Bar Association.

The question is "How does increasing participation with Legal Aid or Legal Services apply to those who do mediation?" The answer is that we DRC certified mediators are already committed to mediate in indigent cases. The North Carolina Supreme Court, in establishing the Mediated Settlement Conference Program, built in a commitment to handling indigent cases without pay. Rule 7 D provides that "Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent." This provision applies, not only to appointed cases, but to a mediator who mediates by selection. Remember that when we each completed the Application for Certification, we signed agreeing to mediate indigent cases without pay.

How then would experienced mediators handle the issue of payment of their fees where one of the parties is represented by Legal Aid or Legal Services? Some mediators will agree "up front" to waive a portion of the fee when asked to mediate by designation. Other mediators are comfortable with waiving a judicial determination of indigency after the mediation is concluded, if there is no substantial settlement or recovery by the Legal Aid or Legal Services client. Still others may prefer a court determination of indigency. Whenever the waiver takes place, the mediator still commits to the same effort, enthusiasm, and neutrality as when being compensated at their usual party selected rate.

Be reminded that we certified mediators have an obligation to mediate where a party is unable to pay. That obligation is clearly established in the Rules. Let's be aware of and open to these opportunities to assist Legal Aid and Legal Services clients.

*Melzer (Pat) Morgan, a Retired Superior Court Judge living in Reidsville, is a NCDRC Certified Superior Court Mediator. He is the chair of the NC Bar Association Dispute Resolution Section Pro Bono committee. He may be contacted at [resolveit@bellsouth.net](mailto:resolveit@bellsouth.net) or 336-613-0260. The Commission thanks Judge Morgan for advising mediators of this important opportunity.*

*Photos Taken At The Commission's  
Annual Retreat  
Held November 2-3, 2007, in Blowing Rock*



Commission members, ex-officio members and staff: (Left to Right) First Row: Sherman Criner; Lynn Gullick; Judge Sanford L. Steelman, Jr.; Larry Hudspeth; Diann Seigle; Judge Joe Turner; Edward Hay; and Leslie Ratliff. Second Row: Jessie Conley; Wayne Huckel; and Betty Fuqua. Third Row: Professor Mark Morris and Judge W. David Lee. Fourth Row: Bob Beason, Frank Laney, Andy Little, and Alisa Huffman.

*Old Friends*

The terms of a number of Commission members expired this fall and one member resigned. The Commission will miss: Dorothy Bernholz, who chaired the Commission's Standards Discipline and Advisory Opinions Committee; Judge John Carroll, Joanne Foil, Ken Gumbiner, and Judge Kimberly Taylor. Ms. Bernholz, Mr. Gumbiner, and Judge Taylor each served two full terms on the Commission. The Commission is grateful for the dedication and many contributions of these five members and wishes each of them much success in their future endeavors. Of course, all are invited back to visit!



*New Faces*



Professor Mark Morris is sworn in as a member of the Commission.



Wayne Huckel (on left) takes his oath of office. Mr. Huckel is sworn in by Judge Stanford Steelman, Jr.

*Many Thanks!!!*

The Commission thanks Ella Wrenn, Superior Court Trial Court Coordinator in District 9, for hosting the Commission's November meeting. Ella and her husband, Ronnie, own Blowing Rock's historic Green Park Inn.

**The Dispute Resolution Commission has adopted three new Advisory Opinions pursuant to its Advisory Opinion Policy. The first was adopted in March, the second in May and the third in August of 2007. The Commission encourages all mediators who are facing an ethical dilemma or who have a question about rule interpretation to contact the Commission's office and request guidance. If time is of the essence, a mediator may seek immediate assistance from Commission staff over the telephone or by e-mail. Mediators may also request a written opinion from the Commission. Written Advisory Opinions carry the full weight of the Commission. To view the Advisory Opinion Policy, go to [www.ncdrc.org](http://www.ncdrc.org) and click on "Standards of Conduct for Mediators" and then click on "Advisory Opinion Policy". Previously adopted Opinions may also be viewed on the web. The full text of the three new Opinions follows.**

## **Advisory Opinion of the NC Dispute Resolution Commission Opinion Number 07-11**

(Adopted and Issued by the Commission on March 16, 2007)

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

### **Concern Raised**

In March of 2004, mediator conducted a superior court mediated settlement conference and helped the parties reach an agreement in a dispute over the availability and location of certain real property. Although no written agreement was drafted at the conclusion of the initial conference, the mediator filed a Report of Mediator with the court immediately after the settlement conference, reporting that the parties had reached an agreement and that the matter was fully resolved. However, during their mediated settlement conference, the parties agreed that immediately following their conference, they would travel to the site of their dispute to conduct a visual inspection of the property in question to ensure that what they had agreed to was a workable solution and to agree on any remaining details. The mediator did not accompany the parties to the site nor did he follow up with them after the site visit to ensure that they had reached a full agreement and that it was reduced to writing and signed. Some time later, the defendant sought to change the terms of the oral agreement. The plaintiff became angry, disavowed the agreement in full and sought a trial of the matter. The judge refused the plaintiff's request for a trial, telling her that the mediator had reported the matter settled. The plaintiff eventually agreed to the terms reached at the initial conference in order to avoid having the judge dismiss her case with prejudice. The defendant contacted the Commission to inquire about her mediator's conduct.

### **Advisory Opinion**

**The mediator was required by Mediated Settlement Conference Rule 4.A.(2) and Rule 4.C. (Rules effective March 4, 2006) to ensure that the agreement reached in mediated settlement was reduced to writing and signed.** N.C.G. S. § 7A-38.1(l) expressly provides that agreements must be reduced to writing and signed to be enforceable. Oral agreements are not only not enforceable, but likely to lead to the situation that occurred here, *i.e.*, one of the parties equivocates, tempers fray and the parties return to court. The mediator seriously erred in failing to require that the agreement be reduced to writing and violated program rules. If there were still unanswered questions at the end of the initial session, the mediator should have recessed the conference, reconvened it at the site location and proceeded to help the parties sort out any remaining details necessary to ensure a full agreement. The mediator should then have taken steps to reduce the agreement to writing or to had one of the attorneys do so.

One of the parties to the agreement was an association and member approval of the agreement was needed. The need for such approval does not obviate the mediator's responsibility to ensure that the agreement is reduced to writing at the conclusion of the conference. A clause inserted in the agreement and providing that the agreement is contingent on the congregation's approval would have resolved that issue.

Not only did the mediator fail in not requiring a signed writing, he should not have reported to the court that the matter was settled when, in fact, absent a writing, it was not. Judges rely on the reports of their mediators and do not want to undermine the mediator or the program by failing to uphold agreements that are reached in mediation. It is imperative that mediators take their case management responsibilities seriously. Reports of Mediator should not only be filed timely, but be both fully and accurately completed. To do otherwise, can compromise the integrity of both the mediator and the program, frustrate the court, and potentially harm parties who may find their rights compromised.

The mediator also filed his Report of Mediator (AOC-CV-813) with the court using an outdated copy of the form. Mediators have a responsibility to ensure that they are referring to current program rules and using current program forms when they conduct their mediations. Program forms and rules are posted on the Commission's web site or are available through its office.

## **Advisory Opinion of the NC Dispute Resolution Commission Opinion Number 07-12**

(Adopted and Issued by the Commission on May 18, 2007)

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

### **Concern Raised**

Prior to a family financial settlement conference, an attorney received a *Mediation Agreement* from his client's court-appointed, family financial mediator. The attorney asks whether a mediator may, by the terms of an Agreement, modify program rules or the Standards of Professional Conduct for Mediators? This Opinion applies to situations where the parties fail to select a mediator and the court is required to appoint a mediator pursuant to the Rules.

### **Advisory Opinion**

In 1995, after determining that the Mediated Settlement Conference Program would be continued and expanded statewide, the Court's first order of business was to create the Dispute Resolution Commission for the purpose of certifying and regulating mediators. The Court and General Assembly agreed that program rules, certification requirements, standards of conduct and enforcement procedures were essential for a program in which parties were being ordered not only to participate, but to compensate their mediator. Absent such a framework, the Court could not ensure program credibility or protect the public.

Any agreement containing terms that modify or run counter to program rules and the Standards, violates the intentions of the General Assembly, Court and Commission in creating a framework to govern program operations and the conduct of mediators. Moreover, the *Mediation Agreement* in question disregards the pledge the certified mediator made pursuant to FFS Rule 8.F. which requires all applicants for family financial certification to agree to adhere to the Standards of Conduct and the court's Order referring the case to family financial settlement which provided that the conference was to be conducted in accordance with the Rules for the Family Financial Settlement Program.

Specifically, the *Mediation Agreement* provided for the court-appointed family financial mediator: 1) to charge a \$150.00 administrative fee; 2) to be reimbursed for any costs he incurs in quashing a subpoena served on him by one of the parties; 3) to give to the parties the "right" to discontinue the mediation at any time; 4) to freely express his opinions on the parties' respective legal positions and to simultaneously serve as both their mediator and neutral evaluator; and 5) to discuss information disclosed in mediation with others, provided the parties give him written permission to do so. All the above provisions would modify, if not violate, existing provisions of the program rules or Standards.

The Commission also notes that the *Agreement* in question provides that while the mediator will explain the mediation process to the parties at the beginning of the conference, he will not normally permit the attorneys to make opening statements. He suggests that, in his experience, such statements contribute to a hostile atmosphere. Rather than opening

statements, the mediator indicates that he will ask the parties and their attorneys questions about the issues they wish to address. While this is not a modification of the Rules *per se*, the Commission believes this language raises a practice issue. The opening session is designed to serve two purposes. First, it gives the mediator an opportunity to explain the mediation process and the role of the mediator to the parties and their lawyers. Second, it give the parties the opportunity to sit down together and, perhaps for the first time, hear one another's perspective on the facts and legal issues in dispute.

FFS Rule 6.A.(1) clearly states that the mediator is in control of the conference. A mediator has latitude, consistent with rules and standards, to conduct the proceeding as he or she sees fit. However, the Commission suggests that it may be important to the attorneys and parties to have an opportunity to address one another directly and to give each other their perspective on the dispute. This contributes to the sense that they have had an opportunity to state their case in their own terms and to heard by the other side and the mediator. Simply answering the mediator's questions, may not permit a party the same opportunity to present the full picture as he or she sees it or to emphasize the issues and points that party feels are most important to them.

## **Advisory Opinion of the NC Dispute Resolution Commission Opinion Number 07-13**

(Adopted and Issued by the Commission on August 10, 2007)

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

This particular Opinion is an outgrowth of complaint that was filed with the Commission.

### **Concern Raised**

During a superior court mediation, a party made representations to the mediator regarding a key fact in dispute. Later in a caucus session with the opposing party, the mediator learned information that the mediator believed irrefutably contradicted the key fact. The mediator returned to the party who made the initial assertion, angrily confronted him and, using foul language, suggested he had lied about the key fact. The party responded by telling the mediator that he found his demeanor and language unprofessional. The mediator collected himself and agreed, but the offended party withdrew from the mediation.

### **Advisory Opinion**

Standard II of the Supreme Court's Standards of Professional Conduct for Mediators provides that, "A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute." Confronting a party in a hostile and accusatory manner and accusing him of lying, or words to that effect, is not only wholly inconsistent with this Standard, but counterproductive as evidenced by the party's quick exit from the conference and the resulting impasse. Rather, the mediator should have brought the contract back to the room, pointed out the inconsistency and asked the party to explain his earlier response.

Mediators have a duty to protect the integrity of the mediation process and to conduct the mediation with decorum. The Commission strongly cautions all mediators against using profanity, even in instances where the parties and their attorneys are using it.





## *Upcoming Mediator Certification Training*

### **SUPERIOR COURT MEDIATOR TRAINING**

**Beason & Ellis Conflict Resolution, LLC:** January 23-27, 2008, in Chapel Hill, NC, and March 26-30, 2008, in Charlotte, NC. For more information or to register, call (919) 419-9979 or (866) 517-0145 or visit [www.beasonellis.com](http://www.beasonellis.com).

**Carolina Dispute Settlement Services:** January 2-6, 2008, in Durham, NC. For more information, contact Diann Seigle at (919) 755-4646, Ext.25. Web site: [www.notrials.com](http://www.notrials.com).

**Mediation, Inc:** 40-hour superior court mediator training course, January 16-20, 2008, in Chapel Hill, NC and February 20-24, 2008, in Charlotte, NC. For more information or to register, call (800) 233-5848 or (919) 967-6611 or visit [www.mediationincnc.com](http://www.mediationincnc.com).

### **FAMILY FINANCIAL TRAINING**

**Atlanta Divorce Mediators, Inc:** 40-hour family mediation training course, February 14-18, 2008, and April 3-7, 2008, in Atlanta, GA; for more information, contact Dr. Elizabeth Manley at (404) 378-3238 or (800) 862-1425. Web site: [www.mediationtraining.net](http://www.mediationtraining.net).

**Carolina Dispute Settlement Services:** See above for contact information.

**Mediation, Inc:** 40-hour family mediation training course, March 5-9, 2008, in Chapel Hill, NC. See above for contact information.

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

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

**Professor Mark W. Morris:** 6-hour course, February 9, 2008, at the NCCU School of Law. area To pre-register online, visit [www.nccourts.homestead.com](http://www.nccourts.homestead.com).

**The ADR Center:** 6-hour course, March 6, 2008, in Wilmington, NC. For more information or to register, contact John J. Murphy at (910) 362-8000 or e-mail [johnm@wemediate.net](mailto:johnm@wemediate.net). Web site: [www.wemediate.net](http://www.wemediate.net).

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

### **16-HOUR TRAINING**

**Mediation, Inc:** Family Financial Supplemental Training course, March 7-9, 2008, in Chapel Hill. For additional information or to register, call (800) 233-5848 or (919) 967-6611.

## CLERK TRAINING

**The ADR Center:** Clerk Training Course on February 14-15, 2008 in Wilmington, NC. For additional information contact John J. Murphy at (910) 362-8000 or visit [www.theadrcenter.org](http://www.theadrcenter.org)

## CME and Training Opportunities

**Atlanta Divorce Mediators, Inc.** is presenting Advanced Divorce Practicum Training on December 13-14, 2007, in Atlanta, GA. For additional information, call (404) 378-3238 or (800) 862-1425 or visit [www.mediationtraining.net](http://www.mediationtraining.net).

**The ADR Center** is presenting Conflict Resolution Training I on January 17-18, 2008 in Wilmington, NC. The center is also presenting Conflict Resolution Training II on March 7, 2008 in

### FEBRUARY MEETING



The next meeting of the Dispute Resolution Commission is scheduled to be held on Friday, February 15, 2008, at the new North Carolina Judicial Center in Raleigh. An agenda for the meeting will be posted at [www.ncdrc.org](http://www.ncdrc.org) two weeks prior to the meeting. All are welcome to attend, but the Commission asks that you contact its office and let staff know you will be present, so that seating is assured.

### *Discipline Imposed*

The Commission has issued a private admonishment to a certified mediator for violating Standard II, Impartiality, and using profane language during a mediated settlement conference. The mediator was found to have deviated from the requirement of impartiality in that he accused a party of lying or misrepresenting the underlying facts which gave rise to the lawsuit which was the subject of the mediation. The Commission urges all mediators to keep their tempers and emotions in check during mediation, to remain non-judgmental and impartial and use appropriate language.

In another instance, a certified MSC/FFS mediator was issued a private admonishment for her failure to immediately report to the Commission a disciplinary complaint filed against her with the State Bar and the resulting censure. The Commission reminds all

*(continued on page 11)*

### We've Moved!



The Commission's Office has re-located to the new NC Judicial Center located at:

901 Corporate Center Dr.  
Raleigh, NC 27607  
(919) 890-1415  
(919) 890-1935 fax

The Commission's office is open on a part-time basis from 9:00 a.m. to 4 p.m. Those hours must sometimes be adjusted due to illness, off site meetings, or appointments. If you would like to stop by, please do staff the favor of calling first, so that we can be sure that someone is here to greet you and provide whatever assistance you need.

### Care to Comment???

All mediators are invited to comment on proposed revisions to Standard III of the Standards of Professional Conduct for Mediators. That Standard addresses confidentiality. The proposed revisions would create an exception to confidentiality by requiring mediators to report attorney misconduct that they learn about during mediation. The proposed revisions were emailed to mediators on November 15. If you would to comment, please remember to do so by March 1, 2008. If you have deleted your e-mail, proposed revisions and the commentary to them are posted at [www.ncdrc.org](http://www.ncdrc.org).

### ***Mediator Sued***

A mediator was recently sued in superior court. The complaining party alleged that the mediator had acted improperly in the manner in which he had scheduled the party's case for mediation thereby depriving the party of timely notice. The Attorney General's Office elected not to represent the mediator based upon its interpretation of the statute authorizing the Attorney General to represent state officials.

This situation has raised a number of issues that the Commission and the North Carolina Bar Association's Dispute Resolution Section will be discussing this winter. They include the availability of and limits to judicial immunity for mediators, the interpretation of the Attorney General's authority to represent mediators as state officials and the origin and meaning of the phrase "officer of the court".

Please watch for further notice regarding these issues and others arising as a result of the Attorney General's determination, to be posted on the Commission's web site or in this newsletter.

### ***New Program Launched***

Over the next few days, the Commission's office will be mailing to the offices of Chief District Court Judges, District Attorneys, and Community Mediation Centers, copies of legislation authorizing the Supreme Court to establish certification criteria for mediators serving district criminal court and rules providing for the referral and mediation of district criminal court cases.

As Judge Steelman noted in his message on page 1 of this newsletter, the new legislation and rules are intended to lend credibility to

the efforts of district criminal court mediators, formalize program operations and encourage districts that are not yet referring district criminal court cases to mediation to do so.

The new *Rules Implementing Mediation In Matters Pending In District Criminal Court* were modeled to the greatest extent possible on the existing mediated settlement conference rules, but do depart from them in a couple of significant ways. First, unlike the mandatory MSC and FFS Programs, judicial districts are not required to establish a program to implement the new Rules. Rather, the Rules contemplate that Chief District Court Judges, District Attorneys and local Community Mediation Centers will decide together whether to establish a program pursuant to the new Rules. Moreover, if the new Rules are implemented, they give the court or its designee, which could be the District Attorney, discretion regarding the referral of individual cases to mediation and provide that the complaining witness and defendant must both agree to participate in mediation before a referral can occur.

The new rules establish a different case management structure than exists for the MSC, FFS and Clerk Programs. Community Mediation Centers and, not individual mediators, will serve as case managers. The Centers will assist the court in scheduling cases and will provide the mediators. Participating mediators will not be compensated by the parties for their services and will be affiliated as staff or as a volunteer with a Center. Mediators will be appointed to serve and party selection will not be an option. Participating mediators must be trained and be certified by the Dispute Resolution Commission as district criminal court mediators. The certification process will, in some

respects be a collaboration between the Centers and the Commission. Applications are now available and the Commission expects to begin certifying mediators early in 2008.

The Commission is in the process of posting the enabling legislation, new rules, and other program materials on its web site at [www.ncdrc.org](http://www.ncdrc.org). To obtain a program brochure, call the Commission's office at (919) 890-1415.)

The Commission is excited about this opportunity to work with Community Mediation Centers and their staff and volunteers and hopes that many districts will consider implementing the new rules.

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### ***Private Discipline Imposed***

certified mediators that MSC Rule 8.E. and Rule FFS Rule 8.F. require certified mediators to immediately report to the Commission any disciplinary complaint or action which he or experiences as well as any criminal convictions or disbarments as soon as the mediator has notice of them.

In 2006, a third mediator received a written admonishment for failing to reduce an agreement to writing and reporting to the court that the matter was as settled when there was, in fact, no signed agreement. MSC, FFS and Clerk Rules all require mediators to ensure that agreements are reduced to writing and signed.

