The Intermediary

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

October 2011

Volume 10, Issue 1

Commission Members

From the Chair By Judge W. David Lee

Commission staff have now wrapped up the certification renewal period for Fiscal Year 2011/12. I understand there was a real rush of calls toward August 31 as many of you scrambled to beat the deadline for renewing and that checks continued to come in long after the deadline had passed. So far, it appears that the vast majority of you have elected to continue your service to our courts and citizens in the coming year and the Commission is grateful.

Judging by the calls that Commission staff fielded over the past twelve months, FY 2010/11 was not the easiest of times and perhaps some of you were happy to see it pass. Many of the calls came from mediators, including some party-selected ones, who reported problems with fee collection and inquired about tools available to assist them. Parties called, too, asking what to do if they did not have the funds to pay their mediator's fees. We also heard from court staff, asking about *pro se* and indigent parties in the context of their mediation programs. Most recently, during the renewal period, Commission staff fielded calls from mediators asking whether the Commission allowed a grace period in which to pay renewal fees when financial hardship was an issue (the Commission does have such a policy). Other callers reported tax liens and bankruptcies on their renewal applications. I think very few folks made it through FY 2010/11 unscathed.

I want to thank all our mediators for persevering in this tough economic climate. I know that many of you, and particularly court appointed mediators, took losses in cases that you spent hours scheduling and mediating or waited months to be paid in others. Though it has been tough for everyone, the Commission believes that this economy only serves to underscore the need for our mediation programs and the work that you do.

In times like these, many parties are hard pressed to fund long term litigation or to wait for a dispute to run its course in our courts. Mediation often offers

(Continued on Page 2)

Commission Staff

Leslie Ratliff, Executive Secretary
Leslie.C.Ratliff@aoc.nccourts.org

Sharon Corey-Laue, Admin. Asst.
Sharon.l.Corey-Laue@aoc.nccourts.org

Maureen M. Robinson, Admin. Asst.
Maureen.M.Robinson@aoc.nccourts.org

P.O. Box 2448
Raleigh, NC 27602-2448

Tele. (919) 890-1415
Fax. (919) 890-1935

Web Address: www.ncdrc.org

(Continued from Page 1)

the best opportunity to resolve conflicts short of protracted and expensive negotiations and trial. Moreover, our courts have also had a tough fiscal year and are under tremendous pressure right now to do more with less. I think it is unlikely that will change in the near future and our courts will have to continue to struggle with inadequate staff and a lack of other resources. Recently, a trial court coordinator who called the Commission's office described her district's superior court Mediated Settlement Conference Program as, "the only case management tool she had." She went on to say how the Program had helped her district get a handle on its trial calendar and made judges more efficient. I believe that judges and court staff in other superior court judicial districts would echo her sentiments and that they are grateful for your assistance.

Though this has, admittedly, been a tough fiscal year, I hope that all of you will understand just how important your contributions have been both from the perspective of those who seek assistance from our courts and those who strive to keep the doors of our courts open. Thank you for renewing your mediator certifications and for continuing your commitment to our mediation programs. I trust that FY 2011/12 will be a year that brings greater prosperity and more optimism and that our State's mediation programs will continue to flourish, both in good times and bad. ♦

In This Issue

Judge Lee forwarded the memo that appears below to all certified, superior court mediators on December 1, 2010.

M E M O

To: All Certified MSC Mediators

From: Judge W. David Lee

Re: Impasse Without Mediation

It has come to the Commission's attention that some lawyers are continuing to ask mediators to impasse cases in the absence of an actual mediation conference or following only a perfunctory telephone call. The mediator is usually advised that because no offer (or no offer beyond that already on the table and rejected) will be made at the mediation, it would be futile to schedule a meeting. Given this information, the mediator is then asked to report an impasse.

Mediated Settlement Conference Rule (MSC Rule)1.C.(6) provides that in instances where the parties believe there is good cause not to proceed with a conference, that they may file a motion with the court asking to dispense with the proceeding. If the parties do not file such a motion or their motion is not granted, Mediated Settlement Conference ("MSC") Rule 6.B.(5) makes it clear that it is the duty of the mediator to proceed with scheduling and conducting a conference, and MSC Rule 4.A. requires all parties, attorneys, and insurance company representatives to attend, unless they are excused or the attendance requirement is modified, as set forth in the Rule. Failure of the mediator to conduct a mediation conference would be a violation of the MSC Rules, which would subject the mediator to discipline by the Commission and could expose the mediator to sanctions by the Court. Furthermore, a report of impasse by the mediator when there has not been a mediation conference would be a direct misrepresentation to the Court, which would further expose the mediator to sanctions and discipline.

As you may be aware, the Commission addressed this same issue with its first Advisory Opinion (Opinion #99-01), which is attached for your review. The opinion makes it clear that anything short of an actual mediation conference attended by the parties and others as contemplated by MSC Rule 4 does not meet the requirements of the MSC Rules.

All mediators, whether court-appointed or party-selected to mediate a case, should refuse requests to declare an impasse when there has not been an actual mediation and should proceed, with or without the parties' cooperation, to schedule a date for the conference. ♦

Community Mediation Center Funding Cut

This year the General Assembly eliminated funding for community mediation centers. Last year the centers had received an appropriation of $1,139,513. This action will likely mean that at least some centers will be forced to curtail or even eliminate services they provide to the communities they serve. During the legislative session, the Commission wrote to the General Assembly on behalf of the centers and expressed support for community mediation. While the Commission appreciates that the General Assembly had difficult choices to make, it is concerned this decision will adversely affect North Carolina communities and the courts.

Community mediation centers have a long history in this State. In fact, centers predate the mediation programs operating in North Carolina's courts. The Orange County Dispute Settlement Center, the first of its kind in North Carolina, mediated its first case in 1978 and by 1979 had obtained space and opened an office. That Center became a model for other centers which opened beginning in the early 1980's.

Each center has its own identity. Early centers typically served an individual country. Some still follow that model, while others now operate regionally. Some centers offer an array of services while others offer a more limited menu. Among some of the services that centers provide are mediation of landlord-tenant, truancy, animal nuisance, consumer/merchant and employer/employee disputes. Many centers have recently begun to mediate Medicaid appeals. Besides mediating disputes privately for parties, many centers also have a presence in our courts, offering mediation services to those involved in district criminal court and juvenile cases. Some centers also provide private arbitration. Most centers operate with a minimal number of paid staff and rely heavily on volunteer mediators.

The centers' 2009-2010 Annual Report to the General Assembly indicates that 54,887 North Carolinians were directly served by centers between June 30, 2009, and July 1, 2010. Importantly, many of the individuals served were of limited economic means and could not have afforded the cost of litigation.

The Commission believes that centers not only provide services to citizens, but that they also assist our courts. By helping many parties resolve their disputes pre-litigation, they potentially reduce case filings, thereby conserving judicial resources. In addition, center mediators work in many of our district criminal courts. Often times, center mediators can help parties resolve their conflicts more quickly than they might otherwise, again, conserving judicial time and resources. Moreover, often times, parties involved in these kinds of disputes have an ongoing relationship. A mediator may not only be instrumental in helping parties resolve their immediate dispute, but may also assist them in repairing their relationship and moving forward such that their need for future police or judicial intervention may be minimized or eliminated. Some centers are also active in some juvenile courts and at least one center is operating a new program experimenting with mediation of post-judgment family matters, including mediating disputes involving visitation and child support.

The Commission hopes that all centers will be able to survive funding cuts and a tough economy and continue to serve their communities and the courts of North Carolina. We will all be better off for their contributions. ♦

Revisions To Court -Ordered Arbitration Rules Recommended

Non-binding court ordered arbitration, a primarily district court program, began in North Carolina in 1989 as a pilot program in three judicial districts. Today, the program is available in 32 district court judicial districts and 71 counties. Despite budget constraints, the program has persevered due to its success and popularity.

NCGS §7A-37.1, the enabling legislation for the program, allows the Supreme Court to adopt rules to govern the procedure. The rules were last revised in 2005 when the compensation for arbitrators was increased from $75 to $100 per hearing. An extensive rule revision process involving an ad hoc committee and the ADR subcommittee of the State Judicial Council, chaired by Frank Laney, began last year and the proposed set of rules was submitted to the full State Judicial Council at their September 2nd meeting. The rules were unanimously approved and have been submitted to the Supreme Court for adoption. The following highlights recommended changes:

- Limits the program to district court and eliminates referrals of superior court cases;
- Clarifies the case types that are eligible for arbitration;
- Updates the process to become a court appointed arbitrator by adding a hearing observation requirement;
- Sets the arbitration assessment fee as the maximum allowable fee defined in N.C.G.S. §7A-37.1(c1);
- Adds provisions to clarify how parties may participate in arbitration hearings who are not financially able to pay the fee; establishes entry of judgments and liens to collect unpaid fees;
- Explicitly allows district courts to adopt local rules that are not inconsistent with the Supreme Court rules;
- Clarifies that the arbitrator is not to rule on dispositive motions or dismiss the action as a sanction, but must simply rule upon the case based upon the evidence submitted, or lack thereof; and
- Clarifies that the parties may stipulate to a binding arbitration award.

The rules have been submitted to the Supreme Court with a recommended effective date of January 1, 2012.♦

The above article was submitted by Deshield Smith. Ms. Smith has been a Court Management Specialist with the Court Programs and Management Services Division of the NC Administrative Office of the Courts since January 2007. She specializes in family courts, family drug treatment courts, court ordered arbitration, family financial mediation, and jury management issues. She also serves as the project director for the federally grant funded access and visitation program.

Commission Policies Revised

At its fall retreat held September 9-10, the Commission revised its *Requirements for Observer Conduct* and *Advertising Guidelines.* Changes to the policies are highlighted below. Both documents are also posted on the Commission's web site at www.ncdrc.org.

The Commission's office has received many complaints from certification applicants that they are having difficulty obtaining observations of mediations, particularly in family cases. Applicants frequently report to the Commission that mediators do not return calls or tell them that they do not allow observers. The Commission asks all certified mediators to do their part to help applicants for mediator certification complete their observation requirements. If you are contacted, please consider assisting the caller and allowing him or her to observe. If every mediator allowed even a couple of observers each year, there would no shortage of opportunities and no particular group of mediators would be burdened with numerous such requests for assistance. The Commission has adopted Requirements for Observer Conduct which are printed below. A mediator may want to make sure that any observer he or she authorizes to attend is aware of these Requirements and understands that she or he is obligated to follow them or may be asked to leave.

Requirements for Observer Conduct

(Adopted by the Dispute Resolution Commission on May 8, 2009, and revised on September 10, 2011.)

Be considerate of the mediator who is helping you. During the conference, be as quiet and unobtrusive as possible and observe the following rules of conduct at all times:

1) Make every effort to be on time for the conference. If your schedule changes and you will not be able to attend, let the mediator know so they do not wait for you.
2) Dress appropriately. This is a court ordered proceeding.
3) Give your full attention to the conference. Cell phones and other similar devices are to be turned off during sessions and kept in a pocket, briefcase or handbag.
4) Do not try to talk to or to pass notes to the mediator while s/he is working. This disrupts the mediator's concentration
5) During the conference, do not inject yourself into the negotiation's process or attempt to express any opinions unless you are expressly invited to do so by the mediator. If one or both of the parties ask you to value the case or to comment on their chances in court during either a joint or a caucus session, advise then that you are there only as an observer.
6) Do not make any suggestions about legal arguments to the attorneys either during or after the conference.
7) Observers, like the mediator, are to remain neutral. Avoid any statements or body language that would display any inclination on your part to favor one side or his/her arguments over that of the other.
8) Mediators are mindful of the clock and may not want to discuss what is happening with observers between caucus sessions. You should check with the mediator before the conference starts and ask when he or she prefers to take your questions or respond to your comments. For example, the mediator may be willing to talk with you between caucus sessions, during breaks, at lunch or after the mediation.
9) Remember that the mediation process is confidential. You should not reveal any confidential information that you learn in caucus to the other party during the conference or afterward. In addition, you should not speak to anyone after the conference regarding any statements made or conduct occurring there.
10) Observers should not use the mediation session as an opportunity to solicit any kind of business from either parties or attorneys present. ♦

Advertising Guidelines

(Adopted by the Dispute Resolution Commission on May 16, 2003, and Revised on September 10, 2011.)

1. REPRESENATION OF MEDIATOR CERTIFICATION(S)

When advertising that s/he is certified by this Commission, a mediator shall specify certification by the NC Dispute Resolution Commission, Dispute Resolution Commission, NCDRC or DRC. A mediator should not identify him/herself as certified by the Administrative Office of the Courts or the Courts. Because of the number of mediation programs now operating in the North Carolina courts, it could be misleading to the public and the bar for a mediator simply to offer him/herself as "certified" without specifying the program or the type of mediation to which the certification pertains. Thus, a mediator shall also identify that s/he is certified to conduct mediated settlement conferences for superior court, district court, or both superior court mediations, family financial mediations, district criminal court mediations and/or mediations of estate and guardianship cases. A family financial mediator certified by the Dispute Resolution Commission shall not hold him or herself out offer him/herself as certified to mediate custody or visitation matters.

Although both the Superior Court and Family Financial Settlement Programs Rules now provide for a number a menu of dispute resolution alternatives processes, certification pertains only to the mediated settlement conference option. Because the DRC does not certify neutrals evaluators, arbitrators, or presiding officers, a mediator offers such services shall not hold him/herself out as certified by the Commission to serve in these capacities in one of these areas.

If a mediator allows his/her certification to lapse, *i.e.*, the mediator does not renew prior to June 30th of any given fiscal year, the mediator shall immediately remove any certification designation from his/her letterhead, business cards, web site and/or other advertising. If a mediator voluntarily relinquishes his/her certification and notifies this Commission or if this Commission revokes a mediator's certification, the mediator shall immediately remove the certification designation from his/her letterhead, stationery and/or other advertising.

APPROVED EXAMPLES:

NCDRC Certified Mediator – Superior Court & Family Financial, Clerk of Court, Special Proceedings, Estates & Guardianship, District Criminal Court

NCDRC Certified Superior Court Mediator, Clerk of Court, Special Proceedings, Estates & Guardianship, District Criminal Court

DRC Certified Mediator – Superior Court, Clerk of Court, Special Proceedings, Estates & Guardianship, District Criminal Court

DRC – Certified Family Financial Mediator, Clerk of Court, Special Proceedings, Estates & Guardianship, District Criminal Court

2. REPRESENTATION OF OTHER QUALIFICATIONS, INCLUDING DEGREES HELD

When advertising or marketing his/her mediation practice to the public, a mediator shall avoid making any false or potentially misleading representations regarding his/her education, work experience, training or other qualifications to serve as a mediator.

(Continued on Page 25)

Mediation in POP Culture

What The Public Is Hearing About Mediation And Other Forms Of Dispute Resolution....

I'll Have a Side of Conflict Resolution with My Arepa

"Conflict Kitchen", a take-out restaurant located in Pittsburg, uses food as a vehicle to get people talking and thinking about conflict, especially as it relates to countries with which the US is at war or has poor diplomatic relations. As they satisfy a basic human need with food indigenous to the featured country, Conflict Kitchen hopes its patrons will think about their commonalities with peoples of that part of the world. In addition, through take out packaging which shares information about the county, its peoples, culture and arts, they hope to educate their patrons.

Conflict Kitchen food is served take-out style from a storefront. Only one county and a single indigenous food item is featured at a time and food orders are wrapped in custom-designed paper. Information about the county, its culture, arts and peoples are printed on the wrapper along with quotes and portions of interviews and observations provided by natives, both those living in the featured country and those expatriated to the US.

In its first four months of operation, Conflict Kitchen served *kubideh*, an Iranian sandwich consisting of minced, grilled meat served on a pita like bread with onion, mint, and basil. The sandwich and wrapper were developed in collaboration with members of Pittsburgh's Iranian community. During its second four months of operation, Conflict Kitchen featured an Afghan staple, *bolani pazi*, a homemade turnover filled with either pumpkin, spinach, lentils, or potatoes and leeks. Most recently, the restaurant served Venezuelan *arepas*, grilled corn cakes filled with a variety of ingredients.

Each Conflict Kitchen iteration is augmented by events, performances and discussions designed to share additional information about the county and its people, culture, and arts and to encourage exploration of the country's relationship with the US. One such activity featured a live SKYPE webcam of two meals being eaten simultaneously, one in Pittsburgh and the other in Tehran. Using their web site at www.conflictkitchen.org, organizers hope to extend the dialogue beyond food and activities. ♦

The Torch is Passed!

The Girl Scouts are working to insure that a new generation of negotiators (and maybe mediators!) will be around to resolve disputes arising in the years ahead. The Scouts new Win-Win Patch teaches girls aged 9-11 about principles of negotiation. In order to be awarded the patch, a Scout must complete a process that involves:

1. Learning about negotiation;
2. Watching someone in their community who is an experienced negotiator and then debriefing with that person (the curriculum suggests that parents, teachers, lawyers and salespeople can be good resources to tap) and then writing about what was observed and learned;

(Continued on Page 9)

(Continued from Page 8)

The Win-Win Patch

3. Practicing the "Art" of Negotiation using a prescribed game that teaches negotiation principles;
4. Creating a skit, poem or song that reflects how negotiation can be helpful and presenting it to friends, family or the troop;
5. Practicing "how to ask" (the Scout creates a list of five things to ask for, develops three appropriate ways to ask and then practices her approaches with others);
6. Planning a pretend trip (participants present their ideal travel destinations, explain why they think their sites are ideal and then negotiate among themselves to determine where they will go);
7. Role playing sales pitches to Girl Scout cookie customers;
8. Negotiating a purchase (the Scouts bring items from home to sell and set up a shop where they take turns negotiating a price for the purchase of the items);
9. Finding a book that involves characters involved in negotiating, reading it and discussing the book and the characters' negotiations with others;
10. Teaching a friend, sibling or family member how to negotiate; and
11. Playing Reign of Aquaria (Reign of Aquaria is an online flash game designed to teach young girls ages 7-12 negotiation skills).

The Win-Win curriculum was developed by the Girl Scouts in collaboration with Dr. Linda Babcock, a professor and researcher at Carnegie Mellon University who, along with Sara Laschever, is the author of *Women Don't Ask: Negotiation –and Positive Strategies for Change*, originally published in 2003 and now available in paperback through Bantam Dell . (For more information about the book and Dr. Babcock's research see page 11).

In creating Win-Win, Dr. Babcock and the Scouts wanted to teach young girls not only how to negotiate and resolve disputes, but also how be effective advocates for themselves and their interests. Dr. Babcock's research shows that women are often hampered in their careers and in other facets of their lives by their reluctance to simply ask — to ask for raises, promotions and opportunities in general. Dr. Babcock and the Scouts believe that reaching young girls early is a good way not only to make them good negotiators, but more confident, successful adults.♦

Ceasefire

Operation Ceasefire, a program developed to combat gang violence is having phenomenal success in American cites, including Baltimore, Boston, Minneapolis and Cincinnati. The key to Ceasefire's success is not zero tolerance policies, locking up gang members or busting drug dealers… it is simply talking. After a gang related killing, perpetrators are, of course, sought, but, Ceasefire asks communities to do much more. Following such violence, cities participating in the program bring members of law enforcement, community elders and social services providers together to sit down and talk with members of the gangs involved to discuss the underlying factors that triggered the violence, most especially gang rivalries and alliances. The focus of the meeting in not to criticize or assign blame to gang members in general, but to address and explore "hot" situations before more killings or violence result. Once authorities figure out which gangs or gang members are involved in a dispute and what they are fighting about, steps can be taken to intervene positively, including: closely monitoring individual gang members and especially those considered most likely to commit violence, including visiting them in the homes; implementing curfews; surveilling gang members; and concentrating police in "hot" areas to deliver a stern warning, both verbally and by their presence, that they know the area and gang are "hot" and will crack down if forced.

The meetings also try to help gang members better appreciate how their actions are impacting their communities. In Cincinnati, among those who attended meetings were a mother who had lost her son to gang violence and an emergency

Continued on Page 10)

(Continued from page 9)
room physician who treated both gang members and innocent victims of gang violence. Gang members are told that the meeting was called because their community cares about them, not because it hates or wants to punish them. Gang members are also told about a special hot line they can call to ask for assistance in enrolling in GED classes or entering counseling, drug treatment, job training and job placement programs.

Ceasefire was developed by David M. Kennedy and colleagues at Harvard's Kennedy School of Government. The Program is designed to serve as an alternative to harsher, arrest centered programs which have not proved effective, at least in the long run, in combating gang violence. Ceasefire operates on the premise that most gang violence is committed by a relatively small number of individuals. By determining who those individuals are and monitoring them closely, especially during "hot periods", while at the same time reaching out to the bulk of gang members with opportunities and alternatives to gang culture, is, Mr. Kennedy believes, a more affective approach to reducing violence. However, for the program to work, he cautions that cities must keep the meetings and dialogue going and growing and they must offer real opportunities to help gang members move beyond gang culture and become more productive members of society.

To learn about other aspects of Ceasefire and how it has effected a North Carolina community visit:

http://ceasefire.ci.fayetteville.nc.us/default.aspx ♦

Negotiation Results in Win for Players and Owners

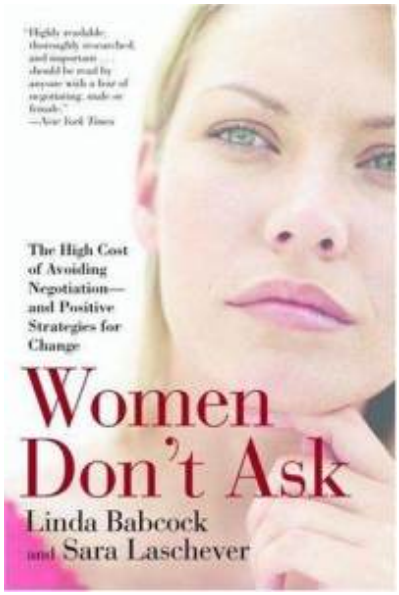
The NFL might have had to call off the 2011 football season if not for a successful conclusion to negotiations held between representatives of players and owners. Conflicts between owners and players extended back to 2008 and came to a head on March 11, 2011, when players led by quarterbacks Tom Brady, Peyton Manning and Drew Brees, filed an anti-trust lawsuit against the owners and league. The suit was filed shortly after the expiration of a 2008 collective bargaining agreement between the players and league. The players accused the 32 NFL teams of conspiring to deny their ability to market their services "through a patently unlawful group boycott and price-fixing arrangement or, in the alternative, a unilaterally imposed set of anticompetitive restrictions on player movement, free agency and competitive market freedom." The owners responded to the suit with a lockout beginning at midnight on March 11th. The parties had a lot at stake. NFL football is a 9 billion dollar a year business.

The federal judge to whom the case was assigned, Susan Richard Nelson, granted the plaintiff's request for an injunction to stop the lock out and ordered the owners and players into mediation. NFL Commissioner Roger Goodell, welcomed mediation and expressed faith in the process as a means to settle the dispute, "We do believe that mediation is the fairest and fastest way to reach an agreement that works for the players and for the clubs. And we believe that ultimately this is going to be negotiated at the negotiating table. .."

Unfortunately, the dispute could not be resolved in mediation. Major stumbling blocks to the process included dissatisfaction with the mediator appointed by the court. While the players favored the court's appointee, Federal Magistrate Arthur Boylan of Minneapolis, the owners wanted George Cohen, a federal mediator in Washington, D.C., who had conducted discussions between the parties in early March of 2011. Concerns were also raised about admissibility of conduct and statements made in the mediation and of Judge Nelson's control over the process. As talks in mediation flagged and the start of the season loomed, representatives of players and owners began to talk privately outside the process. Their negotiations eventually ended in agreement on July 25, 2011, and the season could begin.♦

BOOK SUMMARY

Women Don't Ask: The High Cost of Avoiding Negotiation— and Positive Strategies for Change
By Linda Babcock, Ph.D., and Sara Laschever



Following is a summary of Women Don't Ask: The High Cost of Avoiding Negotiation-and Positive Strategies for Change, by Linda Babcock, Ph.D., and Sara Laschever. The book was originally published in 2003 and is now available in paper back. The following summary appears at http://www.womendontask.com/more.html, a website dedicated to the book and from which the book may be ordered. The Intermediary believes that the book and Dr. Babcock's research have implications for mediation and mediators and is grateful to Ms. Laschever who gave permission to reprint the summary:

When Linda Babcock asked why so many male graduate students were teaching their own courses and most female students were assigned as assistants, her dean said: "More men ask. The women just don't ask." It turns out that whether they want higher salaries or more help at home, women often find it hard to ask. Sometimes they don't know that change is possible--they don't know that they can ask. Some times they fear that asking may damage a relationship. And sometimes they don't ask because they've learned that society can react badly to women asserting their own needs and desires.

By looking at the barriers holding women back and the social forces constraining them, *Women Don't Ask* shows women how to reframe their interactions and more accurately evaluate their opportunities. It teaches them how to ask for what they want in ways that feel comfortable and possible, taking into account the impact of asking on their relationships. And it teaches all of us how to recognize the ways in which our institutions, child-rearing practices, and unspoken assumptions perpetuate inequalities--inequalities that are not only fundamentally unfair but also inefficient and economically unsound.

With women's progress toward full economic and social equality stalled, women's lives becoming increasingly complex, and the structures of businesses changing, the ability to negotiate is no longer a luxury but a necessity. Drawing on research in psychology, sociology, economics, and organizational behavior as well as dozens of interviews with men and women from all walks of life, *Women Don't Ask* is the first book to identify the dramatic difference between men and women in their propensity to negotiate for what they want. It tells women how to ask, and why they should.♦

(First published in 2003, Women Don't Ask: The High Cost of Avoiding Negotiation — and Positive Strategies for Change, has met with critical acclaim. Dr. Linda C. Babcock is a researcher and professor of economics at Carnegie Mellon University who specializes in negotiation and dispute resolution. Responding to her research findings -- that women do not know how to negotiate effectively – Dr. Babcock approached the Girl Scouts about creating a Win-Win badge that would provide young girls with an opportunity to learn how to negotiate effectively. For more about the badge, see page 8 of this edition of the Intermediary. Sara Laschever is a widely published writer and editor who co-founded the quarterly journal, now website, millennium pop, with her husband, music critic Tim Riley. Ms. Laschever has a special interest in career obstacles affecting women.)

Dearth of Jury Trials Worries Committee

'Does the public view that in a negative way?

By Annie Butterworth Jones

Associate Editor of The Florida Bar News

(The following article first appeared in "The Florida Bar News" on the October 15, 2010 , and is reprinted here with permission of the Florida Bar News.)

Over a span of 30 years, jury trials have taken a noticeable nosedive, and the decrease has garnered the attention of Florida attorneys.

Mayanne Downs

In January, the Committee to Study the Decline in Jury Trials was commissioned by Bar President Mayanne Downs, and the committee's inaugural planning session was held at this year's Midyear Meeting in Orlando on September 23.

From 1962 to 2002, federal civil trials decreased by nearly 10 percent, and federal criminal trials experienced an even greater decrease. Those numbers, Downs reminded committee members at their meeting, should raise some serious questions about the future of jury trials and the legal profession as a whole.

"It's not just that those of us who are in trial practice love jury trials, and that we feel so alive when we are fortunate to take part in one, but rather, there are numerous things that flow from that," said Downs, mentioning the impact fewer trials has for women and minority lawyers.

"My point is not that it's about me, but rather it's the kind of subtle things you wouldn't think about if you think about the decline of jury trials: their dramatic criminal impact, their evidentiary issues, and the fact that no settled case ever generated law in the appellate level."

Those concerns were reiterated throughout the committee's first meeting, which focused largely on the group's mission statement, issued by Downs and the Bar Board of Governors earlier this year.

Co-chair Jay Cohen read portions of the statement aloud: "Our mission statement … is to research and analyze the trend of declining jury trials, both state and federal, civil and criminal. We're to determine the reasons for the decline and the impact that it has upon the justice system and the citizens on any issue of concern. And, if appropriate, which actions, if any, do we take as The Florida Bar?"

Although reasons for the decline are mostly positive — most members cited an increase in alternative dispute resolutions, including arbitrations and mediations — members of the committee shared their concerns with several resulting issues: a lack of trial opportunities for young lawyers, the impact on the Bar's certification program, membership in ABOTA, and employment for judges and court staff.

"We're about to be 90,000 Florida Bar lawyers, the second largest bar in the U.S. How is all this going to impact the young lawyer?" said Cohen. "Dispositions are up, and yet the number of cases that are disposed of via jury trials are down and down substantially. There are different reasons why there are fewer trials, or fewer smaller trials in the criminal division than the civil division, but it's happening in both divisions."

According to the National Center for State Courts, the decline in civil trials represents a change in judicial management, a focus from presiding over trials to managing disputes. If that's the case, said committee member Paul Regensdorf, maybe the decline in trials isn't such a bad thing.

"Candidly, I am not concerned as much with us as lawyers. You know, 'Are we not going to be able to certify them? Are we not going to be able to become members of ABOTA because of the reduced number of trials?'

(Continued on Page 25)

Snapshots!

(a quick look at what is happening in and around the Commission)

Proposed Rules Go to Supreme Court

The Commission has delivered proposed rule changes to the Supreme Court. Included among the revisions were proposed changes to the: Mediated Settlement Conference, Family Financial Settlement, Clerk Mediation, and District Criminal Mediation Program Rules. Proposed revisions to the Standards of Professional Conduct for Mediators and the Rules for the Dispute Resolution Commission were also recommended. The revisions were initially adopted by the Commission and were, thereafter, approved by the Alternative Dispute Resolution Committee of the State Judicial Council and the State Judicial Council. Assuming they are approved by the Court, the Commission will notify certified mediators of the changes by email and post them on its web site at www.ncdrc.org.

Commission and Section Study Clerk Mediation Program

The Commission and the Dispute Resolution Section have established a joint, standing committee to study the Clerk Mediation Program and, in particular, to look at why the Program has to date been underutilized by Clerks. The committee is chaired by William F. Wollcott, III, a certified MSC and Clerk Program mediator and attorney from Asheville. The committee will review the Program's enabling legislation and rules to see whether any revisions are needed and develop a handbook and training program on mediation for Clerks. The committee also intends, with the cooperation of a few Clerks, to establish pilot sites in a small number of selected counties. If the Program operates successfully in those counties, the Committee hopes that clerks in other parts of the State will be encouraged to make referrals. (Unlike the MSC and FFS Programs, referrals to Clerk Mediation are discretionary and Clerks only refer disputes which they believe would benefit from the process.) The committee hopes to make the program a more useful and accepted case management tool for Clerks. Commission member J. Anderson "Andy" Little serves on the committee.

Commission Meets with Elected District Attorneys

Ex-officio Commission member and chair of the Commission's District Criminal Court Mediation Program, Frank C. Laney, will meet with District Attorneys on October 19th to provide more information about district criminal court mediation and how it can assist them in managing their caseloads. Accompanying Mr. Laney will be former Commission member and community mediation center director, Terri Masiello, and Mediation Network of North Carolina Executive Director Jody Minor.

Caseload Statistics Published

The Administrative Office of the Courts has now published 2010/11 caseload statistics for mediated settlement conference programs. The statistics will be posted on the Commission's web site in the near future as part of the Commission's Annual Report for FY 2010/11. The Commission reminds all mediators to file their Reports of Mediator (Reports) timely with the court. The AOC cannot keep accurate statistics if Reports are not filed with court staff. The Commission shares caseload statistics with legislators, judges, State Bar and NCBA officials and members of the public, so is important that the numbers reported accurately reflect the work that is the being done and the contributions mediators are making to the work of our courts.

"Green Book" to Be Re-published

Alternative Dispute Resolution In North Carolina: A New Civil Procedure, also affectionately known as the "Green Book", is tentatively scheduled to be re-published this winter or in the early spring. The book, originally published in 2003, was the brainchild of Carmon J. Stuart, a founding member of the Dispute Resolution Commission and a former Clerk of the U.S. District Court for the Middle District of North Carolina. Through the book, Mr. Stuart hoped to

(Continued on Page 14)

(Snapshots, continued from page 13)

preserve a record of the history of dispute resolution in North Carolina for both present and future generations. The original publication was a joint project of the Commission and the NCBA's Dispute Resolution Section and Mr. Stuart, along with Deputy Commissioner John Schafer of the NC Industrial Commission, served as co-chairs of a Book Committee appointed to spearhead the development and publication of the work. Certified mediator and attorney Jacqueline Clare served as editor.

The new Book Committee, also a joint project of the Commission and the NCBA's Dispute Resolution Committee, is being led by Cary attorney and federal appellate mediator, Frank C. Laney. The new publication will essentially be an update of the original work both in terms of content and how it is published —as Mr. Laney explained at the Commission's September retreat, the new, updated book will be available both electronically and on a print on demand basis.

The book's original chapters were written by many different mediators who volunteered their time and expertise to the project. Many of those same mediators as well as some new folks are submitting revised or even new chapters to reflect how dispute resolution has evolved and grown in North Carolina since 2003. The Commission is grateful for the work of this Committee and its many volunteer authors and looks forward to the publication of the new and improved Green Book!

Commission Asks Mediators to Help with Observations

The Commission is asking all certified mediators to assist mediator certification applicants in completing their mediation observations. The Commission's office is receiving complaints from applicants that many certified mediators are refusing to return calls or are telling applicants that parties do not want observers present. Family financial applicants are having an especially difficult time finding opportunities to observe. The Commission believes that those who are certified have an obligation to assist others in completing the certification process. Because many certified mediators are refusing to cooperate, a small number of mediators have been carrying the lion's share of the load. In the interest of collegiality and fairness, the Commission asks all certified mediators to lend a hand and allow at least a couple of observers each year. Observers must abide by the Requirements for Observers Conduct adopted by the Commission (see page 6 of this edition) and if they fail to do so, may be asked to leave and reported to the Commission's office.

Industrial Commission Adopts New Mediation Rules

The NC Industrial Commission has revised its Rules for Mediated Settlement and Neutral Evaluation Conferences (IC Rules) effective January 1, 2011. The new IC Rules provide that all mediators serving its Program must be certified by the Dispute Resolution Commission. This revision also means that all IC mediators and, pursuant to IC Rule 9, neutral evaluators, will be subject to the Supreme Court's Standards of Professional Conduct for Mediators enforceable through the Dispute Resolution Commission (DRC). IC Deputy Commissioner John Schafer, who serves as an ex-officio member of the DRC, reported on the new Rules and other changes at the Industrial Commission at the DRC's September retreat. Copies of the IC Rules are posted on the Industrial Commission's web site and anyone with questions may contact Mr. Schafer at (919) 807-2585.

Section Names New Chair

The Commission congratulates George Doyle, Chapel Hill attorney and certified mediator, who has been named as the Chair of the North Carolina Bar Association's Dispute Resolution Section. In that capacity, Mr. Doyle also serves as liaison from the Section to the Commission. Mr. Doyle attended the Commission's annual retreat and explained that during his tenure, he hopes to focus on energizing the Clerk Mediation Program. He cordially invites all certified mediators to attend the Section's 2012 annual meeting and educational program which will be held on February 24th in Greensboro. Information about the February 24th CLE program can be found at: http://www.ncbar.org/cle/programs/870DRM.aspx. Mr. Doyle also hopes that all mediators will join the Section in celebrating its 20th Anniversary next year. ♦

COMMISSION ADOPTS ADVISORY OPINIONS

Several Advisory Opinions (AO) have been adopted since the last publication of *The Intermediary*. Copies of each of the following Opinions were distributed to all certified mediators by email shortly after their adoption by the Commission, and they are being re-printed here in an effort to insure that everyone saw them and took the opportunity to read the full text. Copies of all AO's are archived on the Commission's website at www.ncdrc.org. Click on "Ethics/Complaints/ Continuing Education' from the menu on the left, then click on "Mediator Ethics" and, lastly, click on "Advisory Opinions Adopted to Date". All AO's are searchable by key word using the "Control F" function.

Advisory Opinion Policy

The Dispute Resolution Commission has adopted new Advisory Opinions: #10-17, #11-18, #11-19 and #11-20 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. The question raised and a record of the guidance provided are logged in for the mediator's protection in the event a complaint is later filed. If time is not a factor, mediators may request a formal, 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". The Opinions below are those recently adopted by the Commission:

Advisory Opinion of the
NC Dispute Resolution Commission

Advisory Opinion Number 10-17
(Adopted and Issued by the Commission on September 18, 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

The Commission issued Advisory Opinion #08-15 on November 7, 2008. That Opinion provided that a mediator should not agree to serve as a fiduciary when such work came to him/her as a result of a mediation that s/he conducted. A mediator who transitions to the role of fiduciary the Opinion reasoned, creates the perception that s/he has, "…manipulated the mediation process or the parties with the ultimate goal of furthering his/her own interests at the expense of the parties." Such a perception serves to discredit the mediator and the mediation process and, ultimately, the courts and Commission.

A mediator has now contacted the Commission and explained that he mediated a case some time ago which resulted in impasse. Recently, he was contacted by one of the lawyers involved in the case and asked whether he would be willing to serve as an arbitrator in the same matter. Mediator asked whether Advisory Opinion #08-15 precludes his serving as an arbitrator?

(Continued on Page 16)

(Continued from page 15)

Advisory Opinion

Advisory Opinion #08-15 was narrowly drafted to address only situations where a mediator agrees to serve as a "fiduciary" in a matter that s/he has previously mediated. A fiduciary relationship is one that is founded on trust and confidence and the fiduciary has a responsibility to act primarily for the benefit of others. A fiduciary holds a position analogous to that of a trustee and the role gives rise to certain legal responsibilities and accountabilities. Often the relationship is of a long term nature and the fiduciary may derive substantial monetary benefit from his/her service.

Mediators and arbitrators serve as neutrals and not fiduciaries. Both mediators and arbitrators share the same immediate mission, *i.e.,* conducting a proceeding to resolve the dispute. A mediator conducts a conference with the goal of helping the parties work their disputes out themselves and an arbitrator holds a hearing and renders an award which decides the matter for the parties. Given that the immediate mission is the same, the public would not be likely to view the transition from mediator to arbitrator with the same skepticism that it would view the transition from mediator to fiduciary, where the roles and obligations are fundamentally different. Mediation and arbitration proceedings are also generally time and interaction limited. A fiduciary, on the other hand, may serve for a period of months or even years and his or her service may generate an income stream. From a historical and professional practice perspective, the concept of "med-arb", where a mediator transitions to the role of arbitrator in instances where the parties are unable to reach an agreement in mediation, is an old and accepted method of dispute resolution.

While Advisory Opinion #08-15 does not preclude a mediator from later serving as an arbitrator in the same dispute, the Commission cautions those making such a transition to be careful in doing so. The mediator in this instance should contact all the parties prior to the arbitration and remind them that he served as their mediator and obtain their written consent to now arbitrate the matter. The mediator should also engage in appropriate self-reflection before agreeing to serve. S/He may have spent several hours with the parties during mediation. In that time, did s/he develop any strong positive or negative feelings toward any of the individuals involved that might cloud his judgment or compromise her/ his neutrality? Did s/he learn any confidential information during a caucus session that s/he may not be able to exclude from his thought process and that may inappropriately affect her/his decision? If the mediator has any concerns about his ability to be fully neutral, s/he should not serve. ♦

Advisory Opinion of the
NC Dispute Resolution Commission

Advisory Opinion Number 11-18
(Adopted and Issued by the Commission on May 6, 2011)

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.

(*Continued on Page 17)*

(Continued from Page 16)

Concern Raised

Court staff have registered complaints with the Commission over a period of years about the failure of superior court mediators to comply with their case management duties, including failing to file Reports of Mediator, late filing of Reports [months after the ten day deadline established by Mediated Settlement Conference ("MSC") Rule 6.B(4)(a)], and filing incomplete Reports. This Advisory Opinion was initiated by the Commission after recently issuing a private reprimand to an experienced mediator for failing to file his Reports correctly over an extended period of time and after having been notified of his failure to comply with the Rules in the past.

Advisory Opinion

It is important that a mediator's Reports be filed timely and completely. First, Reports of Mediator are an important case management tool for judges and their staff, allowing them to have more control of their dockets and better allocation of their time. When Reports are not filed timely and complete, these efficiencies are compromised. To clear up any confusion that may exist about reporting the "results" of mediated settlement conferences, it is the duty of all mediators to file a Report with the court, even when a conference is not held due to a case being disposed of prior to scheduling or conducting the conference.

Reports are also the single most important tool in assessing program performance. Court staff report monthly to the Administrative Office of the Courts on the number of cases mediated and settled in their judicial districts. When mediatorsdo not report or report late, their conferences and settlements may go uncounted with the result that MSC Program caseload statistics reported to the Supreme Court, the General Assembly, and to the public will not reflect the Program's true impact on the courts.

Second, certified mediators have the opportunity to earn fees as private providers of court-mandated mediation services. However, the same Rules that afford that opportunity to certified mediators also require them to perform certain case management duties under the Rules, including scheduling and holding the mediated settlement conference within the time frame assigned by the court and reporting the results of the conference. In assigning a case management role to mediators, the legislature intended to minimize the need for the involvement of court staff, and thus taxpayer dollars, in operating mediation programs within the courts. This trade-off of opportunity and duty is one of the most important features of the court-ordered mediation programs in North Carolina. Without it, there would be no mediation programs and no certified mediators.

When mediators fail to fulfill their case management duties, court staff may have to step in to gather information and correct problems, thus taking time away from their other administrative responsibilities. It is a measure of how important the case management duty assigned to mediators is in that MSC Rule 6.B.(4) says: "Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the Court and sanctions."

The assignment of case management duties, including the filing of timely and complete Reports, is as integral to the design of the mediation programs in this State as is certification itself. Simply put, the price for making money in the court system as a certified mediator is completion of administrative duties assigned by the Rules. Failure to carry out those duties subjects mediators to the contempt powers of the court and to discipline, including decertification, by the Commission. ♦

(Continued on Page 18)

(Continued from Page 17)

Advisory Opinion of the NC Dispute Resolution Commission

Opinion Number 11-19
(Adopted and Issued by the Commission on May 6, 2011)

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

A party-selected, certified family financial mediator postponed a family financial settlement conference because a party advised him that she did not have the funds to pay his required $500.00 advance deposit. The party's attorney filed a Motion to Dispense With Mediated Settlement Conference based upon his belief that his client could not afford mediation. A district court judge later determined that the party did not have the funds to pay her share of the mediator's fee and granted the Motion to Dispense. This opinion addresses three issues: 1) whether the Family Financial Settlement Conference (FFS) Rules permit the mediator to charge an advance deposit for his mediation services, 2) whether it was appropriate for the mediator to refuse to conduct the conference on the basis that the party could not pay, and 3) whether the court should dispense with mediation when it determines that a party is unable to pay her share of the mediator's fee?

Advisory Opinion

1) Do the FFS Rules permit the mediator to charge an advance deposit for his services as a mediator?

FFS Rule 7.A. provides that, "When the mediator is selected by a greement of the parties, compensation shall be as agreed upon between the parties and the mediator."

Since the mediator in this scenario was party-selected, the terms of his compensation are governed by that agreement. Thus he could require an advance deposit on his eventual fees. The terms for a court-appointed mediator, by contrast, are set out in their entirety in FFS Rule 7 and may not be varied by agreement.

However, once the mediator has entered into a contractual relationship with the parties and has begun the scheduling process, FFS Rule 8.*I*, which limits the fee arrangement if a party claims inability to pay, *applies*. Thus, a mediator, who is selected by the parties and charges an advance deposit, should proceed with caution and should keep in mind the provisos in this opinion.

2) Was it appropriate for the mediator to refuse to conduct the conference on the basis that the party could not pay the advance deposit?

FFS Rule 7.A. allows the parties and the mediator to agree on the terms of the mediator's compensation and to

(Continued on Page 19)

(*Continued from Page 18)*

change any of the provisions of that rule which are applicable to court-appointed mediators. However, mediators are also governed by FFS Rule 8.I., which requires certified mediators, whether party-selected or court-appointed, to accept as payment in full of a party's share of the mediator's fee such amount as determined by the court pursuant to FFS Rule 7.

The mediator's duty is to schedule and hold the mediated settlement conference (see Rule 6.B(5)). Thus, ordinarily, it is inappropriate for the mediator to delay holding the conference because s/he determines that a party claims an inability to pay the mediator's fee, even when the party agreed to make an advance deposit. The only time it is appropriate to delay the conference is to give the party time to ask the court to determine whether s/he has the ability to pay the mediator's fee if program rules allow that motion prior to the conference.

Superior Court Mediated Settlement Conference ("MSC") Rule 7.D. makes clear that the court will hear the motion only after the case has been settled or tried. Thus, in a Superior Court case, that motion will be heard after mediation and the mediator should proceed with scheduling and holding the conference. No delay in scheduling or holding the conference should occur simply because the mediator learns that a party will not pay his/her advance deposit. Indeed, the mediator's fee may not be paid by that party at all if the court determines that the party is unable to pay his/her share of the fee.

The rule is a bit different in the FFS program in District Court. There is no requirement in Rule 7.E. that the court delay hearing a motion for relief from the obligation to pay the mediator's fee until the conclusion of the case. This difference was created by the drafters of the rule in recognition of a greater occurrence of such motions in equitable distribution ("ED") cases and in light of the fact that other means of relief are available in that program.

In particular, the court has the power in the FFS program to require that the mediator's fee be paid out of the marital estate. Thus, if a party is found to be unable to pay in an ED case, but the marital estate can afford to pay the entire mediator's fee, the mediation could proceed with one party not paying, but the mediator getting his/her entire fee. It is appropriate, then, for a mediator to delay the conference in an ED case, but only to allow time for a party to seek a ruling from an appropriate judge as to his/her ability to pay. However, because it is possible in both the MSC and FFS programs to delay that motion until after the settlement conference, the mediator may not delay it to enforce, in effect, an advance deposit term of his/her agreement with the parties in the face of a party's claim of inability to pay.

There is obvious tension between FFS Rule 7 which allows the parties and the mediator to set the terms of the mediator's fee by agreement, FFS Rule 6 which requires that the mediator schedule and hold the conference, and FFS Rule 8 which requires mediators to mediate cases with indigent litigants as a term of the mediator's certification. That tension is resolved in this instance by requiring that the mediator schedule and hold the conference in the face of a claim of inability to pay.

3) Should the court dispense with mediation when it determines that a party is unable to pay her share of the mediator's fee?

FFS Rule 1 does not state the grounds or factors the court should apply in ruling on a motion to dispense with mediation. However, the drafters made a clear policy choice in the rules that litigants would not be exempted from the requirement of mediation simply because they were indigent or because they lived a long distance from the site of the mediation. In return, they drafted a section of FFS Rule 7 to provide for participation in this pre-trial settlement program without costs and they drafted a section of FFS Rule 4 to provide for participation by electronic or other means than physical attendance.

(*Continued on Page 20)*

(Continued from Page 19)

In the FFS program, there are three methods by which indigent litigants may participate without costs: 1) the party is relieved entirely of the obligation to pay a share of the mediator's fee; 2) the court conducts a judicial settlement conference without cost to anyone; and 3) the court requires that the full mediator's fee be paid out of the marital estate.

An FFS Rule 1 motion to dispense with mediation should not be allowed simply due to a party's inability to pay or a party's remote location. It certainly should not be used to resolve the dilemma faced by the mediator in this scenario whose fee agreement called for an advance deposit. If the court finds that the party is indigent, it should simply say so and employ one of the tools at its disposal to let that party participate in the mediation. The mediator may not collect all of his/her fee, but that is as it should be under the terms of the mediator's certification found in FFS Rule 8. ♦

Advisory Opinion of the NC Dispute Resolution Commission

Opinion Number 11-20
(Adopted and Issued by the Commission on September 9, 2011)

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

Attorney mediator mediated an agreement in a family financial case. The agreement was reached after hours and the attorney's staff was no longer in the building. Since no one else was available to notarize the agreement and the mediator was a notary public, he proceeded to notarize the parties' signatures on the agreement consistent with the requirements of N.C.G.S. § 50-20(d). Mediator has now had second thoughts and contacted the Commission and asked whether it was appropriate for him to notarize the agreement. He is concerned that he could be regarded as a beneficiary of the transaction since he was paid for his services in helping to mediate the agreement. Both parties were represented by counsel, who drafted the agreement.

Advisory Opinion

Inquiry #1 – May the attorney mediator notarize the agreement in the situation described above?

N.C.G.S. § 10B-20(c)(6) provides that a notary shall not perform a notarial act when the, "…notary will receive directly from a transaction connected with the notarial act any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the fees specified in G.S. 10B-31, other than fees or other consideration paid for services rendered by a licensed attorney, a licensed real estate broker or salesperson, a motor vehicle dealer, or a banker."

(Continued on Page 21)

(Continued from Page 20)

N.C.G.S. 10B-60 charges the NC Secretary of State's office with regulating notary conduct and enforcing the Notary Public Act, including the above provision. The Secretary of State's Office has advised the Commission there is nothing that prohibits the attorney mediator from notarizing the agreement in the situation described above because he is not actually a beneficiary of the agreement itself, even though the agreement may provide for his compensation in conducting the conference. In essence, the mediator is being compensated only for his service as a mediator and is not receiving some portion of the marital estate or otherwise benefitting from the underlying agreement.

Inquiry #2 – Could a certified, non-attorney mediator also notarize the agreement in the situation described above?

N.C.G.S. § 10B-20(k) provides that, "A notary public who is not an attorney licensed to practice law in this State is prohibited from rendering any service that constitutes the unauthorized practice of law. A non-attorney notary shall not assist another person in drafting, completing, selecting or understanding a record or transaction requiring a notarial act." The Secretary of State's office has advised the Commission that since the North Carolina State Bar has determined that serving as a mediator per se is not the practice of law, the above provision does not prohibit a non-attorney mediator from conducting mediations in North Carolina.

Since the parties in the situation described above were represented by counsel, who drafted the agreement, nothing should prohibit a non-attorney mediator from notarizing the parties' signatures under the Secretary of State's analysis set forth under Inquiry #1 above, *i.e.*, a non-attorney mediator would be no more a beneficiary than would an attorney mediator. ♦

Commission's Fall Retreat
Friday, September 9 - Saturday, September 10, 2011.

Back left to right: Judge Michael Morgan, N. Victor Farah, John Schafer, Leslie Ratliff; ***Middle row left to right;*** J. Anderson (Andy) Little, Robert Beason, Jacqueline (Jackie) Clare, Judge Ann E. McKown, M. Ann Anderson, George Doyle, H. Lawrence (Larry) Hudspeth, Frank Laney; ***Front row left to right***; Karan Whitely, Jessie Conley, Lynn Gullick, Dawn Bryant, Judge W. David Lee, Gary Tash, Judge Joseph Turner, Edward Hay, Jr., Lori Cole and Martha Curran.

WELCOME

Chairman Lee and the members of the Dispute Resolution Commission welcomed the Commission's newest members, **Lynn Gullick and M. Ann Anderson**, at the January meeting.

Ms. Gullick a Greensboro mediator, was appointed by Chief Justice Sarah Parker to serve until September 30, 2013. She is an active member of the NCBA's Dispute Resolution Section and served as the Section's chair from 2007-2008. Ms. Gullick replaces Wayne Huckel.

Ms. Anderson, an attorney and mediator from Pilot Mountain, was appointed by Governor Beverly Perdue on October 26, 2010, for a term expiring September 30, 2013. Like Ms. Gullick, she also an active member of the NCBA's Dispute Resolution Section and served as chair from 2006-2007. Her husband, Tom, is also a certified mediator. Ms. Anderson replaces Professor Mark Morris.

Thank You for Your Service !

The Commission sends its thanks and best wishes to **Professor Mark W. Morris** and **Wayne P. Huckel** who recently completed terms on the Commission. Professor Morris served as Chair of the Commission's Standards, Discipline and Advisory Opinions Committee and Mr. Huckel chaired the Commission's Mediator Certification and Training Committee. As Judge Lee noted, their contributions were many and they will be missed.

Mr. Huckel mediates full-time in Charlotte. Professor Morris resides in Raleigh, teaches law at UNC Central University School of Law and trains mediators. He is also the Director of the Law School's Dispute Resolution Institute and supervises its Alternative Dispute Resolution Clinic.

WELCOME BACK

At the Commission's January meeting, the oath of office was also administered to Commission member Superior Court Judge Michael R. Morgan (Judicial District 10). Judge Morgan was re-appointed by Chief Justice Sarah Parker for a term expiring September 30, 2013. At the Fall Retreat, the oath of office was administered to Commission members N. Victor Farah and J. Anderson Little. Mr. Farah was re-appointed by NC State Bar President, Anthony S. diSanti, and Mr. Little was reappointed by Chief Justice Sarah Parker, both terms will run through September 30, 2014.

At the January 2010, Commission meeting, Judge W. David Lee (not pictured) administered the oath of office to (*left to right*) Judge Michael R. Morgan, Ann Anderson and Lynn Gullick. *(Photos on this page of The Intermediary are courtesy of Commission staff member, Maureen M. Robinson.)*

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 (866) 517-0145 or visit their web site: www.beasonellis.com.

Carolina Dispute Settlement Services: 40-hour superior court mediator training course, January 23 - 27, 2012, in Raleigh. For more information or to register, contact Dawn Bryant at (919) 755-4646, Web site: www.notrials.com.

Mediation, Inc: 40-hour superior court mediator training course. For more information or to register, contact Celia O'Briant at (888) 842-6157 or (919) 636-5697 or visit their web site: www.mediationincnc.com.

FAMILY FINANCIAL TRAINING

Atlanta Divorce Mediators, Inc: 40-hour family mediation training course, November 18 - 22, in Montgomery, AL and December 8 - 12 in Atlanta, GA. For more information, contact Melissa Heard at (770) 778-7618 or visit their web site: www.mediationtraining.net.

Carolina Dispute Settlement Services: 16-hour family mediation training course, November 15 - 16 and March 13 - 14 in Raleigh. See above for contact information.

Mediation, Inc: 40-hour family mediation training course, November 1 - 5 in Raleigh. See above for contact information.

6-HOUR FFS/MSC COURSE

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

Mediation, Inc: 6-Hour training course, October 29, in Raleigh. 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. 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.

CME and Other Training Opportunities

The NC Bar Association Dispute Resolution Section's Annual Meeting, *No Dispute About It: Dispute Resolution Is Here To Stay*, Friday, February 24, 2012, in Greensboro. For additional information, contact the NCBA at (800) 662-7407 or (919) 677-0561 or visit http://www.ncbar.org/cle/programs/870DRM.aspx.

Atlanta Divorce Mediators, Inc. is presenting "Deprivation Mediation Training" on November 3-5 in Atlanta, GA. For additional information, call (404) 378-3238 or visit www.mediationtraining.net.

Center for Cooperative Parenting, Inc. is presenting "Issues in High Conflict Divorce" workshop on November 4. For additional information, call (919) 933-0273 or visit www.centerforcooperativeparenting.org.

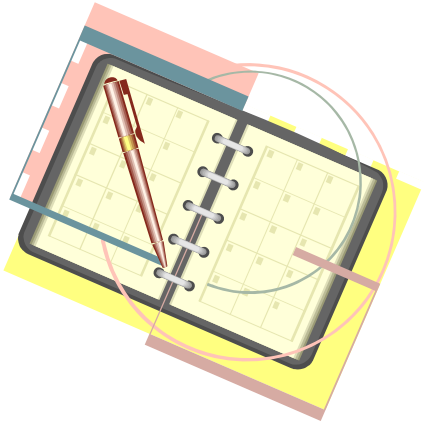
The NC Bar Association in compliance with FFS Rule 8.A., has agreed to offer the "2010 Basics of Family Law, The Modern Family**"** online for FFS mediator certification applications. For a fee of $50.00 the applicant has up to two weeks to view the program. For more information or to register to watch online, visit www.ncbar.org/cle/programs/videos/721bfl.aspx. (No CLE credit will be given for viewing this program on-line.)

The NC Bar Association is presenting "Basics of Elder Law" on October 28, in Cary. Contact the NC Bar Foundation at (919) 677-8745 or (800) 662-7407 or visit www.ncbar.org/CLE.

The NC Bar Association is presenting "Workplace Injuries and Conditions (2011 Basics of Worker's Compensation) on November 10, 2011, in Cary. Contact the NC Bar Foundation at (919) 677-8745 or (800) 662-7407 or visit www.ncbar.org/CLE.

UPCOMING COMMISSION MEETINGS

Upcoming meetings of the Dispute Resolution Commission are scheduled for Friday, January 27, 2012, and Friday, May 11, 2012, at the North Carolina Judicial Center in Raleigh; and Friday, September 14-15 in Asheville. Meeting agendas are posted at www.ncdrc.org at least two weeks prior to meetings. All mediators and members of the public 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.



Thank you for reading the Intermediary!

(Advertising Guidelines, continued from Page 7)

The Commission is particularly concerned about the number of unaccredited or self-accredited institutions now awarding undergraduate and advanced degrees, including J.D. degrees and Ph.D. degrees. In evaluating degrees submitted for purposes of certification, the Commission insists those degrees be awarded by institutions which have been accredited by accrediting authorities recognized by either the Council for Higher Education (CHEA) or the U.S. Department of Education.

The Commission affords mediators an opportunity to market their practices to attorneys and the public by posting biographical information on the Commission's website at www.ncdrc.org. The Commission has determined that mediators shall not identify themselves in their postings as holding degrees when those degrees were awarded by institutions that have not been accredited by authorities recognized by either CHEA or the Department of Education. Moreover, mediators shall not indicate on the Commission's website that they have studied at or completed course work at such institutions. If a mediator has questions about whether an institution s/he attended is recognized by either CHEA or the Department of Education, she or he may contact the Commission's office.

In addition, the Commission discourages mediators and mediation trainers working with Commission certified programs from coupling notice of DRC mediator or training program certification with representations that the mediator/trainer holds certain, specified degrees when those degrees were awarded by unaccredited or self-accredited institutions, including coupling such information on mediator/trainer letterhead, business cards, websites, or other marketing/registration materials intended for consumers of mediation or mediator training services. ♦

(Dearth of Jury Trials Worries Committee, continued from Page 12)

"If that is the price we pay for a more efficient system, then that's not a great concern. What would be a concern is if there was serious evidence that the public is losing confidence in the jury system because there are fewer trials. I can't think that it's extremely likely that that's happening."

In fact, a show of hands around the room demonstrated that nearly all committee members present had been unaware of the substantial reduction in jury trials over the past 10 years until reading the recent data and being selected for the panel. The question then, Regensdorf said, shouldn't be how the issue is affecting attorneys.

"We need to ask: Does the public view that in a negative way?"

The jury trial panel plans to meet at the next board meeting and begin tackling issues brought up by members, as well as the tasks assigned in the committee's mission statement. The goal is to have findings and recommendations to present to the board in 2011. ♦

HAPPY 20TH
ANNIVERSARY
TO THE
MEDIATED SETTLEMENT PROGRAM!
(Legislation establishing the pilot program was adopted in 1991.)