



# The Intermediary

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



*From the Chair*  
*By J. Anderson Little*

## NEWS FROM THE DRC

**New Members.** Since the last issue of *The Intermediary*, the Commission has welcomed eight new members. At its Annual Retreat September 13-14, 2013, the Commission thanked Gary Tash and Judge Michael Morgan for their two terms of dedicated service, and Dawn Bryant, who was not in attendance. Profiles of four of our new members appear in this issue. Look for the remaining four profiles in our next issue.

**Mediator Toolbox.** We went online at the DRC homepage with the Mediator Toolbox this year, to widespread favorable reviews. I think it fair to say that this resource, available with one click of your mouse, puts the NC DRC's website ahead of its counterparts in all other states. You can find forms you might need in your mediation practice in one location, including DRC developed forms and applicable AOC forms. Recently added are revised forms for a Motion to Withdraw as Mediator and a Consent Order for Substitution of Mediator; and more will be coming in the last quarter of this year.

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## Commission Members

J. Anderson Little, Chair Chapel Hill, NC	Judge Gary S. Cash, Esq. Asheville, NC	Lynn Gullick, Esq. Greensboro, NC	Judge Michael R. Morgan Raleigh, NC
Judge Charles T.L. "Chuck" Anderson Hillsborough, NC	Jacqueline Clare, Esq. Raleigh, NC	Susan A. Hicks, Clerk Carthage, NC	Robert Ponton, Esq. Raleigh, NC
M. Ann Anderson, Esq. Pilot Mountain, NC	Commissioner Lorrie L. Dollar Cary, NC	Richard G. Long Jr., Esq. Monroe, NC	Diann Seigle Raleigh, NC
Judge Jesse B. Caldwell, III Gastonia, NC	N. Victor Farah, Esq. Raleigh, NC	Judge J. Douglas McCullough Raleigh, NC	Judge Teresa H. Vincent Greensboro, NC

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Resolution Commission  
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**Proposed Rule Changes.** The Commission has submitted proposed revisions to the DRC Rules and all program rules to the ADR Committee of the State Judicial Council. In the course of its review of the rules, many interesting issues emerged and were discussed. For instance, with respect to the filing of grievances or complaints against a mediator, current DRC Rule VIII.C.(2)(e) provides that “there shall be no statute of limitations on the filing of complaints.” Concerned about the open-endedness of this provision, the Commission passed a proposed change to provide for a one-year statute of limitation.

Perhaps the most significant substantive change to the Rules impacting the work of mediators is the revision of the process for requesting court appointments. If approved by the Supreme Court, the requirement of submitting letters to each resident superior court judge (MSC Program) or chief district court judge (FFS Program) in a district not contiguous to your county of residence will be eliminated. In its place, a mediator shall affirmatively designate annually the districts in which s/he will accept court appointments. Those designations will be made during his/her electronic certification renewal application process. Each designation will constitute an affirmation that the mediator has read the local rules and understands that failure to accept appointments may be grounds for removal from the list. You can find a summary of other proposed changes to the rules on page 12.

**Observations for Certification.** The Commission receives calls on a regular basis from mediator certification applicants as to the difficulty in finding observations in order to complete their applications. As part of the proposed rule revi-

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revisions, certain pre-litigation cases would be eligible to satisfy the observation requirements. If adopted, additions to MSC Rule 8 and FFS Rule 8 will include a provision that requires certified mediators to make reasonable efforts to accommodate observation requests from mediator certification applicants. I encourage all of you to step up and allow prospective mediators to observe your mediations, particularly those observers who reside several counties distant from your own.

**Standards of Conduct.** An important change to Standard III of the Standards of Conduct for Mediators was approved and has been sent to the State Judicial Council. This change allows for a narrow exception to that standard regarding discussions with courts or courts' staff about the case being mediated. The exception would allow for discussions about procedural matters only and only with the express permission of the parties. Mediators should remember that we cannot respond to inquiries from court staff or judges about the case or the parties that otherwise would violate the duty of confidentiality under Standard III. See page 8.

**Report of Mediator.** I'd like to remind mediators to file their Reports of Mediator on time. Timely reporting by mediators is a vital component of most districts' case administration systems and, in many districts, prompts staff to set the case for trial. Please remember that the duties of mediators relate not only to the conduct of the mediation itself but also to the scheduling and reporting of results of the mediation. This is an important trade off in our system of court ordered mediation which has allowed hundreds of mediators across the State to work for compensation within the courts. As a matter of practicality under the rules, mediators can be disciplined for not reporting on time, including the ultimate discipline which is the loss of certification.

**ADR Statistics.** In FY 2012/13 all MSC districts except one reported the results of mediated settlement conferences to AOC. Reporting by counties has not been as successful in the FFS and Clerk Programs. Recently, however, the AOC has designed and implemented an easy to use reporting system, *CaseWise*, that should encourage local court staff to report accurately what is happening with mediation across the State. The new system will require only two computer "touches" per case by court staff to supply all the information needed for accurate reporting. One of those touches is prompted by receipt of the Report of Mediator, thus underscoring the importance of submitting reports on time. See pages 19-21.

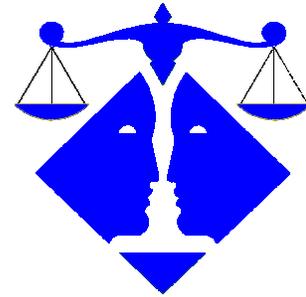
**Continuing Mediator Education.** The Commission will continue to discuss the issue of continuing mediator education. At present, the DRC suggests, but does not require, the completion of 3 hours of qualifying CME each calendar year. The next issue of *The Intermediary* will feature an in-depth article on this topic. In FY 2012/13 only 35.7% of mediators reported CME activity. See page 8.

**Pre-Litigation HOA Mediation.** House Bill 278 was ratified and establishes a voluntary pre-litigation mediation process in certain Homeowners Association disputes. Mediators who would like to work in homeowner association disputes should be aware of additional mediation opportunities in that area.

**New Deputy Director.** Lastly, the Commission is happy to welcome Harriet S. Hopkins to the DRC staff as our Deputy Director. She comes to us with 30 years of experience as an attorney in private practice in Durham, and with more than 15 years as both a mediator certified by the DRC for the MSC and FFS programs, and as an arbitrator in the District Court Arbitration Program.

The Commission truly appreciates and applauds your dedication and service as mediators to the court mandated mediation programs. Your work greatly benefits the administration of justice in North Carolina and the public at large; and so, we thank you.

# Commission Adopts New Advisory Opinions



In 2013, the Dispute Resolution Commission adopted three new Advisory Opinions, 13-24, 13-25, and 13-26. The first two address mediator responsibility with respect to attendance issues, and the third, mediator responsibility to schedule a mediation after the case has been appealed. The Commission encourages all mediators who are facing an ethical dilemma or who have a question about rule interpretation to contact the Commission's office and request guidance. If time is of the essence, mediators may seek immediate assistance from Commission staff over the telephone or by e-mail. If time is not a factor, mediators may request a written opinion from the Commission. Written Advisory Opinions carry the full weight of the Commission and are issued when the Commission believes that a question and the Commission's response may be of interest to the wider mediator community. To view the Advisory Opinions Policy, go to [www.ncdrc.org](http://www.ncdrc.org) and click on "Mediator Ethics" and then click on "Advisory Opinions Policy". Previously adopted Opinions are archived on the web and may be searched using your keyboard's "Ctrl + F" function. These Opinions were distributed by e-mail to certified mediators immediately following their adoption and the full text of the three 2013 advisory opinions also appears below:

## **Advisory Opinion of the NC Dispute Resolution Commission**

Opinion Number 13-24

(Adopted and Issued by the Commission on February 1, 2013)

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 new party, a Georgia resident, was added to a superior court case just prior to a scheduled mediation. The new party's attorney is a Georgia lawyer who has not been admitted to practice in North Carolina. That attorney contacted the mediator and asked whether he could participate in the mediation. Mediator asks the Commission whether, if he allows the out-of-state attorney to attend and participate, he will be facilitating the unauthorized practice of law.

### **Advisory Opinion**

The mediator has a duty to serve as a neutral facilitator of the parties' negotiations. Public policy encourages the process of bringing the parties together. While parties and their attorneys are required to attend pursuant to rules promulgated by the Supreme Court, the mediator is not required to police attendance issues. The mediator should proceed to hold the conference, facilitate the parties' negotiations, and report to the court those individuals who were present at the conference. The parties should direct any questions about attendance to the court.

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Pursuant to North Carolina Rules of Professional Conduct Rule 5.5(c)(2), a lawyer admitted to practice in another jurisdiction, but not in North Carolina, does not engage in the unauthorized practice of law in this jurisdiction if the lawyer acts with respect to a matter that is reasonably related to a pending or potential mediation, the services are reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice, and the services are not services for which pro hac vice admission is required. However, pursuant to Comment 6 to Rule 5.5, a lawyer must obtain admission pro hac vice in the case of a court-annexed mediation. Rule 5.5(d) prohibits a lawyer from assisting another person in the unauthorized practice of law.

When there is existing litigation and the court orders the case to mediation, a mechanism is in place for the lawyer to be admitted pro hac vice for the mediation. On the other hand, if the case is not in litigation, the lawyer may participate in the mediation without being admitted pro hac vice as long as the services are related to the lawyer's representation of that client in a jurisdiction in which the lawyer is admitted to practice. ♦

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## **Advisory Opinion of the NC Dispute Resolution Commission**

Opinion Number 13-25

(Adopted and Issued by the Commission on February 1, 2013)

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**

One of the parties to a court-ordered superior court mediation is a corporation. An officer of the corporation filed the answer and several motions relating to discovery on behalf of the corporation. No outside counsel has made an appearance on behalf of the corporation. The attorney for one of the other parties informed the mediator assigned to the case that he would not participate in the mediation unless the corporation obtained legal counsel to participate in the mediation. Mediator now asks what he should do if the corporation does not have an attorney present for the mediation. He also asks whether, if he convenes the conference and allows the corporate officer to negotiate on the corporation's behalf, he would be facilitating the unauthorized practice of law.

### **Advisory Opinion**

The mediator has a duty to serve as a neutral facilitator of the parties' negotiations. Public policy encourages the process of bringing the parties together. While parties and their attorneys are required to attend pursuant to rules promulgated by the Supreme Court, the mediator is not required to police attendance issues. The mediator should proceed to hold the conference, facilitate the parties' negotiations, and report to the court those individuals who were present at the conference. The parties should direct any questions about attendance to the court.

N.C. Gen Stat. §84-5 prohibits a corporation from practicing law, and case law interpreting the statute, with certain exceptions, holds that a non-attorney employee of a corporation may not litigate on behalf of a corporation. Furthermore, Rule 5.5(d) of the North Carolina Rules of Professional Conduct prohibits a lawyer from assisting another person in the unauthorized practice of law. Serving as a mediator, however, is not the practice of law, and therefore, as long as the lawyer mediator is acting as a mediator consistent with court-ordered program rules and the Standards of Professional Conduct for Mediators, the mediator will not be assisting in

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the unauthorized practice of law by conducting the settlement conference as ordered by the court, and would not be in violation of Rule 5.5(d) by doing so. Absent an order of the court dispensing with the mediation, the mediator should hold the conference as originally ordered by the court.

In an effort to help the parties make informed decisions about attendance, and to help make their time spent at mediation more productive, mediators are encouraged to engage the parties (whether together or separately) in conversation about attendance issues. Mediators may help the parties become aware of the attendance requirements, raise questions about the consequences of the parties' decisions regarding attendance, help the parties identify persons who need to be a part of their team's discussions and negotiations at mediation, and help the parties identify the appropriate officials who may meet the attendance requirements.

This scenario also presents a "best practice" issue. Questions about attendance often arise before mediation is scheduled or held, and such disputes can become highly charged and confrontational. Mediators who go beyond the suggestions discussed above and take a position on an attendance issue may find themselves in an adversarial relationship with one or more parties. If there are concerns of lack of impartiality, the mediator may be in violation of Standard II, which requires the mediator to maintain impartiality toward the parties, and pursuant to Standard II.C, may be required to withdraw. Additionally, if the mediator gives legal advice about attendance issues, this would violate Standard VI, which requires the mediator to limit himself or herself solely to the role of mediator, and instructs the mediator not to give legal or other professional advice during the mediation. Ultimately, as noted above, the parties should address attendance questions to the court. ♦

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## **Advisory Opinion of the NC Dispute Resolution Commission**

Opinion Number 13-26

(Adopted and Issued by the Commission on May 17, 2013)

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

### **Concern Raised**

Mediator was assigned to conduct a mediated settlement conference in a superior court case and worked with the parties to schedule a date for mediation. Thereafter, the mediator received a notice of appeal of an order denying the defendant's motion to dismiss, which raised the doctrine of sovereign immunity. The attorney for the defendant contacted the mediator and asked to have the mediation conference postponed due to the pending appeal. The attorney insisted that the filing of the appeal immediately divested the trial court of its jurisdiction in the matter and that, as such, the mediation ordered by the court should not proceed.

The mediator contacted the plaintiff's counsel and was advised that the plaintiff wanted the mediation to go forward as scheduled. The mediator contacted the defendant's attorney to advise him that unless the attorney obtained an order of the court either staying the case or postponing the mediation, the mediator intended to hold the conference as scheduled. Defense counsel insisted that he and his client would not appear for mediation, if held. The mediator contacted the Commission for guidance.

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## Advisory Opinion

N.C. Gen Stat. §1-294 provides that a timely notice of appeal stays all further proceedings in the court below on the judgment appealed from or upon the matter addressed therein, but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. Once a party gives notice of appeal, the trial court is divested of its jurisdiction if the appeal is an immediately appealable interlocutory order. However, when a party appeals a non-appealable interlocutory order, such appeal does not deprive the trial court of jurisdiction and the trial court may proceed with trying the case. RPR & Associates, Inc. v. The University of North Carolina-Chapel Hill, et al., 153 N.C. App. 342 (2002), appeal dismissed and disc. review denied, 357 N.C. 166 (2003).

An interlocutory order that affects a substantial right is immediately appealable, and it is the trial court that has the authority to determine whether its order affects a substantial right of the parties or is otherwise immediately appealable. (A party may apply to the appellate court for a stay if the trial court chooses to proceed with the matter.) Accordingly, a trial judge would need to determine on a case-by-case basis whether the matter is stayed or if the court still has jurisdiction, which would allow the mediation to proceed.

Upon learning that an appeal has been filed and that the mediator's duty to hold the conference has been called into question, the mediator should look to the trial court for guidance. While it remains the responsibility of the parties to seek clarification from the court, if they do not, the mediator should seek guidance from the court, through court staff, as to whether the matter is stayed upon appeal or whether the case, including mediation, will proceed through the trial court. ♦

### FY 2012-2013 MEDIATOR CERTIFICATION STATISTICS\*

The total number of outstanding certifications by program as of June 30, 2013, were:

1307 active MSC certifications

313 active FFS certifications

167 active CMP certifications (to conduct guardianship and estate mediations)

77 active DCC certifications

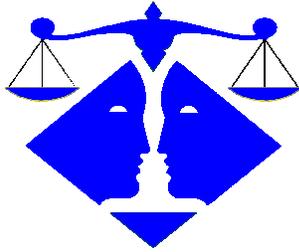
There were also 83 inactive MSC, 19 inactive FFS, and 10 inactive CMP certifications. \*\*

\* These numbers reflect total certifications outstanding and not the total number of mediators. The number of mediators is slightly less than the total number of certifications given that 184 mediators hold dual certification, *i.e.*, both MSC and FFS certification (166 active and 18 inactive) or multiple certifications.

\*\* Inactive mediators may not conduct mediated settlement conferences and their names do not appear in the Commission's mediator database accessible at [www.ncdrc.org](http://www.ncdrc.org). However, they continue to receive information and updates from the Commission and may reactivate their certifications on request.

**THE COMMISSION SINCERELY THANKS THOSE  
MEDIATORS WHO RENEWED FOR FY 2013/14!**

# PROPOSED CHANGES TO THE STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS



## **PROPOSED REVISIONS TO STANDARD III AND STANDARD VII.H.**

An amendment to **Standard III** allows for disclosure to the court of certain procedural matters by the mediator *with the consent of the parties*, while reiterating the duty of maintaining confidentiality of any information communicated to the mediator by any participant during the mediation process.

An amendment to **Standard VII.H** clarifies that *de minimus* gifts to and from mediators are acceptable if they are provided at the mediation and intended to further the mediation or intended to show respect for cultural norms. Otherwise, a mediator should neither give nor accept any gift, favor, loan or other item of value that raises a question as to the mediator’s actual or perceived impartiality.

*Note: These proposed revisions are pending review and approval by the ADR Committee of the State Judicial Council, the State Judicial Council and the NC Supreme Court*

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## ***CONTINUING MEDIATOR EDUCATION***

The Commission strongly encourages all certified mediators to engage in at least 3 hours of CME (Continuing Mediator Education) annually. Although this is not required, mediators are required to report CME activities on their annual renewal application forms. For FY 2012/13, as of September 3, 2013, 425 mediators answered “yes” to having undertaken CME and 763 answered “no.” **Thus, only 35.7% of mediators reported completing some CME.**

Keep in mind that Standard I.A of the Standards of Professional Conduct for Mediators addresses competence of the mediator and provides in part, “...A mediator shall obtain necessary skills and substantive training appropriate to the mediator’s areas of practice and upgrade those skills on an ongoing basis.” (Emphasis added).

See the CME opportunities beginning on page 10 of this newsletter. You can also find excellent resource information on the DRC website, [www.ncdrc.org](http://www.ncdrc.org) under “Ethics/Complaints/Continuing Education, such as prominent websites dedicated to mediation, recommended books on dispute resolution, a sampling of mediation blogs, and other resources.

# Upcoming Mediator Certification Training



## Upcoming Mediator Certification Training

### *Superior Court Training*

**Carolina Dispute Settlement Services:** 40-hour superior court mediator training course, on November 11 - 15, 2013, in Raleigh, NC; and January 27 - 31, 2014, in Raleigh, NC. For more information or to register, Contact Diann Seigle at (919) 755-4646, or visit their web site: [www.notrials.com](http://www.notrials.com).

**Mediation, Inc.:** 40-hour superior court mediator training course on January 14 - 18, 2014, in Charlotte, NC and April 14 - 18, 2014, in Raleigh, NC. For more information or to register, contact Andy Little at (919) 967-6611 or (888) 842-6157, or visit their web site at [www.mediationincnc.com](http://www.mediationincnc.com).

### *Family Financial Training*

**Success Consulting and Mediation,** 40-hour family mediation training course. For more information, contact Melissa Heard at (770) 778-7618 or visit their web site at [www.mediationtraining.net](http://www.mediationtraining.net).

**Carolina Dispute Settlement Services:** 16-hour family mediation training course on December 3 - 4, 2013, in Raleigh, NC. See above for contact information.

**Mediation, Inc:** 40 hour family mediation training course, November 12-16, 2013, in Raleigh, NC; and May 20 - 24, 2014, in Raleigh, NC; 16-hour family mediation training course, November 14-15, 2013, in Raleigh, NC, and May 23 - 24, 2014, in Raleigh, NC. See above for contact information.

### *6-Hour Training*

**Mediation Inc:** 6-hour training course on May 3, 2014, in Raleigh, NC. 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](http://www.nccourts.homestead.com).

**The ADR Center (Wilmington):** 6-hour course on November 22, 2013; January 31, 2014; and March 28, 2014; in Wilmington. For more information or to register, contact John J. Murphy at (910) 362-8000 or email [johnm@theADRcenter.org](mailto:johnm@theADRcenter.org), or visit their web site at [www.theADRcenter.org](http://www.theADRcenter.org).

**Judge H. William Constangy** (Charlotte): 6-hour course. For more information, contact Judge Constangy at (704) 807-8164.

# Clerk Training and CME OPPORTUNITIES

## *Clerk Training*

**Mediation, Inc.:** 10-hour Clerk mediator training course available on DVD. For more information or to register, contact Andy Little at (919) 967-6611 or (888) 842-6157, or visit their web site at [www.mediationincnc.com](http://www.mediationincnc.com).

**The ADR Center (Wilmington):** 10-hour live Clerk mediator training course. For more information or to register, contact John J. Murphy at (910) 362-8000 or email [johnm@theADRcenter.org](mailto:johnm@theADRcenter.org), or visit their web site at [www.theADRcenter.org](http://www.theADRcenter.org).

## *CME Opportunities*

**Success Consulting and Mediation** is presenting “Domestic Violence” on December 13-14, 2013, in Atlanta, GA; “Divorce Practicum” on November 22-23, 2013, in Atlanta, GA. For additional information, call (770) 778-7618 or visit [www.mediationtraining.net](http://www.mediationtraining.net).

**NC Bar Association** is presenting the following seminars at the Bar Center in Cary, NC. For more information call (919) 677-8745 or (800) 228-3402 or visit [www.ncbar.org/CLE](http://www.ncbar.org/CLE).

“Real Property Skills: From A to Z” on November 7-8, 2013.

“Navigating Financial Issues in Divorce” on November 21, 2013.

**NC Bar Association** is presenting the following telephone seminars. For more information, see above.

“Attorney Ethics and ADR” on October 31, 2013, from 1pm-2pm.

: “Treatment of Trusts in Martial Separation” on November 5, 2013, from 1pm-2pm.

“Estate Planning for the Elderly, Part 1” on November 19, 2013 from 1pm-2pm.

“Estate Planning for the Elderly Part 2” on November 20, 2013, from 1pm-2pm.

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# Clerk Training and CME OPPORTUNITIES

## *More CME and Training Opportunities*

**The ADR Center (Wilmington)** is presenting the following programs. For more information or to register, contact John J. Murphy at (910) 362-8000 or email [johnm@theADRcenter.org](mailto:johnm@theADRcenter.org), or visit their web site at [www.theADRcenter.org](http://www.theADRcenter.org).

“Basic Mediation Training in the District Criminal Court Program” on February 19 - 20, 2014, and June 11 - 13, 2014.

“Advanced Mediation Training in Negotiation” on January 10, 2014.

“Advanced Mediation Training in Dealing with Angry Parties” on April 11, 2014.

“Advanced Mediation Training on Activity Based Parenting in Divorce” on June 10, 2014.

“Advanced Mediation Training on Communication Options in Conflict” on June 10, 2014.



### NCBA Dispute Resolution Section Annual Meeting Set

The Section will hold its Annual Meeting and Continuing Education Program on Friday, February 14, 2014, at the Grandover Resort in Greensboro, NC. Featured will be a segment led by Claudia Horwitz on “Mindfulness in Mediation: Strengthening Your Inner Capacity and Presence for Greater Impact.” The morning session will include a panel discussion on ADR in the legislative process with several state legislators. Small breakout sessions on relevant ADR topics will also be offered.

For more information about the conference, the Section and its work, and/or to join the Section or to register for the conference, go to [disputeresolution.ncbar.org](http://disputeresolution.ncbar.org). Non-attorney mediators are welcome to join the Section as well as attorneys. This is an excellent opportunity for CME credits!

**Proposed Revisions to Dispute Resolution Commission  
Rules and All Program Rules**

At its annual meeting in September, 2013, the Commission approved revisions to the **MSC Rules, FFS Rules, Farm Nuisance Rules, Clerk Rules, and District Criminal Court Rules**. The proposed revisions have been submitted to the ADR Committee of the State Judicial Council which will review them and send them to the State Judicial Council and ultimately to the NC Supreme Court for final review. A brief summary of the program rule changes is set out below:

- \* Elimination of the letter writing requirement for court appointments in MSC, FFS, Farm and Clerk programs
- \* Changes to the observation requirements to allow observations of pre-litigation matters
- \* Changes to rules to allow the mediator and the parties to agree on the location of the mediation, and if they cannot agree, to clarify that it must be in the county where the case is pending
- \* Revision of FFS Rule 8.A to achieve consistency with MSC Rule 8.C with respect to out-of-state attorney applicants

The Commission also approved proposed revisions to the **DRC program rules**, as summarized below:

- \* Division of the Standards, Discipline and Advisory Opinions Committee into two separate committees: Standards and Advisory Opinions Committee and Grievance Committee
- \* Clarification of the role of ex-officio members, in particular that they are ineligible to vote on committee or Commission matters, and are advisory only.
- \* Imposition of a one year statute of limitation from the end of the mediation by impasse or settlement for filing a complaint against a mediator or a mediator training program. Current Rule VIII.C.(2)(e) provides that there shall be no limitation on the filing of a complaint.

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***QUOTABLE QUOTES***



“If you understood everything I said, you’d be me.”— Miles Davis

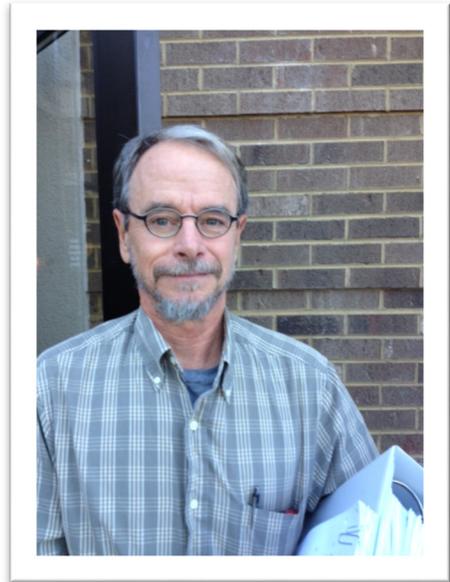
“Remember not only to say the right thing in the right place, but far more difficult still, to leave unsaid the wrong thing at the tempting moment.”— Benjamin Franklin



## DRC WELCOMES NEW COMMISSION MEMBERS THANK YOU FOR YOUR WILLINGNESS TO SERVE!

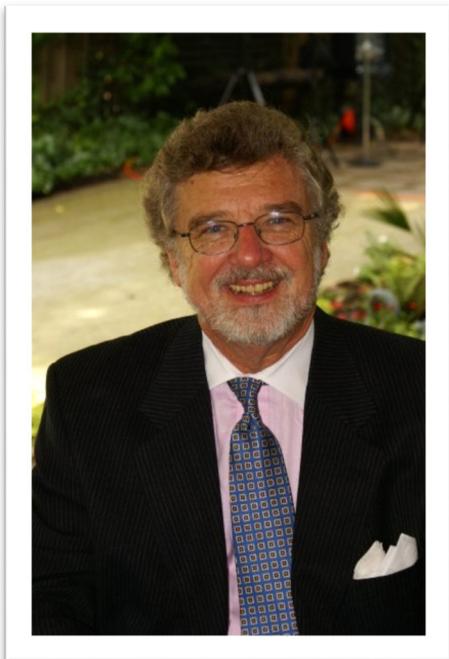
*In this issue of The Intermediary, we feature four of our new members.  
We will focus on the other four new members in our next issue.*

**Judge Charles T.L. "Chuck" Anderson** was born in Charleston, SC , graduated from UNC Chapel Hill, and UNC School of Law. Judge Anderson worked with North State Legal Services from 1976-1980, and then served as the Executive Director of NC Prisoner Legal Services from 1981 to 1986. He engaged in the private practice of law for 10 years with Northern Blue law firm in Chapel Hill. Judge Anderson was elected in 1996 as district court judge for District 15B where he continues to serve. He also serves as an advisory board member for UNC-CH Center for Public Service and on the Administration of Justice Task Force of the NCBA. Judge Anderson helped found the Chatham Education Foundation, and has been involved with many non-profits, including Orange-Chatham Alternative Sentencing, Inc. , the Adolescent Pregnancy Prevention Coalition and Joint Orange-Chatham Community Action, Inc.



\*\*\*\*\*

**Judge Jesse B. Caldwell** grew up in Gastonia, graduated from UNC Chapel Hill, and UNC School of Law. He was a trial lawyer for twenty years, including service in private practice and as the Public Defender for District 27A, and has served for two decades as a North Carolina Superior Court Judge. Since 1995, he has served as Senior Resident Superior Court Judge.



Judge Caldwell is President of the NC Conference of Superior Court Judges; and is an adjunct professor of law at Charlotte School of Law, Gaston Community College, and Gardner-Webb University. He serves on numerous community boards, is very active in civic work, and is a frequent speaker at community events. He serves as Moot Court coach for Forestview High School; has acted in and directed numerous community theatre productions; and is a Certified Lay Speaker in the United Methodist Church, having preached in over fifty churches of different denominations.

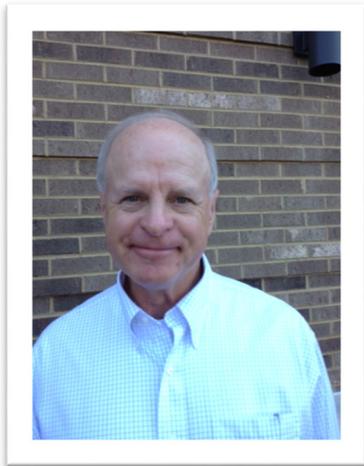
The North Carolina Academy of Trials Lawyers presented him with the "Outstanding Trial Judge Award" in 2000. He is the father of four children, including Jesse, IV, an assistant public defender in Gaston County.

*(Continued on page 14)*

(Commission member bios, continued from page 11)

**Judge Gary S. Cash** attended Davidson College, during which time he was an International Rotary Scholar at the University of Muenster, West Germany. Following his graduation in 1971, he was a Rockefeller Fellow at Yale University Divinity School before graduating from the UNC School of Law in 1976. Judge Cash worked in Asheville for ten years as a general practitioner in the private practice of law. He was elected to the district court bench in 1986 in District 28 where he served until his retirement on January 1, 2011. He served as Chief Judge for eight years.

Judge Cash has held numerous judicial leadership positions including serving as President of the Conference of Chief District Court Judges, President of the NC Association of District Court Judges, and as a Director of the NC Joint Judicial Conference. Other past professional and community activities include, among others, his serving as Chair of the NC Custody Mediation Advisory Committee, as a member of the NC Domestic Violence Commission, as a member of the NC Family Court Advisory Committee, as a member of the Z. Smith Reynolds Foundation Advisory Panel, and as a founding member of the board of directors of the Child Abuse Center of Asheville. Judge Cash was awarded the 2008-2009 28<sup>th</sup> Judicial District Bar Professionalism Award, the 2009 NC Advocates for Justice Outstanding NC Trial Judge Award, the 2009 NC Association for Marriage and Family Therapists Champion of the Family Award, and the 2011 Pisgah Legal Services Roy Davis Award. He is currently a member of the Asheville, NC firm of Fisher Stark Cash, PA.



Judge Gary S. Cash



Judge J. Douglas McCullough

\*\*\*\*\*

**Judge J. Douglas McCullough** grew up in Swansboro, NC, graduated from UNC Chapel Hill with a degree in history, and from University of South Carolina School of Law where he was managing editor of the Law Review. After service in the US Marine Corps as a JAG Officer, he was a federal prosecutor in the Organized Crime and Racketeering Section of the Philadelphia Strike Force in Philadelphia, PA. He served as Counsel to the US Senate Ethics Committee before returning to NC where he held several positions in the US Attorney's Office for the EDNC, including service as the Acting US Attorney twice. He was in private practice with Stubbs & Perdue of New Bern and Raleigh from 1996-2000 and 2009-2010. He was first elected to the NC Court of Appeals in 2000 and re-elected in 2010. Of significant note, while serving in the US Attorney's Office, Judge McCullough prosecuted drug smugglers and oversaw drug seizures which eventually led to the take-down of Panama's notorious dictator, Manuel Noriega. Judge McCullough authored a book, Sea of Greed, which tells this fascinating story.



## ***QUICK TIPS:***

File your Reports of Mediator on time. This helps insure that court staff report current and accurate data which leads to accurate computations about the efficacy of DRC programs. This also helps ease the burden on court staff.

If you are substituted as mediator, be sure to verify that the motion and order allowing substitution have been filed and that the court's appointed mediator has been paid. MSC Rule 7.C, FFS Rule 7.C, Clerk Rule 7.D.

Allow applicants for mediator certification to observe your mediations. Offer to do so if the opportunity arises.

Review the Standards, the Advisory Opinions and Program Rules on a regular basis.

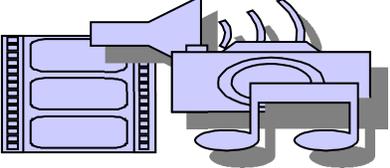
Remember that you have an obligation to assist pro bono, indigent litigants at no charge. As a practical matter, the mediator must schedule and conduct the mediation to its conclusion by settlement or impasse, and thereafter, a party may apply to the court for a finding of indigency. Under no circumstances should a mediator have ex parte conversations with a party, or call into question said party's ability to pay, or comment to the court his/her opinion on the matter. If a finding of indigency is made, the mediator shall waive his/her fee for that party. MSC Rule 7.D, FFS Rule,7.E Clerk Rule 7.E.

On business cards, letterhead, websites, etc., be sure to designate for which programs you are certified; it is potentially misleading to say only "certified mediator," or even "DRC certified mediator." See DRC advertising policy.

Non-parties may attend a mediation if the parties agree; however, if the parties do not agree, the mediator should attempt to mediate the attendance issue first. If the parties cannot agree, the mediator has discretion to determine if the individual is permitted to attend; the mediator is at all times in control of the conference. See Advisory Opinion 06-12; MSC Rule,6.A, FFS Rule 6.A, Clerk Rule 6.A, Farm Rule 5.A.

*The Commission welcomes and encourages your questions and comments as they may arise in your mediation practice. Thank you for your service as mediators in North Carolina's court programs.*

# Pop Culture & Mediation



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

## Getting Lord Grantham to “Yes.” Downton Abbey and the Art of Moving Past Impasse

There’s a good chance that many of you readers are among the super fans of the PBS hit, “Downton Abbey” and are anxiously awaiting the season premier in January, 2014. We have to wait a very long time to re-attach to the characters; so, if you need a “fix” for more DA relationship drama and a lesson in negotiation as well, check out this article published on January 18, 2013, in Forbes, written by Victoria Pynchon, and slightly adapted here: <http://www.forbes.com/sites/shenegotiates/2013/02/18/getting-lord-grantham-to-yes/>.

In the episode she describes, Lord Grantham is staunchly resistant to the recommendations of his son-in-law, Matthew, and the “chauffer-turned-privileged-son-in-law,” Tom, to embrace change, modernize and innovate with technology, which if not undertaken, will virtually be the end of Downton Abbey. Tom, being outside the aristocratic circle, comes to understand Lord Grantham’s values, and effectively mediates a solution and brings him to “yes.”

Lord Grantham is the last holdout in the family to change; nothing can convince him to go along with modernization. Here’s Ms. Pynchon’s column, in part:

### **“The Negotiation Lesson”**

**Matthew has just left the breakfast table to inspect the land. He’s invited Grantham to come along. Grantham rejects the proposal, stating he won’t be of much use. This is a red flag to a negotiator. Grantham wants to be of use. Putting that in his back pocket, Tom capitalizes on Grantham’s need to feel useful, and explains to him how much Matthew values Grantham’s support.**

### **Tom’s “Pitch”**

**I wish I had the actual script, but here’s the gist of how Tom moved Lord Grantham past impasse.**

***I understand from watching, Tom says, that everyone who marries or is born into this family is required to sacrifice individual desire to the welfare of Downton. Matthew, he says, contributes his knowledge as a manager and tradesman. I contribute what I know about farming, Tom adds, having grown up on a sheep farm.***

*(Continued on page 17)*

### **A FIVE YEAR LOOK-BACK OF MSC PROGRAM SETTLEMENT RATES**

The following table shows,\* for each calendar year, the percentage of MSC cases mediated which settled in whole or in part at a mediated settlement conference.

YEAR	MSC	MSC**
2008-2009	54.5%	not available
2009-2010	54.6%	not available
2010-2011	56.4%	65.5%
2011-2012	55.5%	67.9%
2012-2013	56.4%	63.4%

\* Data obtained from NC Courts Statistical and Operations Reports; some districts reporting only for a portion of a year.

\*\* Percentages when cases reported settled prior to mediation or during a recess are considered, as the Commission believes that the order to mediate serves as a catalyst for the settlement of cases.

(Downton Abbey, continued from page 16)

**Here comes the deal-clincher. Only you, says Tom, know the people of Downton and know how to care for them. Only you, Tom continues, actually care. That is your contribution, your obligation, your value, your purpose.**

**Finally, Grantham agrees but only on one condition.**

**Grantham always has “one condition” because he needs to have the last word, to get the last concession from his negotiation partner. He must save face and Tom understands that. He also understands that Grantham values autonomy, purpose, tradition.**

**Play in the town cricket match on the “house” team, Grantham says. An entreaty Tom has repeatedly rejected.**

**It is the period at the end of the negotiation’s sentence.**

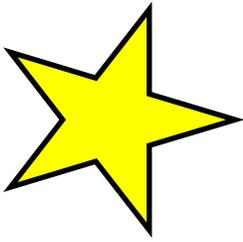
**Tom has subordinated his individuality to the greater good but Grantham needs assurances that the greater good includes fealty to tradition—which undeniably includes the town cricket match.**

**Tom says “yes” and Grantham concurs with the plan. With that, a successful classic interest-based negotiation concludes.”**

Reprinted with permission by Ms. Pynchon.

Mediator Victoria Pynchon is the co-founder of She Negotiates Consulting and Training (<http://shenegotiates.com>) where she and her partner, Lisa Gates, help women close their own personal wage and leadership gaps through training and consulting.

[She Negotiates Consulting and Training](http://shenegotiates.com)



THE COMMISSION THANKS OUTGOING  
MEMBERS

THE DRC GREATLY APPRECIATES THE SERVICE OF THE FOLLOWING  
COMMISSION MEMBERS WHOSE TERMS ENDED SEPTEMBER 30, 2013.

**DAWN BRYANT, DISTRICT CRIMINAL COURT MEDIATOR**

**GARY TASH, ATTORNEY, FAMILY LAW SPECIALIST**

**JUDGE MICHAEL MORGAN, SUPERIOR COURT JUDGE, 10TH DISTRICT**

*(See photos on page 21)*



**DEPUTY DIRECTOR JOINS DRC STAFF**

In late, 2012, the Dispute Resolution Commission created the position of Deputy Director. This position supplements existing staff and supports the ongoing operations and the future direction of the DRC. In July, 2013, the Commission welcomed Harriet S. Hopkins, attorney, arbitrator, and mediator as its new Deputy Director.

Harriet has been a solo practitioner in private practice in Durham, NC, for 30 years, focusing on social security disability, worker’s compensation, residential real estate, contract disputes, advance care planning, estate administration and more. Having been certified as an MSC mediator in 1996 and as an FFS mediator in 2001, she has mediated hundreds of superior court, FFS, and NC Industrial Commission cases. She has also loved serving as an arbitrator in the 14<sup>th</sup> Judicial District since it was chosen as a pilot district at the inception of the arbitration program

Harriet recently served as campaign manager for Superior Court Judge Michael O’Foghludha’s successful campaign in 2010, which she enjoyed tremendously. In the past, among other positions, Harriet has served on the board and as President of the NC Association of Women Attorneys and Chair of the Legal Services of North Carolina “Access to Justice” campaign for the 14<sup>th</sup> Judicial District. In the distant past, she deferred her admission to UNC School of Law in order to work on the passage of the Equal Rights Amendment in North Carolina in 1978!

Her biggest joys are her two grown children: Jason, a Phi Beta Kappa graduate from Gettysburg College in Pennsylvania, and Maggie, a Phi Beta Kappa graduate and valedictorian from Salem College in Winston-Salem. Harriet loves gardening, hiking, traveling, the beach, the Full Frame Film Festival, making jewelry, and Durham!

*Commission Meetings*



All mediators are reminded that Commission meetings are open to the public. If you wish to be present, please let Commission staff know so that seating is assured. The next regularly scheduled meeting is the Commission’s winter meeting on December 6, 2013 in Greensboro, NC. Information about Commission meetings and minutes are regularly posted on the Commission’s website.

## MSC PROGRAM STATISTICS July 1, 2012 - June 30, 2013

MSC Statewide Totals	# OF CASES PENDING AT BEGINNING OF THE FISCAL YEAR	# OF CASES ORDERED TO MSC (AOC-CV- 811) OR SENT BY LOCAL RULE (VMSC)	# OF CASES WHICH VOLUNTARILY SUBMITTED TO MSC (VMSC) (new as of 1/1/2012)	# OF CASES ORDERED/ SUBMITTED TO OTHER SETTLEMENT PROCEDURE such as Neutral, Summary Trial, Arbitration, or Other (AOC-CV-818)	DO NOT FILL IN	# OF CASES IN WHICH MOTION TO DISPENSE/ EXEMPT CASE FROM MSC WAS ALLOWED (SUPREME COURT RULE 1.C.6)	# OF CASES REPORTED SETTLED PRIOR TO OR DURING RECESS OF ADR (Report 806, 813 or 817, RELIABLE REPORT THAT CASE SETTLED OUTSIDE/WITH OUT ADR)	# OF CASES FULLY RESOLVED IN ADR (Report 806, 813 or 817 indicates the parties reached "Agreement on all issues") SETTLED	# OF CASES NOT RESOLVED (Report 813 indicates the parties reached an "IMPASSE")	# OF CASES DISPOSED WITHOUT ATTENDING ADR (Dismissal, Trial, or other type of disposition) CLOSED/ MOOT	DO NOT FILL IN	DO NOT FILL IN
A	B	C	D	E	F	G	H	I	J	K	L	M
County	Begin Pending*	Ordered or Sent to Mediated Settlement Conference (VMSC)	Voluntarily Submitted to Mediation Settlement Conference (VMSC)	Ordered or Submitted to Other Settlement Procedure (MEBO)	Total Caseload for FY	Ordered Exempted from ADR (MEDE)	Reported Settled Prior To or During ADR Recess (MEDS)	Reported All Issues Resolved at ADR (MEDA)	Reported Impasse (not resolved) at ADR (MEDI)	Disposed Without ADR Session (MEDB)	Cases Completing Process	End Pending
District 1	104	25	1	0	130	2	0	6	3	8	19	111
District 2	94	86	0	0	180	1	0	20	18	13	52	128
District 3A	70	167	7	0	244	1	13	54	48	46	162	62
District 3B	392	150	0	0	542	0	0	52	38	6	96	446
District 4A	364	155	3	1	523	1	2	37	19	73	132	391
District 4B	103	15	1	0	119	0	0	2	2	0	4	115
District 5	792	385	1	0	1,178	0	33	34	46	120	233	945
District 6A	0	69	0	1	70	0	1	19	24	4	48	22
District 6B	70	59	0	0	129	0	0	49	1	0	50	79
District 7A	3	47	0	0	50	0	7	12	10	7	36	14
District 7BC	150	132	2	2	286	8	20	51	19	4	102	184
District 8A	62	52	0	1	115	3	3	23	16	8	53	62
District 8B	125	185	0	0	310	2	3	25	29	42	101	209
District 9	74	101	2	0	177	0	2	31	16	15	64	113
District 9A	49	33	0	0	82	0	1	3	6	0	10	72
District 10	362	838	42	0	1,242	33	331	362	241	112	1,079	163
District 11A	96	139	2	0	237	0	0	0	0	0	0	237
District 11B	84	308	0	1	393	5	2	62	37	15	123	272
District 12	115	378	0	0	493	47	13	111	94	113	378	115
District 13A	222	131	3	0	356	0	6	34	38	49	127	229
District 13B	140	85	1	1	227	0	5	12	20	118	155	72
District 14	269	262	0	0	531	0	0	6	3	0	9	522
District 15A	108	111	1	0	220	5	31	34	36	4	110	110
District 15B	231	185	1	6	423	5	24	44	25	76	174	249
District 16A	30	62	1	0	93	6	7	33	11	29	66	7
District 16B	0	1	0	0	1	0	0	0	0	0	0	1
District 17A	26	0	0	0	26	0	0	0	0	0	0	26
District 17B	250	194	0	40	484	2	0	19	63	35	119	365
District 18	150	506	0	0	658	0	0	212	162	148	522	136
District 19A	77	96	2	0	175	1	19	35	31	24	110	65
District 19B	33	109	1	0	143	1	11	30	23	23	88	55
District 19C	87	109	1	0	197	0	10	29	48	39	126	71
District 19D	375	86	0	0	461	1	8	21	23	16	69	392
District 20A	70	76	2	1	149	7	23	34	26	23	113	56
District 20B	96	69	0	0	165	0	0	32	42	19	63	72
District 21	1,167	686	7	5	1,855	0	3	85	74	59	221	1,634
District 22A	879	198	3	29	1,109	4	18	56	51	37	166	943
District 22B	373	38	5	1	417	0	6	24	25	28	63	334
District 23	66	90	2	0	158	3	7	26	18	25	79	79
District 24	150	101	10	0	261	0	43	45	30	10	128	133
District 25A	168	87	0	44	297	0	0	27	20	2	49	248
District 25B	170	132	0	0	302	0	1	8	13	46	68	234
District 26	459	1,263	31	51	1,804	18	196	408	422	121	1,165	639
District 27A	226	200	0	0	426	10	21	75	34	38	178	248
District 27B	78	80	0	0	80	0	8	49	16	5	78	2
District 28	385	186	0	0	571	3	13	192	12	18	238	333
District 29A	177	60	6	0	243	1	0	8	8	30	47	196
District 29B	205	102	3	0	310	4	3	31	31	13	62	226
District 30A	128	117	0	0	245	5	0	11	20	71	107	138
District 30B	223	99	0	0	322	1	0	30	19	32	62	240
Statewide Totals FY 2012-13	10,037	8,847	141	184	19,209	160	894	2,603	2,011	1,724	7,412	11,797

\* Begin Pending corrected by local audit

# FFS STATISTICS FY 2012/13

A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
County	# OF CASES PENDING AT BEGINNING OF FISCAL YEAR	# OF CASES ORDERED TO FFS (AOC-CV-424) OR SENT BY LOCAL RULE (MSC)	# OF CASES VOLUNTARILY SUBMITTED TO MSC (MSC) new as of 1/1/2012	# OF CASES ORDERED TO JUDICIAL SETTLEMENT CONFERENCE (JSC)	# OF CASES ORDERED TO SETTLEMENT PROCEDURE (e.g. Family Law Arbitration, Collaborative Law) (AOC-CV-426, SIDE 1)	DO NOT BILL	# OF CASES IN WHICH MOTION TO EXEMPT CASE FROM FFS WAS ALLOWED	# OF CASES REPORTED SETTLED PRIOR TO OR DURING ADR RECESS (ADRT)	REPORT 827 OR 834 INDICATES THE PARTIES REACHED "AN AGREEMENT ON ALL ISSUES"	REPORT 827 OR 834 INDICATES PARTIES REACHED "AN AGREEMENT ON SOME ISSUES"	REPORT 827 OR 834 INDICATES PARTIES REACHED "AN IMPASSE"	# OF CASES DISPOSED WITHOUT ADR (ADRW)	Cases Completing Process	End Pending
District 2	31	15	0	0	0	46	8	0	7	1	4	4	24	22
District 3A	28	53	0	0	0	81	0	0	19	0	21	27	67	14
District 3B	935	352	0	0	0	1,287	6	8	42	11	20	45	132	1,155
District 4	80	0	30	0	0	110	1	5	41	3	8	2	60	50
District 5	316	237	0	0	0	553	1	0	42	2	19	187	251	302
District 6A	4	15	1	5	0	25	0	0	9	1	5	5	20	5
District 7	4	2	1	0	0	7	0	0	2	2	0	0	4	3
District 8	16	28	0	0	0	44	3	2	6	0	10	8	29	16
District 9A	0	1	0	0	0	1	0	1	0	0	0	0	1	0
District 10	149	306	6	0	1	462	2	3	51	7	58	166	287	175
District 11	39	44	0	0	0	84	17	7	4	7	16	11	62	22
District 12	286	92	0	39	0	417	55	0	27	18	36	165	301	116
District 13	0	1	0	0	0	1	0	0	0	0	0	0	0	1
District 14	6	43	3	2	0	54	2	1	18	4	10	15	50	4
District 16A	35	62	1	0	0	98	6	7	33	0	11	29	86	12
District 17A	16	36	1	0	0	53	0	2	9	4	1	13	29	24
District 18	475	337	0	0	0	812	0	5	69	11	23	203	311	501
District 19A	12	50	0	0	0	62	1	0	20	5	24	12	62	0
District 19B	58	81	3	55	0	197	4	36	52	8	33	4	137	60
District 19C	12	54	0	0	0	66	0	4	18	7	27	9	65	1
District 20A	9	49	0	0	0	58	0	4	22	2	7	10	45	13
District 20B	56	116	1	0	0	173	0	0	64	0	0	15	79	94
District 21	0	2	0	0	0	2	0	0	1	0	0	1	2	0
District 22B	0	24	0	0	0	24	0	0	13	2	8	0	23	0
District 24	29	29	28	0	0	86	2	2	16	0	10	8	38	48
District 25	329	16	21	0	0	366	5	7	32	7	25	69	145	221
District 26	716	26	1	90	0	833	2	0	26	2	60	3	93	740
District 27A	59	36	6	0	0	111	0	0	3	0	2	4	9	102
District 27B	68	64	6	3	4	145	0	18	2	0	1	95	116	25
District 28	135	116	0	1	0	252	1	0	37	6	9	128	181	71
District 29A	79	0	0	0	0	79	0	0	15	2	8	10	35	44
District 29B	45	76	0	0	0	121	0	0	5	2	7	16	30	91
District 30	48	21	0	1	0	70	0	3	6	0	5	6	20	60
FY 2012-13	4,085	2,384	109	196	6	6,780	116	115	711	114	468	1,270	2,794	3,986

Other districts reported no activity, or did not report status.

Departing Commission Members, Judges Michael R. Morgan and Gary B. Tash.  
Also departing but now shown, Dawn Bryant.



Judge Morgan



Judge Tash

Commission Members and Ex-officio Members at the Fall 2013 Retreat



*Back left to right:* Grace Marsh, Victor Farah, Judge Tash, Ann Anderson, Tueresa Hayden, Susan Hicks, Judge Lee, Leslie Ratliff, Judge Morgan, Judge Cash, Judge Steelman. *Middle:* Judge Vincent, Commissioner Lorrie Dollar, Stephanie Nesbitt, Judge McCullough, Richard Long, Ellen Rose, Andy Little, Judge Anderson. *Front:* Renee Stemple-Ellis, Jackie Clare, Lynn Gullick