



# The Intermediary



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



*From the Chair*  
*By Judge William A. Webb*

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**JOIN DRC AND DISPUTE RESOLUTION SECTION**  
**In celebrating**  
**CONFLICT RESOLUTION WEEK**  
**October 15-21, 2017!!!**

The American Bar Association has designated October 15-21, 2017, as "Mediation Week", a time to celebrate the strides we have made in institutionalizing mediation in our nation's courts. The Commission is partnering with the NCBA's Dispute Resolution Section (Section) to mark the occasion. In order to showcase forms of dispute resolution in addition to mediation, the Commission and the Section have designated the week as "Conflict Resolution Week". In this column, I want to share my perspective on Conflict Resolution Week and to tell you about some of celebratory events that we have planned to mark the occasion.

Conflict Resolution Week is the appropriate time to reflect on the history of dispute resolution and to take stock of how far we have come here in North Carolina. That said, though, I believe it is equally important, if not more important, that we also look to the future and consider the role that mediation, other dispute resolution processes, and this Commission can and should play in the months and years to come. Many judges, court staff, and mediators are set to retire over the next decade. Among those retiring will be many who were North Carolina ADR pioneers – the judges, court staff, and, most especially, the mediators, who implemented our pilot Mediated Settlement Conference and Family Financial Settlement Programs and, once approved for statewide expansion, shepherded them through their early years. I honor the many contributions made by our pioneers and acknowledge their considerable successes. Ultimately, though, I believe the most appropriate way to recognize their achievements is not to look back at the past -- but to fully embrace the future. It is now time to generate a road map that will lead us forward. Such a road map will build on the successes of our pioneers, welcome new players to the table, explore fresh perspectives and ideas, ensure access to mediation processes and programs for all, and carry us into the next decade and beyond.

To generate forward momentum, I asked Commission staff to schedule time during our fall retreat, held September 15-16, 2017, for Commission members to talk about the future – the future of the Commission and of North Carolina's mediation programs. As a result of the discussion at that meeting, I have established an ad hoc committee and charged it with continuing to explore where the Commission and our programs go from here, and to ultimately make recommendations to the Commission. Lorrie Dollar, the Commission's Vice-Chair, will chair that ad hoc committee. There will be no shortage of interesting questions and opportunities for the committee and the Commission to consider: How will our mediated settlement conference programs accommodate the growing numbers of pro se and indigent parties utilizing our courts? Can we shore up our underutilized Clerk Mediation Program? How can we ensure a smooth transition as so many judges, court staff, and mediators exit our system over the next decade? Should our mediation programs embrace new technologies? Are there still as yet untapped opportunities to use mediation in our

**The  
North Carolina  
Dispute Resolution Commission**

The Honorable William A. Webb, Chair  
Lorrie L. Dollar, Co-Chair  
LeAnn Nease Brown  
The Honorable Jesse B. Caldwell, III  
The Honorable Gary S. Cash  
Thomas M. Clare, Esq.  
The Honorable Yvonne Mims Evans  
The Honorable Susan A. Hicks  
Richard G. Long, Jr., Esq.  
Kevin M. Marcilliat, Esq.  
The Honorable J. Douglas McCullough  
Robert A. Ponton, Jr., Esq.  
Diann Seigle  
The Honorable Teresa H. Vincent  
Charlot F. Wood, Esq.

**Commission Staff:**

Leslie Ratliff, Executive Director  
[Leslie.Ratliff@nccourts.org](mailto:Leslie.Ratliff@nccourts.org)

Harriet S. Hopkins, Deputy Director  
[Harriet.Hopkins@nccourts.org](mailto:Harriet.Hopkins@nccourts.org)

Maureen M. Robinson, Admin. Assist.  
[Maureen.M.Robinson@nccourts.org](mailto:Maureen.M.Robinson@nccourts.org)

**Contact Information:**

P.O. Box 2448  
Raleigh, NC 27602-2448  
Phone: (919) 890-1415  
Fax: (919) 890-1935  
Email: [DRCMediators@nccourts.org](mailto:DRCMediators@nccourts.org)  
Website: [www.ncdrc.org](http://www.ncdrc.org)

court system? Admittedly, mediation is no longer the new kid on the block – how can we get mediation back in the spotlight and energize a new generation?

It will take some time for the new committee to do its work and for the Commission to chart a course forward based on the committee's discussions and recommendations. In the meantime, LeAnn Nease Brown, who chairs the Section, and I want to use Conflict Resolution Week to draw attention to our programs, to get mediators thinking about the future, and to highlight some challenges that mediators and our programs will likely face in the near future. Among the highlights we are planning for Conflict Resolution Week are the following:

- ◇ We have invited the Chief Justice to kick off the celebration by issuing a press release followed by a reception at **10:00 AM on Monday, October 16, at the NC Judicial Center**. The Chief Justice, Ms. Nease Brown, and I will speak at the reception;
- ◇ The Chief Justice and Governor will issue proclamations proclaiming October 15-21, 2017, as Conflict Resolution Week in North Carolina;
- ◇ The Commission is sponsoring free, one hour CLE approved Webinars for mediators on three issues that they and our programs will undoubtedly face in the near future:
  - i. ODR — Advances in Online Dispute Resolution and Its Role in the Future (**October 17 at 11:55 AM**).
  - ii. Are North Carolina's Mediation Programs Effectively Serving the Needs of the Growing Number of Indigent and Self-Represented Parties Using Our Courts? (**October 18 at 11:55 AM**).
  - iii. How Can North Carolina's Mediation Programs Address the Needs of an Aging Population? (**October 19 at 11:55 AM**).

**You are cordially invited to join us at the October 16 reception and/or to attend one or all of the Webinars. (For more information and to register, see the article on page 4.)**

I invite all of you to get involved and to think about ways that you can join the celebration. Contact your local newspapers or radio stations and alert them to Conflict Resolution Week, maybe even write an article about your work as a mediator or offer to be interviewed; sign up for a speakers' bureau; ask your child or grandchild's teacher if you can come to his/her class and talk about conflict and how it can serve as a positive force for change and growth when constructively addressed; sign up for one of the Webinars described above.

Lastly, be thinking about the future of dispute resolution in our State and particularly in our courts – what do you think will be the most challenging issues facing mediators and our programs in the next decade, how should our programs evolve, how can our programs better serve our courts and the citizens of North Carolina? The future belongs to all of us and we should all be active participants in shaping it.

So...Happy Conflict Resolution Week! And, please, let us hear from you with your ideas for Conflict Resolution Week and beyond.



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## *Upcoming Commission Meetings*

All mediators are reminded that Commission meetings are open to the public. If you wish to attend, please let Commission staff know so that seating is assured.\* The next regularly scheduled meeting is scheduled for Friday, December 7, 2017, in Raleigh. Information about Commission meetings and minutes are regularly posted on the Commission’s website at [www.ncdrc.org](http://www.ncdrc.org). (From the menu on your left, click on “Missions and Operations”, then, from the next menu, select “Meeting Information”.)

*\*Due to time constraints, the Commission can no longer take questions or comments from the public at its meetings. If you wish to make a comment, please email the Commission at [DRCMediators@nccourts.org](mailto:DRCMediators@nccourts.org).*

### **Hopkins Departs**

Commission Deputy Director Harriet Hopkins will leave the Commission on October 16, to take a position with the NC Department of Labor. Harriet has been with the Commission for four years.

Judge Webb stated, “The Commission is grateful for the many significant contributions Harriet made to its work during her time here. She will be missed.” The Commission and its remaining staff wish Harriet much success in her new position.

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The Commission cordially invites all mediators to visit its new social media channels:



Follow the Commission on LinkedIn at NCDRC



Follow the Commission on Twitter @NC\_DRC



## CONFLICT RESOLUTION WEEK 2017

JOIN THE CELEBRATION!!!

The Commission and the Dispute Resolution Section cordially invite all judges, court staff, lawyers, and mediators to help us celebrate Conflict Resolution Week, October 15-21, 2017, in North Carolina. **The celebration will kick off on Monday, October 16, 2017, with a reception at 10:00 AM in the NC Judicial Center, 901 Corporate Center Drive, Raleigh, NC. Chief Justice Mark Martin, DRC Chair Bill Webb and Section Chair LeAnn Nease Brown are all scheduled to speak.** All are welcome to attend the reception. Please RSVP by emailing [DRCMediators@nccourts.org](mailto:DRCMediators@nccourts.org).

Chief Justice Martin and Governor Roy Cooper have both been asked to issue Proclamations marking Conflict Resolution Week in our State. Be on the lookout for additional announcements and articles.

**Lastly, a series of three Webinars has been scheduled on important issues facing our programs and mediators. All Webinars are offered at no charge and all are approved for CLE credit. Please mark your calendars for:**



**Tuesday, October 17 from 11:55 a.m. -1:00 p.m.**

**ODR — Advances in Online Dispute Resolution and Its Role in the Future**

**Daniel Rainey, Esq.**, National expert on ODR; Fellow of the National Center for Technology and Dispute Resolution, an Editor-in-Chief of the International Journal of Online Dispute Resolution

**Ketan Soni, Esq.**, Hull & Chandler, PA, Charlotte, NC, Board Certified in Family Law, DRC Certified FFS mediator



**Wednesday, October 18 from 11:55 a.m. - 1:00 p.m.**

**Are NC's Mediation Programs Effectively Serving the Growing Number of Indigent and Self-Represented Parties? \***

**Christie M. Foppiano, Esq.**, Owner, Foppiano Mediations; Member, Separating Together; DRC certified MSC mediator

**Ellen R. Gelbin, Esq.**, Adjunct Professor, Wake Forest Law; DRC certified MSC, FFS, and NC Industrial Commission mediator

**Karen Britt Peeler, Esq.**, solo practitioner and DRC certified MSC mediator

\*This Webinar is also approved for CME Credit

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**Thursday, October 19, 2017; 11:55 a.m. – 1:00 p.m.**



**How Can NC's Mediation Programs Address the Needs of an Aging Population**

**Kate Mewhinney, Esq.**, Clinical Professor and Managing Attorney of The Elder Law Clinic at Wake Forest University School of Law; Certified Elder Law Attorney and Fellow of the National Academy of Elder Law Attorneys; DRC Certified MSC and Clerk Program Mediator

**Dr. Maryjo L. Cleveland, MD**, Gerontology and Geriatric Medicine, Department of Internal Medicine, Wake Forest School of Medicine

**Again, all three Webinars are offered at no charge and are approved for CLE credit. The Commission hopes that you will join in and participate! To register for one or all of the Webinars, control click on: [http://www.nccourts.org/Training/Conflict\\_Resolution\\_Week\\_webinars.asp](http://www.nccourts.org/Training/Conflict_Resolution_Week_webinars.asp) . Happy Conflict Resolution Week!!!**

**2017/18 Renewal Period Nearing Completion**



The Commission sincerely thanks all mediators who renewed their certification(s) for 2017/18. Implementation of the new CME requirement went smoothly and the Commission thanks each of you for complying with this important new responsibility.

In light of the new CME requirement, the renewal period will be kept open this year until October 31, 2017, though a late fee will be charged any applicant applying for renewal after September 30.

Again, thank you and know the Commission is gratified that you are continuing your important service to the courts and citizens of North Carolina.

**The Commission Welcomes New Appointees and Re-Appointees**

The Commission welcomes the following new members: :

- ◆ The Honorable John M. Tyson, NC Court of Appeals
- ◆ The Honorable William C. Farris, Chief District Court Judge, District 7



Judge Tyson replaces Judge Doug McCullough and Judge Farris replaces Judge Charles Anderson. Both Judge Tyson and Judge Farris were appointed by the Chief Justice and will be administered the oath of office at the Commission's December meeting.

In addition to his new appointments, the Chief Justice has reappointed Judge William A. Webb, Clerk of Superior Court Susan A. Hicks, and Ms. Diann Seigle, to serve additional terms on the Commission. In addition, the State Bar President, Mark W. Merritt, has re-appointed Charlot F. Wood.

The Commission will miss Judges McCullough and Anderson and is grateful for their many contributions.

## From The Perspective of Court Staff --

### An Interview with District 14 TCA E. Deneen Barrier



*Congratulations to E. Deneen Barrier who was recently named the new Trial Court Administrator for District 14 (Durham County). Prior to her promotion, Ms. Barrier was the district's Superior Court Trial Court*

*Coordinator (TCC) and helped to administer its Mediated Settlement Conference Program. We asked Ms. Barrier to give the Intermediary's readers her perspective on what it is like to help support a busy mediation program and to provide some tips to mediators on working with court staff.*

**Leslie** -- *When did you first become TCC in District 14?*

**Deneen** - - I became the TCC thirteen years ago in 2004. But...that was not my first exposure to mediation. From 1996-2004 I worked at the NC Industrial Commission, which had an active mediation program. Frank Laney was there at the time. While at the IC I saw first-hand how much mediation contributed to reducing a huge backlog. It was pretty amazing. I have long been a fan of mediation!

**Leslie** -- *How much of your time on a typical day as TCC was wrapped up in MSC Program administration, e.g., getting referrals out, entering caseload statistics?*

**Deneen** -- Approximately one to two hours per day. It probably averaged out to about a day a week spent on the mediation program. Essentially, I referred cases to mediation, assigned mediators, dealt with matters such as requests for substitutions or extensions, reviewed Reports of Mediator, reached out to attorneys and mediators as necessary, and gathered and reported caseload statistics. Reporting caseload statistics used to be much harder before we got the new streamlined CaseWise system for reporting.

**Leslie** -- *I know you are focused on being a Trial Court Administrator now, but is there anything you will particularly miss about being a TCC, in general, and working with the Superior Court Mediated Settlement Conference Program, in particular?*

**Deneen** -- I very much want the MSC Program to be successful and I do miss working with the mediators. I always enjoyed helping them when I could. I used to schedule a lot of mediation sessions in our new courthouse in Durham. We are very fortunate to work in such a beautiful and bright setting and I was happy to share the space with the mediators who were working to settle our cases. I have always thought that having mediations in the courthouse was a good idea. It's certainly a neutral and secure setting, but, more than that, I hoped being there would help put parties in a frame of mind to settle. After all, if they don't settle, they will be right back with us!

In some respects I will continue to be involved with mediation, though not as directly as before. I am excited for our new TCC, Suzanne Hansen, and I will be much involved in training her and offering support thereafter. So... I will certainly be aware of what is going on and will always look forward to seeing mediators in and around the courthouse.

**Leslie** -- *By the way, have you ever had the opportunity to observe a mediation?*

**Deneen** -- No, but I would really love to do that. Actually, that's probably a great idea for all court staff!

**Leslie** -- *From what I have heard, many mediators who work in District 14, AOC staff, and your own court staff colleagues believe you were a highly effective TCC who ran a tight ship.*

**Deneen** -- Thank you. I do think it is important to run a "tight ship". Fortunately, Judge Hudson [Senior Resident Superior Court

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Judge Orlando Hudson] and Kathy [Kathy Shuart, former District 14 Trial Court Administrator] have been very supportive of the MSC Program and encouraged me to make sure that the rules were followed and deadlines were met. After all, the MSC Program enabling legislation charges the program with making the courts more efficient. So, a district does need to refer all its eligible cases to mediation, encourage counsel and parties to comply with the 21-day period for mediator selection, insist that mediators meet deadlines for completion or have extensions filed in a timely matter, and file their Reports of Mediator on time in order to meet that charge.

**Leslie** – *What did you find to be the hardest or most frustrating thing about working with the MSC Program?*

**Deneen** -- Gathering statistical data. Things got better over time as the AOC refined the CaseWise program we use to report, but statistics are still a challenge. When mediators don't get their reports in on time or at all for that matter, we have to track down attorneys and/or mediators for information. There are some mediators who still don't understand that they need to file a Report of Mediator when settlements are reached prior to mediation. Reporting issues are not always the mediator's fault, of course; sometimes attorneys don't tell mediators (and court staff) that a case has settled. Because the MSC Program has contributed to case management in my district, I have always been willing and committed to tracking down outcomes, which certainly means extra effort. That said, I want to stress that I had and have a great relationship with most of my district's mediators and most were very conscientious.

**Leslie** – *Sitting down with the parties at a mediation in an effort to help them talk out and settle their disputes can be exhilarating, challenging, and even gratifying. As you suggest, the mediator's role as case manager is equally important, but probably not as exciting or satisfying an experience. Is there anything you would like to say to mediators about the importance of case management?*

**Deneen** — Again, I would stress the importance of getting things moving as soon as possible. Contact the parties as early as you can about scheduling their case for mediation. That way if you need to extend your conference date within the deadline, you are not already up against a wall. Get your momentum going early! In District 14, we are generally referring cases to mediation within a week of the responsive pleading or answer being filed. We expect our mediators to move things along, too!

I would also ask that mediators remember that they and court staff are on the same team. We all need to be working to get our reports in timely. Remember that court staff pull information from your Reports of Mediator to complete our statistical reports for the MSC Program. As you know, Leslie, case statistics are compiled for all districts and shared with the Chief Justice, members of the General Assembly, and many others, so we want them to be accurate and truly reflective of the program's success.

**Leslie** – *How can the Commission encourage mediators to do a better job of meeting their case management obligations?*

**Deneen** – In addition to educating and reminding our mediators, I think it might also be helpful for the Commission to reach out to and communicate with attorneys to help them better understand the case management responsibilities of mediators and the importance of the MSC caseload statistics. And, to remind them that they should keep their mediators in the loop about the settlement of their cases so that mediators need not take valuable time following up with them. Attorneys have a role to play in making the program successful and more efficient as well.



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## BEFORE THE GRIEVANCE AND DISCIPLINARY COMMITTEE

### Disciplinary Action Taken

A. The NC State Bar suspended the license of an attorney mediator for forging a Substitute Trustee's signature on a Substitute Trustee's deed and other documents in a foreclosure proceeding. The attorney also compelled a legal assistant to notarize the signatures. Due to several extenuating and difficult circumstances a consent order was issued suspending the license (rather than disbarment) and the suspension was stayed upon certain conditions. Commission Staff investigated the matter and determined that the attorney mediator had notice of the grievance prior to filing her renewal application for FY2016-17. The mediator did not report the grievance on her renewal application, although the evidence showed that the attorney mediator had filed her response to the grievance with the State Bar only 9 days prior to the date the mediator filed for certification renewal. The Committee was very concerned about this failure to disclose and determined to issue the mediator a letter of public admonishment. The Commission then directed that the public sanction be posted on the Commission's website. Click on "Public Sanctions Issued" on the left-hand menu on the homepage, [www.ncdrc.org](http://www.ncdrc.org).

B. A mediator was selected by a pro se party and a state agency to mediate a pre-litigation public records dispute pursuant to GS § 7A-38.3E. Several days prior to the scheduled conference, the pro se plaintiff informed the mediator that he would seek a determination from the court that he was indigent. The mediator refused to hold the mediation unless the plaintiff paid an advance deposit. Plaintiff then raised concerns about the mediator's ability to be impartial, and the mediator withdrew as mediator. The mediator argued that since the mediation was pre-litigation, it was "voluntary", and therefore, he was not bound by program rules regarding indigency. GS § 7A-38.3E clearly incorporates the MSC Program Rules, which include Rule 7.D requiring a mediator to accept the amount ordered by the court as payment from an alleged indigent party to a mediation. Although the Grievance and Disciplinary Committee did not find the rule violation to be intentional, it did conclude that had the mediator reviewed the public records statute, he would have learned that he could not refuse to conduct the mediation on the basis of the plaintiff's alleged inability to pay. The committee issued a private letter of warning, the mediator appealed, and then withdrew his appeal prior to the hearing.

## FISCAL YEAR 2016-17 MSC & FFS PROGRAM STATISTICS SUMMARY

**MSC Program: Of 3478 cases mediated, 2028 were settled, or 58.3%.**

**FFS Program: Of 1373 cases mediated, 1009 were resolved in whole or in part, or 73.5%.**

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**If one includes cases that were reported as settled prior to mediation or during a recess, the percentages are:**

**MSC Program: 64.1%      FFS Program: 75%**

**District-by-district statistical data and statewide compilations will be posted on the Commission's website in the near future. To see the data, click on "Program Information" from the menu, select MSC or FFS Program, then click on "Program Statistics" from the menu.**

## NEW ADVISORY OPINIONS

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. To view the Advisory Opinions Policy, [click here](#). To view all Advisory Opinions adopted by the Commission to date, [click here](#).

The Opinions below were approved by the Commission at its September 15-16 meeting and are posted for comment. To comment, [click here](#).

### OPEN FOR COMMENT Advisory Opinion of the NC Dispute Resolution Commission Advisory Opinion No. 34

(Adopted and Issued by the Commission on \_\_\_\_\_)

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 amendments to the Policy and by issuing opinions, the Commission seeks to educate mediators and to protect the public.

#### Concern Raised

An attorney for a party at a mediated settlement conference reported to the Commission that the mediator simultaneously conducted a second mediation involving a separate dispute and separate parties at the same time and place as the mediated settlement conference in which the attorney participated. The mediator charged the parties in each mediation the mediator's full hourly rate and assessed an administrative fee for each conference.

#### Question 1

May a mediator simultaneously conduct two mediated settlement conferences in unrelated cases involving different parties?

#### Advisory Opinion

**No.**

Standard VII, Conflicts of Interest, begins with "A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute." There is an inherent conflict of interest when a mediator conducts two mediations at the same time in that the mediator is or ap-

pears to be serving his own interests and not those of the parties.

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Subsection G of Standard VII states that, “A mediator shall not prolong a mediation for the purpose of charging a higher fee.” Pursuant to MSC Rule 6.A(1), the mediator is in control of the conference, and as such determines the length of the opening statement, the needs of the parties during caucus sessions, and the amount of time the mediator spends in each caucus session. It would be very difficult for a mediator to be able to “time” the caucus sessions for the separate conferences so that no party is waiting an undue amount of time while the mediator is in caucus with a party in the other conference. As such, it is apparent that conducting simultaneous mediations is likely to result in one or both of the conferences being prolonged prior to settlement or impasse. By choosing to hold simultaneous conferences, the mediator is, in effect, prolonging the conference(s) which results in a higher fee, a violation of Standard VII.G.

The Commission is also concerned about the mediator’s ability to maintain the confidentiality of all information obtained within the mediation process as required by Standard III, Confidentiality. In particular, Standard III.A provides that, “A mediator shall not disclose, directly or indirectly, to *any non-participant*, any information communicated to the mediator by a participant within the mediation...” The parties to each mediation are non-participants in the other, simultaneous mediation. Standard III.B provides that, “A mediator shall not disclose, directly or indirectly, to *any participant*, information communicated to the mediator in confidence by any other participant in the mediation process...”

The mediator must keep track of a significant amount of information, and it may be very difficult to keep track of confidential information disclosed in each caucus during each mediation. The parties and/or their attorneys may express concerns about the protection of their confidential information which could result in a lack of trust or guarded participation in, or dissatisfaction with the process. In fact, this query came from an attorney to a Commission member, and the attorney raised this very concern.

Standard III reflects the bedrock importance of the mediator’s duty to preserve the confidentiality of all information disclosed within the mediation process, and the Commission, therefore, discourages a mediator from conducting simultaneous mediations under any circumstances, even if all parties agree to do so.

## Question 2

**May the mediator assess the mediator’s full hourly rate and administrative fee for each mediated settlement conference?**

**No.**

The Commission suggests that convening two mediations at the same time and place and charging all parties at a mediator’s full hourly rate violates Standard VII in that it places the mediator’s financial benefit ahead of the mediator’s primary obligation to impartially serve the parties.

**OPEN FOR COMMENT**  
**Advisory Opinion of the**  
**NC Dispute Resolution Commission**  
**Advisory Opinion No. 35**

(Adopted and Issued by the Commission on \_\_\_\_\_ )

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 amendments thereto and issuing opinions, the Commission seeks to educate mediators and to protect the public.

**Concern Raised**

Plaintiff’s attorney contacted the Commission. He reported that defendant’s counsel had appeared for a superior court mediated settlement conference without his client. Defendant’s counsel reported that his client had informed him at the last minute that he was unable to attend the conference. Though his client was absent, defendant’s counsel suggested that the mediator proceed with holding the mediated settlement conference. The mediator agreed to proceed and, after discussion, an agreement was reached. Defendant’s counsel signed the agreement on behalf of his client.

Thereafter, defendant’s attorney advised plaintiff’s attorney that his client was refusing to abide by the terms of the agreement, maintaining that his lawyer had no authority to sign the agreement on his behalf. Plaintiff’s attorney admits that he did not ask the defense attorney whether he had full authority to settle. He asks, in light of the defendant’s absence, the following questions.

- 1. Did the mediator have an obligation to raise the issue of settlement authority with the defendant’s attorney?**
- 2. If so, what are the mediator’s obligations to the process if s/he learns that the attorney does not have full settlement authority in the absence of his/her client?**

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## ADVISORY OPINION

### 1. **Did the mediator have an obligation to raise the issue of settlement authority with the defendant's attorney?**

**Yes.**

MSC Rule 4.A(1)(a)(ii) provides that any party or person required to attend a mediated settlement conference shall physically attend unless all parties and persons required to attend and the mediator consent to excuse or modify the attendance requirement or unless physical attendance is waived by order of the court. Citing this rule, in Advisory Opinion No. 02 (2000), the Commission stated that it is highly preferable for all parties to be physically present at the conference, noting that when a party is absent, difficulties can occur. In that Advisory Opinion, the Commission suggested that even when all parties consent, a mediator should not waive the attendance requirement lightly and should encourage all parties required to be present to physically attend. In fact, one of the difficulties noted in Advisory Opinion No. 02 (2000) is the very situation presented in this inquiry, that "an absent party may later claim that his or her attorney did not have authority to settle the case."

Advisory Opinion No. 02 (2000) suggests that if the mediator determines that there is a compelling reason why a party cannot attend, the mediator should seek to ensure that arrangements are made to permit the party to participate via conference call. If the party will not be present physically or by conference call, the Advisory Opinion suggests that "the mediator should seek to protect the mediation process by encouraging the attorney to obtain from such client written authorization to settle the matter on the client's behalf..." The advisory opinion does not offer guidance as to whether the mediator should or should not proceed with the conference if the attorney does not obtain written settlement authority from his client. It states only that the mediator shall report the failure to attend on the Report of Mediator. (Note: Current MSC Rule 6.B(4) requires the mediator to report only the names of those in attendance without noting those who failed to appear.)

Recently adopted Advisory Opinions No. 24 (2013) and No. 25 (2013) also address attendance issues. These advisory opinions also provide that the mediator should encourage physical attendance and should make an effort to help the parties understand the attendance requirement and the consequences of their decisions regarding attendance. In Advisory Opinion No. 24, the issue involved the appearance of an officer of a corporation without an attorney, and in Advisory Opinion No. 25, the issue was the attendance of an out-of-state attorney participant who had not been admitted pro hac vice. Under the facts presented in those advisory opinions, the Commission stressed that the mediator should not take it upon him or herself to act as the "attendance police". In other words, these Opinions held that it was not the mediator's responsibility to determine who should/could participate or to determine whether the conference should proceed. Rather, the Opinions held that the mediator should work with whomever appears for the mediation

and facilitate their discussions. These Opinions are to be distinguished from Advisory Opinion No. 02 (2000) in that the absences noted did not raise issues of settlement authority. When the mediator learns that a party with settlement authority does not plan to appear or is absent, the mediator cannot simply proceed to facilitate the discussion with those who are present, but must take action to address the situation.

**2. What are the mediator's obligations to the process if s/he learns that an attorney does not have full settlement authority in the absence of his/her client?**

In light of Advisory Opinions Nos. 02, 24, and 25, the Commission suggests that best practice in the scenario presented would include the following steps. If notified in advance, the mediator should discuss the attendance rule with the attorney and strongly urge him to contact his client and encourage the client to attend in person.

- 1) If the client will not attend in person and all parties consent and the mediator determines that there is a compelling reason to excuse the party's physical attendance, the mediator should seek to ensure that the party can be available by conference call.
- 2) If the client refuses to attend either in person or telephonically, or if the client fails to show up at the mediation, the mediator should ask the attorney to obtain the client's written permission to settle the matter on the client's behalf by email or text or other reasonable means.
- 3) Absent such written permission, the mediator should encourage the attorney to disclose to the other side the fact that he does not have full, written settlement authority. After full disclosure, those in attendance and the mediator may agree to proceed with the conference.
- 4) If the attorney refuses to disclose that he does not have full, written settlement authority, then the mediator may determine that it is appropriate to recess the mediation or, pursuant to Standard VIII, Integrity of the Process, withdraw from or terminate the mediation, being careful not to breach the mediator's duty to maintain confidentiality under Standard III.B. A recess or a withdrawal will avoid a situation where the other party spends time and money on the mediation process with the understanding that an agreement may be reached, when, due to an absence of authority that may not, in fact, be possible.
- 5) If the attorney refuses to disclose that he does not have full, written settlement authority, then the mediator may determine that it is appropriate to recess the mediation or, pursuant to Standard VIII, Integrity of the Process, withdraw from or terminate the mediation, being careful not to breach the mediator's duty to maintain confidentiality under Standard III.B. A recess or a withdrawal will avoid a situation where the other party spends time and money on the mediation process with the understanding that an agreement may be reached, when, due to an absence of authority that may not, in fact, be possible.

## A CASE STUDY

### Proper Filing of Reports of Mediator: Does it Really Matter?

#### The Problem:

Several months ago a trial court coordinator called the Commission with a concern about not receiving Reports of Mediator from several attorney mediators. She was particularly concerned about one attorney mediator because she knew for a fact that the mediator was selected quite often and had a high settlement rate. She doubted that his successes were accurately reflected in the statistics for the MSC program in her district. She noted that she had very few Reports of Mediator from him. Was the mediator not filing his Reports at all? Was the mediator only filing reports in cases that were actually mediated, as opposed to having been settled after being ordered to mediation but prior to a conference? Was the mediator not filing the Report with the right person---the Superior Court Judge/TCA or TCC? Or, was the mediator failing to schedule conferences after being ordered to do so?

The TCC was worried that if this mediator's stats were not reflective of the success of mediation, there may well be dozens of other mediators across the state who may be improperly filing their Reports as well. The MSC program settlement rate could well be significantly higher than AOC's statistics reflect. For FY 2016-17, AOC statistics reflect that approximately 58% of cases mediated were settled.

#### Determining the Facts:

The trial court coordinator printed out a subset of 25 of all of the cases for which the mediator had either been party-selected or court-appointed during a two-year period. For each case, she indicated the CaseWise exit code. (CaseWise is the AOC system which tracks and records the statistics for the mediation programs.) If the TCC does not have a copy of the Report, it is impossible to report it as settled or impasse, or settled prior to the conference. Court staff must report it as "disposed of without mediation," (MEDB). Commission staff traveled to the courthouse in the district and pulled all of the case files in which the exit code entered was MEDB. Staff sought to determine what, in fact, had occurred in each of those cases reported as MEDB. The TCC and Commission staff believed that some of these cases surely must have settled.

#### The Good News and the Bad News:

Of the 25 cases, the trial court coordinator had closed 17 cases with CaseWise code "MEDB." When the files were reviewed, here is what we learned:

1. Six of the 17 (35%) cases were reported as settled at mediation but the Report had been filed with the CLERK and not the Superior Court Judge's office. In that district, the Clerk does not provide a copy to the trial court coordinator. The mediator did not email or send a copy to the TCC. MSC Rule 6.B(4)(a) requires a copy be filed with the court, and the instructions on the AOC-CV-813 Report of Mediator form reflects the rule.
2. In 7 of the 17 (41%) cases no Report had been filed. In a conversation with the mediator, in most of these cases, the attorneys had reported the case settled prior to mediation; one had been transferred to another county. The mediator did not file Reports in any of those cases, incorrectly believing that since he had not held a mediation, he need not file a Report.
3. In three of the Reports filed, information entered was incorrect or incomplete.

#### Report of Mediator Refresher Tips:

1. **IF YOU HAVE BEEN DESIGNATED BY THE PARTIES OR APPOINTED BY THE COURT, FILE THE REPORT OF MEDIATOR IN EVERY CASE WHETHER IT SETTLES PRIOR TO, DURING, OR AFTER MEDIATION, IS IMPASSED, IS REMOVED TO FEDERAL COURT OR VENUE IS CHANGED, OR A BANKRUPTCY FILING HAS STAYED THE CASE, for example. EVERY CASE.**
2. **FILE THE REPORT WITH YOUR TCA, TCC, JCC, OR JA . IF YOU DO FILE IT WITH THE CLERK, PLEASE MAKE SURE THAT YOUR TCA, TCC, JCC, OR JA GETS A COPY AT THE SAME TIME.**
3. **TAKE THE TIME TO COMPLETE THE REPORTS PROPERLY AND FILE THEM ON TIME.**

# CME OPPORTUNITIES : DRC



## APPROVED PROGRAMS

The Current CME Opportunities are posted on the Commission's website and updated monthly. [Click here](#) to view. Here are a few of the offerings.

**Updates and Opinions that Impact Workers' Compensation for Mediators (2017)**

**Where: On Demand**

**Sponsor: NC Bar Foundation**

**CME Credit Hour: 1.0**

For more Information, [click here.](#)

**What Do Lawyers Want in an Ethical Mediator?**

**Where: On Demand**

**Sponsor: Carolina Dispute Settlement Services**

**CME Credit Hours: 2.0**

To view program, [click here](#)

**The Standards of Professional Conduct for Mediators (2017)**

**Sponsor: NC Bar Foundation**

**Where: On Demand**

**CME Credit Hour: Each Course 1.0**

For more information on each program, click on the "More Information" option.

**Volume I (Preamble and Standard 1) [More Information](#)**

**Volume II (Standards II and III) [More Information](#)**

**Volume III (Standard IV and V) [More Information](#)**

**Volume IV (Standard VI and VII) [More Information](#)**

**Responding to Mediation Advocates' Best and Worst Practices**

Sponsor: Wake County Bar Association

On Demand: 2.0 Hours CME Credit

<https://youtu.be/Az0P2claKDE>



**Mediation in Family Law Cases:  
Ethics and Practical Tips**

**When: On Demand**

**Sponsor: NC Bar Foundation**

**CME Credit Hours: 1.0**

For more information and/or to register, [click here.](#)

**Standards of Conduct for Mediators**  
**Where: On Demand**  
**Sponsor: NC Association of Professional Family Mediators**

CME Credit Hours: 2.0

To view Program, [click here](#)

All certified mediators are required to complete two hours of CME prior to renewing their certification for FY 2017-18. To view the NCDRC's CME Policy [Click here.](#)

To find all NC Bar Foundation approved CME On Demand courses, [click here](#), from the drop down box, click on the "Certified Mediators Education (CME) on Demand" option.



**Attorney Mediators Catharine Arrowood and Judge William Webb  
Recognized by Chief Justice Mark Martin**

Catharine Arrowood, attorney with Parker Poe Adams & Bernstein LLP, and William A. “Bill” Webb, retired Magistrate Judge for the EDNC and DRC Chair, were recently each awarded the Amicus Curiae Award from the Chief Justice of the North Carolina Supreme Court. The award, which describes Ms. Arrowood and Judge Webb as a “Friend of the Court,” is in recognition of their “outstanding service” to the state judicial branch as two of the five co-chairs of the N.C. Commission on the Administration of Law and Justice (NCCALJ). Both Ms. Arrowood and Judge Webb are active MSC mediators.

The NCCALJ spent more than a year conducting a comprehensive review of North Carolina’s court system – the first such review in two decades. In March of this year, Ms. Arrowood and Judge Webb helped present the commission’s final report to Chief Justice Mark Martin, who said its recommendations “create a framework for dramatic, systemic improvement in the administration of justice in North Carolina.”

The recommendations include improving the state’s indigent defense system, using data analytics to reduce case delays, and raising the juvenile age from 16 to 18 for crimes other than violent felonies and traffic offenses. The committee that Ms. Arrowood chaired on legal professionalism also recommended studying ways to make legal services more accessible and creating a Legal Innovation Center to undertake constant review of the judicial system.

**Leaders in the Law**

On September 15, 2017, North Carolina Lawyers Weekly hosted the seventh annual “Leaders in the Law” awards event in Charlotte, NC. It honored legal professionals licensed and practicing law in the state of North Carolina, who have gone above and beyond in their profession and their community. A number of this year’s winners are certified mediators and the Commission salutes them:

Congratulations to DRC Certified Mediators:

**T. Jonathan Adams**

**Kate Deiter-Maradei**

**J. Anderson Little**

**Michael T. Medford**

**Elizabeth Scott**

## COMMISSION SEEKS COMMENT

At its September 15-16, 2017, meeting the Commission approved amendments to the DRC Rules, two new advisory opinions, and an amendment to Standard III.D, which are posted for comment on its website. Click on the link below for the DRC Rules, and see the AOs beginning on **page 6** of this newsletter. Please comment by November 7, 2017.

<http://www.nccourts.org/Courts/CRS/Councils/DRC/Comments.asp>



### PROPOSED AMENDMENTS TO DRC RULES

*The DRC Rules are amended to 1) revise hearing procedures set out in Rules IX and X to permit the Chair to convene 5 person hearing panels in lieu of hearings before the Full Commission; 2) define private and public sanctions and to clarify when sanctions are to be published; 3) revise procedures for Committee review set out in Rules VIII, IX, and X; 4) authorize the Commission to seek injunctive relief in Wake County Superior Court if, in the course of an investigation of a grievance, the Grievance and Disciplinary Committee and the Chair of the Commission determine that a mediator's conduct should be enjoined in order to protect the mediator, the public or the courts; and 5) update and correct additional text.*

### PROPOSED STANDARD III.D(6):AMENDMENT

**“(6) If the mediator concludes that, as a matter of safety, the mediated settlement conference should be held in a secure location, such as the courthouse, the mediator may seek the assistance of court officials or staff in securing a location, so long as the specific circumstances of the parties’ controversy are not identified or identifiable. “**

# Ethics Corner



## WHAT DO YOU THINK?

*This section of The Intermediary poses a scenario that has been the subject of a previously adopted DRC advisory opinion. The Commission invites you to consider the inquiry and determine what you consider the appropriate analysis.*

[Control click here to read Advisory Opinion 17 \(2010\).](#)

### Concern Raised:

A mediator contacted the Commission and explained that, in the past, he had mediated a case for the parties involved in the case 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. The mediator asks if he is permitted to serve as arbitrator when he previously mediated the case which resulted in impasse?

## *New Legislation*

### **AMENDMENTS TO GS § 7A-38.2 and PROGRAM ENABLING**

### **LEGISLATION RATIFIED**

The Commission drafted revisions to GS § 7A-38.2, the statute creating the DRC, which were included in an AOC Omnibus bill, House Bill 236. It passed the General Assembly and was signed by the Governor on July 21, 2017, and ratified as Session Law 2017—158. The legislation creates a new seat on the Commission for a District Attorney to be appointed by the Chief Justice, clarifies when mediator sanctions become public, and preserves the confidentiality of initial applicants for certification whose applicants are denied. Minor technical amendments were made to each mediation program's enabling legislation.

*(continued from page 7)*

**Leslie** – *Let’s talk a little about the increase in the numbers of self-represented (pro se) and indigent parties in the court system. How do you see that affecting the MSC Program and your work in helping to support the Program?*

**Deneen** – Well, let me start by saying that in an effort to help self-represented parties I often used resources developed by the Commission and which are available online. For instance, I often referred self-represented parties to the “*Guide to Superior Court Mediation for Parties Not Represented by Attorneys*” [there is also an equivalent *Guide to the Family Financial Settlement Program*] and to the Commission’s website. There is also a *Guide to Selecting a Mediator* posted which has been helpful for self-represented parties. Also, I didn’t hesitate to refer such parties to the Commission’s staff for information when they called and had questions about mediation. Those resources saved me a lot of time on the phone. If a party claimed to be indigent, we referred him/her to the *Petition for Relief from Obligation to Pay Mediator’s Fee* (AOC-CV-814) and DRC Rules. It would be the indigent parties’ responsibility to present the completed form to the mediator and timely file it with the Court for consideration. I don’t know how growing numbers of self-represented and indigent parties will affect the courts over time, but these resources have been very helpful and should continue to be available to court staff.

**Leslie** — *What are you hearing from your mediators about this increase?*

**Deneen** -- Court appointments involving self-represented parties sometimes makes case management more difficult. However, I didn’t hear a lot of complaints from the mediators working in my district. We have a few mediators in our district who have offered to assist with cases involving self-represented parties.

It can also be more difficult for mediators to collect their fees from self-represented parties. If mediators were not being paid, I tried to be proactive whenever possible. I referred mediators to the Toolbox on the DRC site where there is information on collecting fees. I was willing to call attorneys or pro se parties about payment issues and concerns. Most issues regarding non-payment are usually resolved without the need for a hearing before our superior court judges.

**Leslie** – *A couple of years ago, Commission staff developed “nuts and bolts” Benchbooks on mediation for superior and district court staff and judges. Many thanks to you, Deneen, for your help with that project! Have you found the MSC Program Benchbook for Court Staff to be helpful?*

**Deneen** —Absolutely. Even though I had been administering the program for many years, I still found it enormously helpful as a “go-to” reference, and I referred to it quite often.

**Leslie** —*You and I have talked on a number of occasions about the number of experienced judges and court staff who will be retiring from the court system over the next five to ten years. Does this concern you? Do you have any ideas as to how to address this turnover? Is there a silver lining?*

**Deneen** – There is going to be a lot of turnover and I am concerned that so many experienced individuals will be leaving the system. A lot of the folks who will be retiring are individuals who I respect a great deal and consider friends. That will be tough. But, their departure will open doors for others. Many of the newer folks coming in are more comfortable with technology of all types and have a different skill set than previous generations. I think that will be helpful for them and the system overall. You’ve mentioned to me that the second phase of the “*Benchbook*” project involves development of a mentoring program for court staff. I think this is a great idea and will be tremendously helpful for new court staff.

**Leslie**—*I’m glad you think so. We’ve talked with Amanda Leazer and Brandi Tolbert, court staff who serve as ex officio members of the Commission, and they are on board. Experienced staff who are willing to serve as mentors can be paired with new hires. The Benchbook would serve as the first line of defense and the new folks could call their mentor when they got stuck.*

*(continued on next page)*

*(continued from previous page)*

**Deneen** — Well, when you get this up and running, let me know how Suzanne and I can help.

**Leslie** – *While we’re talking about new court staff “getting up to speed”, what advice have you offered to Suzanne? Would this be advice you’d offer any new hire?*

**Deneen** -- I believe there are things that court staff can do to maximize the program’s effectiveness. I actually have created a list of suggestions for Suzanne. Some of these tips are already in the Benchbook. I also think that if mediators review the list, they can get a good idea of the challenges court staff address every day. Here are a few of the tips I shared with Suzanne:

- Remind mediators that when parties are not being cooperative in scheduling matters, that they need to go ahead and take charge and set a date.
- Insist that attorneys comply with MSC Rule 7.C and pay the administrative fee to any court appointed mediator they wish to replace with a party-selected one. Otherwise, you may find you are spending an inordinate amount of time on substitution requests.
- There should be good cause for any extension of a mediation deadline set by the court.
- Hold firm on your trial dates.
- Make mediator appointments directly from the Commission’s website to make sure you are using the most current contact information available and notify the Commission of any problems with its list.
- Check to make sure that all mediators working in your [superior court] district are, in fact, certified, whether court appointed or party selected.
- When there has been a change of venue in a case already ordered to mediation, let staff in the new district know the identity of the mediator and deadline for completion. Be sure and let the mediator know, too, that there has been a change in venue.
- Reach out to mediators who are not meeting deadlines or filing their Reports of Mediator on time and gently let them know that is not acceptable. If you are unable to get their attention, you may need to ask the Commission for help.
- Always be willing to listen and to be flexible when flexibility is called for, but remember that your job is to keep things moving forward.
- Get and stay organized! Create a way that works for you. I have a black notebook where I kept track of all the cases referred to mediation, the deadline set, the mediator appointed/selected, and any extensions allowed. I frequently checked that notebook to make sure that things were on track. If there appeared to be a problem, I would call the mediator or check in with the attorneys.

**Leslie** – *That’s a great checklist, Deneen! And, lastly, can you comment on the contributions of the MSC Program and its mediators in helping District 14 manage its caseload over the years? Is the Program helping a little, a lot, not helping?*

**Deneen** -- The life of a civil case filed in superior court in District 14 averages 8-9 months. I believe our MSC Program has contributed to our success in moving cases through relatively quickly. The Program has helped, I believe, because we are all committed to actively managing it, with Judge Hudson setting the tone. Attorneys have largely embraced mediation in District 14 which I think is another measure of the program’s success and a lot of cases are being mediated very early -- before we even order them in. And, I feel certain that many disputes are being successfully mediated before they are even filed. I say anecdotally that mediation may be contributing to the reduction in court filings in District 14 during FY 2016-17. Our dockets are shorter and more manageable because of mediation. Of course, mediation is not a panacea and improvements in the program and the process are always possible. But, mediation is one of the best tools we have right now for keeping things moving.

**Leslie** – *Deneen, thanks so much. The Commission is well aware of the many contributions that court staff make to all our mediation programs. They couldn’t operate without the hard work of you and your colleagues. Thanks for all you did as District 14’s TCC and know that the Commission wishes you every success as its new Trial Court Administrator! Oh, and I will see if I can’t make some calls and get you in to see a mediation.*

**Deneen** – Thanks. Leslie. It’s been great talking with you. I will look forward to hearing from you.



# TEST YOUR KNOWLEDGE!



## ***TRUE OR FALSE?***

1. An attorney- mediator has a duty to report to the State Bar any unethical conduct that the mediator observes by an attorney at a mediation.
2. To mediate cases before the NC Industrial Commission, a person must be certified in the MSC Program.
3. The parties and the mediator agree to consolidate two cases involving the same parties in one mediation. The same attorney represents three plaintiffs in both cases and another attorney represents the defendant in both cases. The mediator fee should be divided and 50% billed to the plaintiffs and 50% billed to the defendant.
4. A mediator violates Standard VII.H if she makes a contribution to a fund set up by her local bar association to commission a portrait of a local judge whom the bar association is honoring.
5. An MSC certified mediator may list her credentials as “Certified Superior Court Mediator.”
6. An uncertified mediator was asked by the parties to serve as mediator in a voluntary will caveat mediation (no court order). The mediator’s partner had represented one of the parties in the case in another matter relating to the same case. The mediator may serve as mediator in the voluntary will caveat case.
7. A complaining party must file a complaint against a mediator with the DRC within two years of the date that the mediation is concluded or the complaint will be dismissed.
8. One sanction available to the court upon motion of a party for sanctions against an opposing party due to his failure to attend the mediation is dismissal of a responsive pleading.
9. Two hours of self-study of topics related to mediation will satisfy a mediator’s mandatory, annual completion of CME requirement.
10. A mediator may explain to court staff that there are allegations of domestic violence in a case she is ordered to mediate and ask court staff for a room in the courthouse in which to conduct the mediation.

*Answers on Page 26*

# Mediator Certification Training



## DRC Approved Training

### *Superior Court Training*

**Carolina Dispute Settlement Services** offers approved 40-hour and 16-hour superior court mediator training courses. For more information about the courses, schedules, or to register, contact Diann Seigle at (919) 755-4646, or visit their web site: [www.notrials.com](http://www.notrials.com).

**Mediation, Inc.** offers approved 40-hour and 16-hour superior court mediator training courses. For more information about the courses, schedules, 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).

**Wake Forest University School of Law & Ellen R. Gelbin**, offers a 40-hour superior court training course. For more information about the course or to register, contact Ellen R. Gelbin at (336) 945-0214, or [ellengelbin@ellengelbin.com](mailto:ellengelbin@ellengelbin.com).

### *Family Financial Training*

**Carolina Dispute Settlement Services** offers approved 40-hour and 16-hour family financial mediation training courses. See above for contact information.

**Justice Center of Atlanta** offers an approved 40-hour family financial mediator training course. For more information, contact Melissa Heard at (770) 778-7618 or visit their web site at [www.justicecenter.org](http://www.justicecenter.org)

**Mediation, Inc.** offers approved 40-hour and 16-hour family financial mediator training courses. See above for contact information.

### *6-Hour Approved Trainers*

**Carolina Dispute Settlement Services.** See above.

**Judge H. William Constangy** (Charlotte). Contact Judge Constangy at (704) 807-8164.

**Ken Dougherty, Esq.** (Wake Forest). Contact Ken at (919)-610-4391.

**Mediation Inc.** See above.



*“Need to Know” Tips for Mediators: Splitting Fees in Multi-Party Cases*

**Scenario 1:**

Mediator was party-selected to mediate a MSC case ordered to a mediated settlement conference by the court. Plaintiff A filed suit against Defendant X. Then Plaintiffs B and C also filed suit against Defendant X. The same attorney represents Plaintiffs A, B, and C, and another attorney represents Defendant X in both cases. All claims arise out of the same set of facts (the allocation of proceeds from the sale of a business to the shareholders of the corporation, and related issues). The trial court entered a consent order consolidating the cases for discovery and pretrial matters, but reserving its ruling on consolidation for trial until a later time.

The cases were then scheduled for mediation and were consolidated for that purpose, so that the mediated settlement conference proceeded as a single mediation involving the plaintiffs as a group and the defendant as a single party. The mediation concluded with an impasse.

How should the mediator’s fees be divided?

**Scenario 2:**

Mediator was party-selected to mediate a MSC case involving more than 30 parties. Plaintiffs (Group A) filed a complaint against Defendants (Group B). Group B counterclaimed against Plaintiffs (Group A) and filed a Third Party Claim against Third Party Defendants (Group C). Group C filed a counterclaim against Group B and a Third Party Claim against Third Party Defendants (Group D). Each group is represented by a single attorney. Approximately, half-way through the mediation, settlement was reached with Groups C and D, and they left the conference.

Mediator wonders if the rule contemplates a 50/50 division between plaintiffs and defendants regardless of how many different plaintiffs and/or defendants there are, which would require plaintiffs to pay  $\frac{1}{2}$ , and the defendants to share the other  $\frac{1}{2}$  equally. Plaintiffs suggest that issues between Group C and Group D and Group B have nothing to do with them, and some offset should be given for that.

How should the mediator’s fees be divided?

(answers on page 25)

## In Memoriam

### The Honorable James M. Long



The Commission was saddened to learn of the passing of retired Senior Resident Superior Court Judge James M. Long. Judge Long was a tireless advocate for dispute resolution in North Carolina and was instrumental in the development of the NC superior courts' Mediated Settlement Conference (MSC) Program.

In 1989, then Chief Justice James Exum tapped Judge Long to serve on an NCBA Committee that was considering the potential use of mediated settlement conferences in civil cases filed in North Carolina's superior courts. The Committee was particularly interested in what was happening in Florida, where a new and novel program had been established by the Florida legislature. That program utilized private mediators to conduct mediated settlement conferences in Florida's circuit civil courts. The program's rules provided for the court to refer cases, but gave the parties the opportunity to select their mediator whom they would directly compensate for his/her services. Once selected, the mediator would serve in the role of case manager, scheduling the conference and reporting back to the court on the outcome. Requiring parties to pay their mediator directly meant that the program could operate at no cost to Florida taxpayers. And, having the mediator serve as case manager, meant that court staff would not be burdened with administrative details. If civil cases could be settled, Florida judges could better allocate their time in that court and, then, turn their attention to criminal matters.

Judge Long, in the company of several other North Carolina judges, court administrators, and lawyers traveled to Florida in October of 1990, to speak with Florida judges and court administrators about the new program. They also interviewed a number of Florida attorneys about their experiences with mediated settlement conferences. Impressed by what they heard, Judge Long and the others who traveled with him, returned to North Carolina and eagerly focused their attention on drafting a proposed statute and program rules with the intention of establishing a similar program here. Once the legislation was adopted in June of 1991, eight counties were selected as pilot sites. Surry County, where Judge Long served as senior resident superior court judge, was among them. Judge Long's commitment and enthusiasm resulted in Surry County being the first pilot site to become operational. Moreover, researchers from UNC-Chapel Hill's then Institute of Government, who studied all the pilot counties, found that the overall participation rate (the percentage of all contested cases in which MSCs were actually conducted) was highest in Surry County. The researchers concluded that judicial attitude was most likely the single biggest determinant of participation rates. Of Surry County in particular, they wrote, "One likely reason that participation was so high in Surry County was that the senior resident judge was a "vigorous and effective advocate of mediation in civil cases..."

Judge Long became certified in 1994. In 2010, Judge Long was honored by the NCBA's Dispute Resolution Section with its Peace Award in recognition of his commitment and contributions to the development of dispute resolution in North Carolina and the peaceful settlement of disputes. Judge Long continued to actively mediate until 2013 when he withdrew due to illness. The Commission is grateful to Judge Long for his vision, leadership, and many contributions to the development of dispute resolution in North Carolina.

*This article does not address mediation directly, though it was authored, in part, by a mediator. It is, however, about communication – saying the right things and avoiding inappropriate or unintentionally hurtful comments. We hope you will find the “Ring Theory” useful.*

## How not to say the wrong thing

by

Susan Silk and Barry Goldman

### **It works in all kinds of crises -- medical, legal, even existential. It's the 'Ring Theory' of kvetching. The first rule is comfort in, dump out.**

When Susan had breast cancer, we heard a lot of lame remarks, but our favorite came from one of Susan's colleagues. She wanted, she needed, to visit Susan after the surgery, but Susan didn't feel like having visitors, and she said so. Her colleague's response? "This isn't just about you."

"It's not?" Susan wondered. "My breast cancer is not about me? It's about you?"

The same theme came up again when our friend Katie had a brain aneurysm. She was in intensive care for a long time and finally got out and into a step-down unit. She was no longer covered with tubes and lines and monitors, but she was still in rough shape. A friend came and saw her and then stepped into the hall with Katie's husband, Pat. "I wasn't prepared for this," she told him. "I don't know if I can handle it."

This woman loves Katie, and she said what she did because the sight of Katie in this condition moved her so deeply. But it was the wrong thing to say. And it was wrong in the same way Susan's colleague's remark was wrong.

Susan has since developed a simple technique to help people avoid this mistake. It works for all kinds of crises: medical, legal, financial, romantic, even existential. She calls it the Ring Theory.

Draw a circle. This is the center ring. In it, put the name of the person at the center of the current trauma. For Katie's aneurysm, that's Katie. Now draw a larger circle around the first one. In that ring put the name of the person next closest to the trauma. In the case of Katie's aneurysm, that was Katie's husband, Pat. Repeat the process as many times as you need to. In each larger ring put the next closest people. Parents and children before more distant relatives. Intimate friends in smaller rings, less intimate friends in larger ones. When you are done you have a Kvetching Order. One of Susan's patients found it useful to tape it to her refrigerator.

*(continued on page 26)*

### *In Memoriam*

A. Holt Gwyn

Judge James Long

### **Fee scenarios, page 20:**

1. A, B, C pay 50%, and D pays 50%.
2. A,B,C,D, share admin fee and fees for the first part of mediation equally; then A and B share fees equally for second part.

Answers

1. False. See State Bar Rule 8.3.
2. True.
3. True. See MSC Rule 7.F.
4. False. Such a contribution is not "in return for a referral or expectations of referrals of clients for mediation."
5. False. See DRC Advertising Guidelines. She may say, "DRC Certified Superior Court Mediator."
6. True. An uncertified mediator in a voluntary case is not subject to the Standards. However, the mediator should seek a written waiver from all parties if she chooses to mediate the case.
7. False. A complaint must be filed within 1 year. See DRC Rule IX.C(2)(e).
8. False. See MSC Rule 5.
9. False. See DRC CME Policy.
10. False. See Standard III.C. A mediator may ask court staff for a room in the court house but may not explain the reason for the request (unless all parties consent to the disclosure).

Here are the rules. The person in the center ring can say anything she wants to anyone, anywhere. She can kvetch and complain and whine and moan and curse the heavens and say, "Life is unfair" and "Why me?" That's the one payoff for being in the center ring.

Everyone else can say those things too, but only to people in larger rings.

When you are talking to a person in a ring smaller than yours, someone closer to the center of the crisis, the goal is to help. Listening is often more helpful than talking. But if you're going to open your mouth, ask yourself if what you are about to say is likely to provide comfort and support. If it isn't, don't say it. Don't, for example, give advice. People who are suffering from trauma don't need advice. They need comfort and support. So say, "I'm sorry" or "This must really be hard for you" or "Can I bring you a pot roast?" Don't say, "You should hear what happened to me" or "Here's what I would do if I were you." And don't say, "This is really bringing me down."

If you want to scream or cry or complain, if you want to tell someone how shocked you are or how icky you feel, or whine about how it reminds you of all the terrible things that have happened to you lately, that's fine. It's a perfectly normal response. Just do it to someone in a bigger ring.

Comfort IN, dump OUT.

There was nothing wrong with Katie's friend saying she was not prepared for how horrible Katie looked, or even that she didn't think she could handle it. The mistake was that she said those things to Pat. She dumped IN.

Complaining to someone in a smaller ring than yours doesn't do either of you any good. On the other hand, being supportive to her principal caregiver may be the best thing you can do for the patient.

Most of us know this. Almost nobody would complain to the patient about how rotten she looks. Almost no one would say that looking at her makes them think of the fragility of life and their own closeness to death. In other words, we know enough not to dump into the center ring. Ring Theory merely expands that intuition and makes it more concrete: Don't just avoid dumping into the center ring, avoid dumping into any ring smaller than your own.

Remember, you can say whatever you want if you just wait until you're talking to someone in a larger ring than yours.

And don't worry. You'll get your turn in the center ring. You can count on that.

***Susan Silk is a clinical psychologist. Barry Goldman is an arbitrator and mediator and the author of "The Science of Settlement: Ideas for Negotiators."***

*(Published in LA TIMES on April 07, 2013, and re-printed with permission of Susan Silk and Barry Goldman.*

*Thanks to Pamela Blizzard for sharing the LA TIMES article with Commission staff.)*



*The Dispute Resolution Commission and Its Staff  
Wish All The Intermediary's Readers and Their Families  
A Happy Thanksgiving!*