



CRIMINAL INVESTIGATION & ADJUDICATION COMMITTEE
BREAKOUT SESSION AGENDA
JANUARY 29, 2016
UNC SCHOOL OF GOVERNMENT, ROOM 2321
CHAPEL HILL, NC

- I. **Welcome & Approval of Minutes from December Meeting**
The Honorable William Webb, Committee Chair
Overview of Breakout Session
Judge Webb, Committee Chair & Diann Seigle, Committee Member
- II. **Building a Win-Win: District Criminal Court Mediation**
Video
- III. **Alternative Dispute Resolution & the Role of the Dispute Resolution Commission**
Leslie Ratliff, Executive Director, North Carolina Dispute Resolution Commission
- IV. **Expanding Mediation Beyond District Court**
Frank Laney, Mediator, United States Court of Appeals for the Fourth Circuit
- V. **Discussion on the Efficacy of Mediation in Criminal Court**
- VI. **Next Steps**
- VII. **Adjourn**

Minutes—Jan. 29, 2016 Committee Meeting
Prepared by Jessica Smith, Committee Reporter

Attending: Adams, Buck, Bryd, Coleman, Davis, Holcombe, Jordan, Kemp, McLaurin, Seigle, Wagoner, Webb (Chair), Smith (Reporter)

After approval of the minutes from Committee's last meeting, Webb introduced the topic of the current meeting: use of alternative dispute resolution in criminal cases.

Presentations began with a showing of a short video on district criminal court mediation.

Leslie Ratliff, Executive Director of the Dispute Resolution Commission (DRC) provided information about the DRC including its formation, position within the judicial system, and membership. [Reporter's Note: additional information about the Commission is available on its website <http://www.nccourts.org/Courts/CRS/Councils/DRC/Default.asp>] Ratliff noted that Webb and Siegel currently serve on the DRC. She described the DRC's main programs, including the district criminal court mediation program. Ratliff explained that although the DRC has established rules pertaining to how local mediation centers should operate, the centers are not required to follow these rules. Of the 19 centers in North Carolina, only 6 adhere to these rules. The other 13 centers, however, participate in the district criminal court mediation program.

Jody Minor, Executive Director of the Mediation Network of NC, noted that mediation is not consistently used in district criminal court. He noted that some district attorneys and district court judges use it frequently, but others do not. With respect to centers that are not currently participating in the DRC certification process, Minor stated that the DRC's goal is to have all community centers fully enrolled or in the process of doing so by the end of 2016.

Frank Laney, a mediator affiliated with the 4th Circuit Court of Appeals noted that the district criminal court program is the 1st general use mediation in North Carolina's courts. Because the mediation centers are not state funded, the current model is to offer a regional mediation center. In this way, services can be offered in communities that otherwise would not have the resources to provide them. He noted that mediation is not available in all district courts notwithstanding the fact that the relevant statute provides that all district attorneys and judges shall recommend mediation in appropriate district court cases. He opined that lack of participation should not be attributed to lack of interest, but to lack of knowledge about the program. He explained that the local centers work on a fee-for-service model, where the defendant pays a \$60 fee through the clerk's office. While mediation supporters would love to have state funding, Laney acknowledged this was unlikely to occur. With respect to a defendant's right to counsel for mediation, Laney stated that the AOC issued a legal memorandum some years ago, opining that counsel was not required. He acknowledged however that it may make sense for a defendant to have a lawyer for mediation. Laney advocated for expansion of the mediation program, noting that doing so would require more mediators. He suggested that mediation could be broadened to a wider variety of cases, including some superior court cases. Finally, he noted the necessity of amending G.S. 84-2.1, defining the practice of law, to remove language pertaining to mediators.

With respect to the AOC memorandum noted by Laney, IDS Director Maher suggested that the United States Supreme Court decision in *Rothgery* would affect the analysis of when the right to counsel attaches. [Reporter's Note: In the 2008 *Rothgery* case, the Court held that a defendant's Sixth Amendment right to counsel attached after his initial appearance before a

magistrate.]. Maher however did not weigh in on whether counsel was required for the mediation. He added that he wasn't sure that the appointment of counsel could be delayed for mediation. He also expressed interest in hearing about programs that work prior to arrest and the attachment of the 6th amendment right to counsel. Later in the meeting Seigle noted that they tried doing mediation at the magistrate's office and found it didn't work because emotions were too high at that point; by contrast, once they waited 15 days the parties were ready to mediate.

Minor provided some data on the number of mediated district criminal cases, noting that over 11,000 cases had been sent to mediation, with 79% being resolved through mediation. He noted however that the \$60 mediation fee was paid in only about 5,000 cases.

Webb suggested that the best practical reason for expanding mediation is to get the cases out of the court system. He noted that there already is a legislative mandate for mediation and because mediation requires a referral by the district attorney, a public official is involved in the decision to use mediation. He stated that while he favors an expansion of mediation, he does not favor an expansion that would work to the detriment of indigent defense services. He added that a major question was the timing of appointment of counsel. Another is confidentiality of information revealed during mediation.

Davis stated that the confidentiality point is an important one that needs to be carefully examined. This opinion was echoed by other Committee members.

Reporter Smith suggested that consideration of expansion of the mediation program should be paired with solutions that might address private warrants, such as a waiting period for those charges. Jordan agreed that the Committee should look at private warrants, specifically mentioning private warrants on sexual battery, an offense that results in sex offender registration. He further noted that changes to procedures for private warrants may put more pressure on law enforcement.

On the issue of IDS resources, some discussion ensued among Committee members, with no resolution, about whether IDS was being billed for cases that were mediated.

Kemp asked about the use of mediation in impaired driving and domestic violence cases. Seigle noted that perhaps contrary to conventional wisdom, mediation has been very successful in domestic violence cases. She noted that mediators are very concerned about safety in these cases. She also mentioned literature speaking to the issue and noted that guidance from the ABA now indicates that domestic violence cases can be mediated.

Minor emphasized Seigle's point about the success of mediation in domestic violence cases. He noted that many domestic violence organizations have relationships with a mediation center. Although many judges continue to say that domestic violence cases cannot go to mediation, he said that mediation can be a good option because the parties can work through a meaningful solution, for example where one party agrees to go to treatment.

Coleman asked why parties would opt out of mediation if it is available. Peg Dorer, Dir. of the NC Conference of District Attorneys, suggested that many district attorneys do not recognize that the services exist.

Jordan noted that in Rowan County they have used mediation for 4½ years. He said that 3 things disqualify a case for mediation in his jurisdiction: a defendant's bad record; involvement

of a weapon in the incident; and domestic violence. He noted however that his jurisdiction has a separate domestic violence court. He suggested that mediation probably would not be appropriate for the majority of superior court cases, but it might be worth looking at for crimes such as forgery, uttering, financial crimes, credit card cases, and possibly some property crimes.

Melton (Public Defender and Indigent Defense Subcommittee Member) noted that in her jurisdiction, a for-profit CA company is doing mediation work. She expressed a strong preference for a program run by a mediation center rather than by a for-profit company.

Noting the ad hoc availability of mediation throughout North Carolina, Buck noted that the Committee previously discussed the importance of offering uniform court services throughout the state. He emphasized the importance of this in domestic violence cases, noting that when they go to court the defendant often is barred from possessing weapons. McLaurin agreed that inconsistent availability of mediation throughout the state was an issue.

Adams stated that the primary questions for him were: How will it enhance justice? Is it going to be cost-effective?

Webb noted that an expansion of mediation may require creation of some administrative structures, such as new positions.

Kemp noted that input from the conference of district attorneys and the chief district court judges was important.

Reporter Smith asked whether there was any data available regarding other states' experiences with mediation and whether any type of cost-benefit analysis had been done for North Carolina.

Webb suggested that the National Center for State Courts may be a good resource on these issues. Seigle added that Stevens Clarke studied the issue some time ago. [Reporter's Note: The relevant study is: Steven Clarke, Ernest Valente & Robyn Mace, *Mediation of Interpersonal Disputes: And Evaluation of North Carolina's Programs* (prepared for The Mediation Network of North Carolina 1993) (Institute of Government, University of North Carolina at Chapel Hill) (on file with the Committee Reporter)].

Coleman suggested that any procedure to resolve a dispute without a conviction is a good thing. He noted however that confidentiality was a significant concern for him.

Buck indicated that he liked the idea of mediation, especially before a warrant was issued.

On the issue of costs, Seigle noted that the defendant pays the \$60 fee, which goes to the mediation network, unless the parties agree otherwise. Often, she noted, the fee is split between the parties.

Noting no strong opposition to examining the use of mediation in criminal cases, Webb indicated that he would prepare a survey to elicit Commission members' views on the issue. He added that it was important to look at information from the National Center as well as the Institute study on the issue.