

Dispute Resolution Commission

Minutes

Friday, February 17, 2006

North Carolina Central University School of Law

Durham, NC

10:00 a.m.

Commission members present: Steelman, Bernholz, Conley, Criner, Foil, Gumbiner, Lee, Seigle, Taylor, and Turner. Ex-officio members present: Beason, Cohen, Laney, Little, Morris, and Schafer. Staff and Guests present: Isenhour and Ratliff.

Judge Steelman thanked Mark Morris and Central for hosting the Commission. Professor Morris introduced Dean Raymond Pierce who formally welcomed the Commission and provided a brief update on North Carolina Central University School of Law.

Following Dean Pierce's remarks, Judge Steelman called for approval of the minutes which were approved as submitted. Next, Judge Steelman called for committee reports. He reported first for the Executive Committee. Judge Steelman noted that he had met with Judge Walker, AOC Fiscal staff, and Ms. Ratliff to discuss whether a proposed statutory amendment should be submitted to keep DRC unspent revenues from reverting to the general fund at the end of the fiscal year. The AOC is drafting the legislation, but that it may not be possible to introduce it in the short legislative session this year. Judge Steelman also reported that the proposed new rules and rule revisions submitted by the DRC to the Supreme Court had been adopted on January 26, 2006, with an effective date of March 1, 2006, with one exception. The State Judicial Council's Dispute Resolution Committee would not approve a change in the Family Financial Settlement Rules mandating certification of all mediators participating in the FFS Program. There were two issues. First, should the parties be able to select their own mediator? Second, there were not presently enough certified FFS mediators to meet the demands of a statewide program.

Mr. Criner next reported for the Mediator Certification and Training Standards Committee. He alerted members to a new state law relating to theft of identity and placing restrictions on state agency collection of information such as social security numbers. He reported that Ms. Ratliff had reminded him that all DRC applications for certification contained social security numbers and birth dates. After reviewing the legislation, the Commission voted to strike social security numbers from existing applications and to no longer collect that information. In addition, they voted to substitute year of birth for birth date on the application form and to delete the month and day from existing applications. Next, Mr. Criner submitted alternate inactive status policies for the Commission's consideration. He noted that one alternative was much more detailed. Ms. Ratliff had favored the more detailed version in that she hoped that it might minimize confusion and the number of calls the office received. Mr. Laney suggested some rewording of the more detailed version to tighten the language. Mr. Criner moved for adoption of the more detailed version with Mr. Laney's amendments and it was approved by the Commission. Next, Mr. Criner introduced alternate lapsed status policies for consideration. One of the alternates was more detailed, and that version was adopted.

Judge Steelman then recalled a matter that had been omitted from his report and asked members to consider a request from the AOC's Special Proceedings Forms Committee to consider consolidating all mediated settlement conference forms for the MSC, FFS, and Clerk Mediation Programs. Consolidation of the Farm and new Electric Supplier Program forms was also suggested. Ms. Ratliff added that the combined MSC, FFS, and Clerk forms would be labeled as "G" or general forms. Ms. Wrenn suggested that this approach could be more confusing than helpful. Mr. Little noted that the provisions in some of the forms, the Designation form, for example, are different. Judge Taylor noted this Committee is probably concerned about the proliferation of forms in general. Judge Steelman noted that the Commission has added two new programs recently and was expanding an existing one and, until there was more experience with the Clerk, Electric, and FFS forms, he did not think this was the right time to undertake consolidation.

Ms. Bernholz reported for the Standards, Discipline, and Advisory Opinions Committee. She noted that in the coming weeks her Committee would be considering whether there was a need to revise the Standards now that certification was mandatory for some programs. There was a sense on the part of some committee members that the aspirational language in some of the Standards needed to be tightened to establish clear, minimum requirements for mediator conduct. Without clear requirements, it would be difficult to impose discipline. Her Committee would be looking at the ABA Dispute Resolution Section's Model Standards as well as some other Standards before beginning its work and would likely go through the Standards one at a time.

Judge Lee reported for the Program Oversight Committee. He noted that his Committee would be considering a number of issues: whether to allow mileage for court appointed mediators, clarifying what is good cause for postponements of scheduled conferences, and providing assistance to mediators whose fees were not being paid. There followed considerable discussion about the third item with some Commission members expressing a belief that this issue had already been resolved. This was the consensus of the Commission, and Judge Lee stated they would not pursue that issue. Mr. Little raised another issue. He noted that judges have statutory authority to sanction parties for not attending mediation, but there is no comparable statutory provision providing for sanction of parties who do not pay mediator fees, though program rules allow the sanctions. Judge Taylor suggested that she believed judges had inherent power to impose sanctions in this situation. Judge Steelman asked Judge Lee's Committee to consider this matter.

Next, Judge Steelman asked Professor Morris to report on North Carolina Central University School of Law's new Mediation Institute. Professor Morris explained that Central's Board of Trustees has established a Mediation Institute at the Law School similar to those operating at Pepperdine, Hamlin, and the University of Missouri's School of Law. The first phase would involve expanding the dispute resolution curriculum to permit students to graduate with a law degree and a certificate in mediation. He noted also that the focus of Central's Institute would differ from others in that there would be a focus on examining how minority parties and others with less power in society fare in dispute resolution. The Institute would also work to encourage more minority mediators. He noted that the Institute would be working closely with Carolina Dispute Settlement Services. The Institute would be operational by this summer.

Next, Judge Steelman called for liaison reports. AOC Liaison Ms. Cohen noted that there are currently 16 districts offering the FFS Program and that the AOC will be working with the Commission to bring additional programs on line. Mr. Harkavy noted that the Section had been working with the Commission's office to get e-mail addresses of certified mediators in order to supply them with information about the Section. Mr. Schafer reported that things were moving

forward at the Industrial Commission. Ms. Wrenn reported that the Judicial Support Staff Conference was very pleased that Judge Steelman would be attending and presenting information on the MSC Program at their upcoming April 4-7 meeting on the coast. Ms. Isenhour reported that NC ACR has held a first meeting toward organizing and holding a statewide ADR conference.

At this point, Judge Steelman, recessed the meeting for lunch. He explained that after lunch, Commission members would hold a closed meeting to discuss the application for certification by [REDACTED]

After reconvening the Commission, Judge Steelman excused all ex-officio and liaison members. The panel previously appointed by the Commission Chairman and consisting of Judge Lee, Ms. Bernholz, and Mr. Criner, reported their findings and recommendations.

A number of commission members were excused from hearing this matter because of conflicts. The matter was heard by the following remaining members of the Commission: Judge Steelman, Jo Ann Foil, Diane Seigle, and Jesse Conley. The Commission recommended that [REDACTED] could be certified as a mediator, provided that certain specific pre-conditions were met.

The meeting of the Dispute Resolution Commission was adjourned.

Minutes

Dispute Resolution Commission

Friday, May 12, 2006

Nelson Mullins Riley & Scarborough

Raleigh, NC

10:00 A.M.

Commission members present: Steelman, Banzet, Conley, Criner, Curran, Foil, Gumbiner, Hudspeth, Lee, Seigle, and Turner. Ex-officios: Laney, Little, Minor, Morris, and Schaffer.. Guests: Andy Stockart (AOC), Todd Weatherly (Asheville's Mediation Center), Jeff Gillette (Judge Steelman's law clerk), and Sandy Stevens (State Budget). Staff : Ratliff and Robinson.

Judge Steelman welcomed everyone and introduced guests. He next called for approval of the minutes. Judge Steelman next asked for Ms. Ratliff's office report. She began by introducing the Commission's new staff assistant, Maureen Robinson. She reported this was an extremely busy quarter and reviewed projects the office had worked on: notifying mediators, judges, clerks and court staff of the new rules; writing articles for various publications to alert attorneys to the new rules; trouble shooting enhancements to the Commission's web site; and getting the 2006/07 certification renewal period underway.

Judge Steelman noted that Ms. Ratliff had invited Andy Stockert of the AOC's Technology Services Division to talk about recent enhancements to the Commission's web site. Ms. Ratliff noted that Mr. Stockert was responsible for implementing the programming changes necessary to accommodate on-line renewal and on-line posting of biographical information for mediators. She thanked him for his hard work and noted that she was pleased with the result and hoped the Commission would be as well. At that point, Mr. Stockert and Ms. Ratliff showed the Commission how the site operated, emphasizing the recent changes. After taking some comments, Ms. Ratliff noted plans for a "Phase II" to bring the entire certification process on-line and add a search function to the Advisory Opinions. Judge Steelman thanked Mr. Stockert for his good work.

Judge Steelman reported for the Executive Committee. He first asked Ms. Ratliff to discuss an invitation she had received to participate in ACR's annual conference in Philadelphia this fall. Ms. Ratliff reminded the group that last winter she had traveled to Atlanta to serve on panels at the ABA's Dispute Resolution Section Annual Meeting. ACR had invited her and her fellow panel members to reprise one the panels. Ms. Ratliff referenced a memo outlining estimated costs for the trip. Judge Steelman asked the group whether it wished to approve her attendance. The group voted to send Ms. Ratliff and, if she were not available, a member of the Commission. Ms. Ratliff noted one caveat – that ACR had wanted an answer a couple of weeks before and she was not certain whether she could still be included. Judge Steelman reported that the AOC was drafting a statute to permit the Commission to carry unspent revenues forward at the end of the fiscal year. He said he would continue to monitor this effort.

Ms. Bernholz reported for the Standards, Discipline and Advisory Opinion Committee. She first noted an inquiry from a lawyer representing an FFS mediator. The lawyer explained that his client took his laptop in for repairs. The laptop held relatively detailed information about the financial affairs of mediation participants. The information was deleted during repairs. The lawyer asked what, if any, obligation his client had to advise the participants of the loss of their data. Ms. Bernholz stated that her Committee had determined that the mediator had a duty to warn participants of the loss. She added that her committee was also drafting an Advisory Opinion to address the inquiry. Next, Ms. Bernholz reported her Committee was considering whether to recommend to the Commission that it adopt a statute similar to the State Bar's extending immunity to those who file grievances, provided there is no malice involved. Ms. Bernholz noted that this discussion grew out of concerns expressed by staff that some mediation participants were unwilling to sign the complaint form for fear of retribution from lawyer mediators. Lastly, she noted that the Committee was considering revising the approved complaint form as some of the language on it could be construed as "chilling".

Next, Judge Lee reported for the Program Oversight Committee. He noted that his group was seeking comments on some proposed revisions to the postponement fee rules. He noted that Mr. Schaffer had forwarded some comments. Mr. Little added that this was a big problem, that cancellations were rampant. He said he believed that fourteen days was a bare minimum for imposing a cancellation fee. It was noted that cancellations work a much greater hardship on full-time mediators. It was also suggested that many mediators who actively practice law do not enforce cancellation fees because they don't feel the financial impact as much as full-time mediators. It was observed that this is a difficult area and that passing rules alone is not the answer. Judge Lee noted that his Committee was not calling for a vote on the proposed changes at this time, but would likely do so at the August meeting. Judge Lee also noted that his Committee had considered the issue of mileage reimbursement for court-appointed mediators and had decided not to recommend authorizing such reimbursement.

There followed discussion about the new Clerk Mediation Program and the need for training for Clerks in the mediation process and new rules. It was noted that the Clerks will be meeting September 27-28. Judge Curran reported that she had talked with those planning the meeting and asked for some time on the agenda, preferably two hours, for training for Clerks. She noted that she was reluctant to refer matters to mediation herself at this point, and felt that Clerks needed more insight into the mediation process and the rules. There followed some discussion of what this training might involve. Judge Curran envisioned a presentation on the rules followed by a panel of Clerks whose counties had had some successful mediations. Judge Curran, Mr. Little, Mr. Gumbiner and Ms. Conley agreed to serve on a committee to develop training for the Clerks.

Mr. Little noted that he and Ms. Seigle were developing a video-taped version of the Clerk mediator training. He does not expect to see widespread demand for this training down the road, so a video-tape made sense. Moreover, he observed that this training lent itself to taping since it was presented in lecture and panel discussion format. He added that the Commission will need to consider the issue of whether to approve video-taped training for purposes of certification. There followed some discussion about controls

that could be put into place to insure that those seeking certification actually watched the tape. The matter was assigned to Mr. Criner's Committee. Mr. Little and Ms. Seigle agreed to talk with the members of this Committee after their June 16th training program that would be conducted as a group session but would involve some video-taped material.

Mr. Criner next reported for the Mediator Certification and Training Committee. He noted the office had received an application from a retired Clerk seeking certification as an MSC mediator with the intention of, thereafter, applying for Clerk Program certification. The Clerk had no four-year college degree as required by MSC Rule 8. Ms. Ratliff advised the Clerk that she could not certify him and, after discussion, had forwarded the matter to the Committee. There followed some discussion of MSC Rule 8.B.(2)(c) and the reasons for the four-year degree requirement. Following discussion, it was determined the Commission had no discretion to waive the four-year degree requirement. Ms. Ratliff was asked to so advise the applicant.

Mr. Laney next reported for the Dispute Resolution Committee of the State Judicial Council and noted their upcoming meeting was cancelled. Mr. Laney also reported that Judge Steelman had asked him to chair a new Commission Ad Hoc Committee to look at the issue of certifying and regulating district court (non-family) mediators. He noted that three dispute settlement centers, including Ms. Seigle's center, had requested this Committee's formation. The group's first meeting would be held in Statesville later this month. He anticipated that the group would likely break into two subcommittees – one to consider certification/regulation issues and one to look at developing program rules. Mr. Laney clarified that center participation in any new certification process developed by this Committee and approved by the Commission would be voluntary; this was in no way an effort to force dispute settlement centers to seek certification through the Commission. Judge Steelman noted that this was different from other court-based mediations in that center mediators are often volunteers. Mr. Laney stressed that all centers have been invited to participate in the discussions. He added that he would have a further report at the next meeting.

Judge Steelman next called for liaison reports. Ms. Ratliff noted that Ms. Isenhour had advised her that she had taken a new position and would no longer be mediating actively or attending Commission meetings on behalf of ACR. Mr. Laney reported for the 4th Circuit that Judge Michael Luttig had left the bench to take a position with the Boeing Corporation. Mr. Minor reported that the Mediation Network of North Carolina had restructured its Board to include more at large directors and was developing a new strategic plan. Mr. Schafer reported that the Industrial Commission is again sponsoring its annual CME Program. Ms. Ratliff reported for Ms. Wrenn that Betty Fuqua will replace her as judicial assistant liaison after the November meeting. Ms. Fuqua, she added, is the Superior Court Trial Court Coordinator in District 3A and has a long history working with the Court Ordered Arbitration Program.

There being no further business, Judge Steelman thanked everyone for coming and adjourned the meeting.

Dispute Resolution Commission

Minutes

Friday, August 25, 2006

Elon University School of Law
Greensboro, NC
10:00 a.m.

Commission members present: Steelman, Bernholz, Conley, Curran, Gumbiner, Hudspeth, Lee, Seigle, and Turner. Ex-officio members present: Anderson, Beason, Cohen, Laney (by telephone), Little, Minor, Schafer, Walker, and Wrenn. Guests and Staff present: Mr. Glover, Mr. Brown and Ms. Ratliff.

Judge Steelman thanked the school and Dean Davis for allowing the Commission to meet in the beautiful new Elon Law School facility. He welcomed Ms. Anderson as a new ex-officio member and acknowledged guests, including mediator Joe Glover and Judge Steelman's extern, Mr. Donald Brown. He called for approval of the May minutes. Ms. Bernholz noted that she was reported as present, but, in fact, was absent and Ms. Seigle gave her report. Ms. Ratliff noted that the minutes had stated that Ms. Wrenn reported for the Judicial Support Staff, but that Ms. Ratliff had delivered Ms. Wrenn's report. The minutes were approved with the corrections noted above.

Next, Judge Steelman called on Ms. Ratliff for the office report. She reported that the certification renewal period had closed and that renewals had been strong. On-line renewal had worked much better than anticipated and the feedback had been good. AOC technology staff was now working with her to implement Phase II of on-line renewal which would allow reporting of continuing education and conduct information. She reported that the office had certified a number of MSC mediators pursuant to the grandfathering provision and that she was hearing from a number of district courts about FFS mediation. She had not heard much from the Clerks of Superior Court concerning their new mediation program. Lastly, she reported that she would be going to Philadelphia in October to speak at the Annual Meeting of the Association for Conflict Resolution.

Judge Steelman noted that he was going to take Mr. Laney out of order for a report on the Commission's *Ad Hoc* Committee for District Criminal Court. Mr. Laney began by giving some history of this Committee. He noted that three community mediation centers had asked the Commission to establish a committee to consider certification of district court mediators. At its first meeting, the Committee had divided into two groups -- one to look at certification and one to consider operations and rules. He stressed that this Committee is trying to capture what is already occurring in district court rather than create a new program. Mr. Laney said that he believed revisions to enabling legislation would be necessary for the Centers to pursue certification even though it would likely be a voluntary process. He hoped to have a draft for the Commission's consideration before the end of the year. Mr. Laney also reported that this effort is not universally supported by all community mediation centers and that some preferred that the Committee not move forward. The Committee would meet again on September 22.

Judge Turner noted that One Step Further, a community mediation center, was very active in the district criminal courts in his district. He said that he was glad to hear of the Committee's work

and had thought for some time that program rules were needed. He noted further that he would make this type of mediation mandatory; that it was no less valuable than the mediation occurring in superior court and in district court family matters. He would authorize districts to have the option to participate, but make mediation mandatory, once a district opted in. Judge Steelman said the Commission would consider a recommendation from the Committee at its November meeting. Mr. Laney added that certain centers are anxious to move forward and might want to ask the Commission to commence certification of mediators before legislation has been adopted.

Next, Mr. Laney shared a letter that his Committee had received from Judge Corbett in District 11B. Judge Corbett had been approached by Campbell Law School and asked to create a new program in his district for the mediation of district civil court matters. Campbell wished to have students mediate the cases. Mr. Laney reported that he had circulated the letter to the *Ad Hoc* Committee members and had not received much response. He had, however, written Judge Corbett on behalf of the Committee and told him that he did see any problem with what Campbell was suggesting but that, since there was no authorizing legislation, that the program be voluntary rather than mandatory and that steps be taken to ensure that any district court arbitration program operating in the district was not adversely impacted. Judge Turner responded that this was another area of interest for him and that he did not understand why mediation was not available in district civil court. Judge Steelman asked him whether he thought the Commission should consider a dispute resolution menu for district court? Judge Turner responded affirmatively and asked whether there was any research indicating which case types did better in mediation versus arbitration? Ms. Ratliff responded that she did not think that any such data was being kept. Judge Turner added that arbitration does not work well in automobile accident cases involving insurance companies. Mr. Gumbiner responded that he was not sure mediation would be any more successful in settling those cases.

Judge Steelman asked Judge Turner whether he might be willing to play a leadership role in looking at the issue of mediation of civil cases in district court. Judge Steelman said that he was willing to serve on a committee. Mr. Little and Ms. Seigle also volunteered. Judge Lee echoed Judge Turner's observation -- accident cases are not resolved in arbitration -- and said that he thought mediation should be available in district civil cases and that its availability might curb the practice of filing district court cases in superior court. Mr. Little observed that one reason that mediation in district civil court had not been explored was that it was anticipated the AOC would object given that the District Court Arbitration Program was already in place. Judge Walker responded that he believed a menu was needed in district court and he offered the AOC's assistance and cooperation in exploring that possibility. He said that he was mindful that the arbitration program had been and probably would continue to be threatened whenever money was tight.

At that point, Mr. Laney concluded his remarks and Judge Steelman reported for the Executive Committee. Judge Steelman noted that Judge Walker and AOC legal staff had drafted legislation to allow the Commission to retain revenues that had not been spent at the end of the fiscal year, *i.e.*, unspent certification fees. The bill would go to the legislature in January. Even if adopted, however, the legislation would not, he cautioned, serve as an absolute bar to the money reverting to the general fund. Nevertheless, he thought it did offer the Commission some protection from a precipitous drop in renewals and would allow for funding of special projects. Judge Steelman asked the Commission to approve proceeding with the legislation, and they voted affirmately.

Next, Judge Steelman noted that the General Assembly had approved a disaster mediation bill. The legislation, he explained, was designed to expedite the resolution of insurance claims. Judge Steelman reported that he had spoken with Wayne Goodwin of the Insurance Commissioner's

office and had offered the Commission's assistance. Ms. Ratliff briefly noted that there were some problematic sections in the statute. Judge Steelman asked whether any Commission members were willing to assist him in working with the Insurance Commission to draft some amendments and to consider implementation. Messrs. Little and Beason volunteered.

Judge Lee next reported for the Program Oversight Committee. Judge Lee explained changes to MSC and FFS Rule 7 that his Committee was proposing. The revisions were intended to clarify the meaning of "good cause". His Committee was also recommending that MSC Rule 7.C. (now D.) be revised to make it clear that the word "parties" refers to named parties only. Judge Lee called for a vote and the changes were adopted unanimously. Thereafter, there followed a very lengthy discussion of pre-audit certification and a recent Court of Appeal's decision (Finger v. Gaston County, 178 N. C. App ___ (5 July 2006)(COA 05-871) which held that a settlement agreement was void because Gaston County did not have the authority to enter into the settlement agreement without the pre-audit certification required by statute, documenting that the governmental entity has available the funds to consummate the agreement. It was discussed that mediators need to be educated that a pre-audit certification will be required if a governmental entity is a party and is being required to pay monies pursuant to the terms of the agreement. There was some discussion about whether the mediation rules should be amended to require a governmental entity to bring a pre-audit certification letter to mediation. Some responded that would not be practical since the entity wouldn't know the amount until after the mediation has concluded. Judge Steelman asked Mr. Schaffer to consider this matter further since these issues typically arise in workers' compensation cases. Judge Walker suggested some language that, when an agreement has been reached, would require a governmental entity to seek certification in good faith following mediation. Judge Steelman noted this was a complicated issue and suggested to Ms. Anderson that it would make a good topic for the Dispute Resolution Section's next Annual Meeting. Ms. Anderson agreed.

Next, Judge Steelman asked Mr. Brown to address the group. Judge Steelman and Mr. Brown noted that he had done legal research on the use of religious arbitration (Sharia Law) in Canada and he explained how the Sharia system operated. He suggested that Canada had made a mistake in refusing Muslims the right to have their divorces settled under Sharia law rather than Canadian divorce law. He argued that woman were not disadvantaged under Sharia. After his talk, there followed a question and answer period. Judge Steelman observed that he thought it was good for Commission members to hear how dispute resolution processes were being used in other countries, and problems with which those countries are dealing.

In Mr. Criner's absence Ms. Ratliff reported for the Mediator Certification and Training Standards Committee. She drew the members' attention to proposed changes to the Clerk Trainer Guidelines. She said that a new Section I. had been added to authorize availability of this training on video-tape. This would address concerns about how often training could be offered. Section I was unanimously adopted by the Commission. Next, she noted that the Committee had adopted a "staleness" policy relative to FFS training reported on certification applications. She said that that policy mirrored a similar MSC policy.

Ms. Bernholz next reported for the Standards, Discipline and Advisory Opinions Committee. She noted that her Committee had addressed three complaints this quarter. The first involved a mediator who failed to attend a second session held in a mediation that had been recessed, who did not reduce the agreement to writing, and who reported on an outdated form which had not been fully completed. The Committee decided to privately admonish the mediator because there had been no other complaints and the mediator's failure to reduce the agreement to writing, had not actually harmed the complaining party. In the second matter, a mediator had lost his temper

in mediation, used inappropriate language, and behaved in an adversarial way toward a party. The Committee decided to publicly admonish the mediator. Following staff investigation of the third complaint, no probable cause was found and the complaint was dismissed. Ms. Bernholz next reported that her Committee was recommending that staff always issue an Advisory Opinion in instances where discipline is imposed. Commission members unanimously adopted this recommendation. Next Ms. Bernholz directed the members' attention to a proposed new Advisory Opinion addressing a mediator's duty to warn parties of financial risk because of a breach in confidentiality. She noted that the opinion was very narrowly drawn and that it admittedly raised other issues regarding file retention and technology that the Committee intended to address at a later time. She moved for its adoption and the Opinion was unanimously adopted. Ms. Bernholz last requested that the Commission members vote on the proposed new complaint form which had been revised to use simpler language and to remove a provision relating to liability of a complaining party for harassing a mediator. The revised form was unanimously adopted. Ms. Bernholz noted that her Committee had met three times this quarter, including a meeting during lunch today, and was very busy. She reported that in the coming quarter they would be working to produce a comment on a question proposed by the State Bar, *i.e.*, does an mediator/lawyer have a duty to report an attorney's unethical conduct in mediation to the State Bar? She also noted that they will be considering some possible major revisions to the Standards of Conduct Professional Conduct for Mediators.

Next, Judge Steelman called for Liaison Reports. Ms. Anderson reported that an orientation session had been scheduled for new Dispute Resolution Section Council members. She also noted that the Section had begun an outreach program to insurance companies and adjusters. Ms. Cohen reported for the AOC that the Custody Mediation Program would be expanded statewide and the remaining ten districts brought on board. She also reported that the permanency planning mediation effort was moving forward and that Greg Firestone had been brought in to conduct training and that an *ad hoc* committee would be considering policies and program rules. Judge Walker also reported for the AOC that the courts had been very successful in the last legislative session, that technology would be augmented and new staff hired. The use of e-citations were expanding rapidly. Lastly, he noted that Justice Building renovations were delayed. Mr. Minor reported that eight percent of the MNNC funding had been restored this legislative session. He also reported that the Network is proposing designing a research tool to solicit feedback from district attorneys, mediators, center personnel, complaining witnesses and others involved in district criminal court mediation regarding the work of the *Ad Hoc* Committee. Mr. Schafer reported that the Industrial Commission will hold its annual conference and CME on workers' compensation mediation on October 18-20 in the Research Triangle Park. Ms. Wrenn reported that Trial Court Coordinators will meet in October. She also reminded everyone that her term on the Commission was drawing to a close and that, after the November meeting, Betty Fuqua would replace her as court staff liaison.

Judge Steelman asked everyone to be sure to bring their calendars to the November meeting since they would need to set meetings out for new calendar year. Judge Curran offered the new District 26 courthouse as a future meeting place for the Commission and it was also noted by Ms. Ratliff and Ms. Seigle that the Dean of North Carolina Central Law School had offered the board room at the school as a permanent meeting place. There being no further business, Judge Steelman adjourned the meeting.

Dispute Resolution Commission

Meeting

Friday and Saturday, November 3-4, 2006 Green Park Inn, Blowing Rock, NC

1:00 p.m., Friday, November 3

Members present: Steelman, Bernholz, Conley, Criner, Curran, Gumbiner, Hay, Lee, Seigle, Taylor, and Turner. Ex -Officio members present: Anderson, Beason, Fuqua, Laney, Little, Minor, Morris, and Wrenn. Staff and guests present: Ratliff, Jabber, Johnson, and Massiello.

Judge Steelman introduced and welcomed new Commission member, Edward Hay, a bankruptcy attorney from Asheville; and new ex-officio member, Betty Fuqua, Trial Court Coordinator in District 3A. Mr. Hay replaces Judge Lewis and Ms. Fuqua replaces Ella Wrenn. Judge Steelman next introduced guests: Leila Jabbar (Carolina Dispute Settlement Services), Melissa Johnson (Blue Ridge Dispute Settlement Services), and Terri Massiello (Piedmont Mediation Center). Judge Steelman called for approval of minutes and they were adopted as submitted. Judge Steelman then administered the oath to Mr. Hay and to Judges Lee and Turner and Ms. Conley, who were re-appointed to the Commission. Judge Lee then administered the oath to Judge Steelman who was re-appointed for a second term as Chair. Then, Judge Steelman presented a certificate to Ms. Wrenn, acknowledging her six years participation as Judicial Support Staff Conference liaison to the Commission.

Ms. Ratliff gave her report for the Commission's office. Judge Lewis was mailed a plaque recognizing his service. Commission support staff, Sharon Laue, was given a promotion and 7% pay increase and new hire, Maureen Robinson, was working out very well. The Commission's website had been given a national award for excellence. She spoke with two NCBA staff regarding concerns that the last Practical Skills Course for new attorneys did not contain instruction on mediation. They explained to her that cuts in the number of hours devoted to the course and recognition that law schools were now doing much more to educate young lawyers about dispute resolution were largely responsible for the decision not to include mediation in the program this year. She was assured that, in the future, the topic would be covered periodically, though not annually. The Commission's Annual Report for FY 2005/06 was distributed in September. She had been advised that the AOC is making adjustments in its reporting system to enable it to collect statistics for the new Clerk Program. The United States Department of Agriculture is launching a new farm mediation program in North Carolina that will focus on disputes between farmers and banks. Lastly, she spoke to the Clerks of Superior Court at their conference about the new Clerk Mediation Program and had just returned from the Association for Conflict Resolution's annual conference where she had participated in a panel discussing regulation of court-based mediators.

Judge Curran reported on the mediation training session for Clerks of Superior Court presented at their conference in Dare County in September. Judge Curran, AOC lawyer Pamela Best and Ms. Ratliff had met with the Clerks to talk about program rules and operations and use of the Commission's website. She described the clerks as "very

positive" about mediation and she expects to see the number of referrals begin to increase. She recently referred her first estate case to mediation.

Mr. Laney reported for the Commission's Ad Hoc Criminal District Court Mediation Committee. He reviewed the proposed statute with the Commission. Ms. Bernholz asked what certification would entail and whether Commission staff could support this function. He responded that certification would be a joint effort between the Centers and the Commission and he anticipated no more than 500 applications. Ms. Bernholz also asked about cost since these mediators are typically volunteers and Mr. Laney responded that every effort would be made to eliminate or minimize certification costs. Judge Turner asked how he would implement the Program in his district. Mr. Laney suggested that he meet with the District Attorney and his local Center to determine whether they were interested. The statute does not mandate participation by a judicial district or Center. Mr. Minor noted that many of the participants in these mediations are indigent. He asked whether there had been discussion about charges for mediation services. Mr. Laney responded that there had not been a lot of discussion, but that this was clearly a different situation than the MSC and FFS Programs. Mr. Minor also expressed concern that the General Assembly might try to mandate Center participation and require charges for mediator services. Judge Turner asked whether there had been any consideration of mandatory referral of cases. Mr. Laney responded that the draft statute had originally contained a "shall" which had been replaced with a "may" since there were concerns that a prosecuting witness could not be required to mediate. Ms. Bernholz asked why this Committee was looking at this issue. Mr. Laney responded that the immediate reason was a request by three Centers that a committee be established. However, he added that he thought that certification was an important step in the evolution of criminal district court mediation and one that might reassure judges who have been reluctant to utilize mediation in District Criminal Court. This statute was a first step in creating a real framework for mediation of criminal district court cases.

Judge Steelman asked when the program would commence operation. He suggested a January 1, 2008, effective date be inserted. Judge Steelman also wondered whether the legislation adding a community mediator to the Commission should be submitted to the General Assembly when the Criminal District Court Mediation Program was being established only as a pilot program. Mr. Minor proposed that it not be a pilot program. Also, Mr. Minor suggested that the new Commission position created not go to a volunteer mediator since he was concerned about consistency of participation. He suggested that the statute say "representative" rather than "volunteer". Judge Taylor asked whether the legislation had been forwarded to the District Attorney's Association. Ms. Bernholz asked about the criminal defense bar. Mr. Laney responded, "no" but noted that district attorney staff had been involved in drafting as had a number of judges. Judge Curran noted that the North Carolina Association of Clerks of Superior Court was now known as the "Conference" of Clerks of Superior Court. Ms. Seigle moved that the Commission approve the draft proposals with the revisions suggested, *i.e.*, removal of the word "pilot" in the proposed new legislation, insertion of the word "representative" for the word "volunteer" to characterize the new Commission member in the revisions to N.C.G.S. 7A-38.2, insertion of an effective date, insertions of "Conference" in lieu of "Association" and the correction of two typographical errors pointed out by Judge

Taylor, to be submitted to the State Judicial Council and the General Assembly. The motion was adopted unanimously. Judge Steelman thanked Mr. Laney for his hard work.

Judge Steelman reported for the Executive/Operations Committee that Ms. Laue had been reclassified by the AOC. He next discussed Session Law 2006-201 (State Government Ethics Act), which may require financial disclosure by members of the Commission if the 'ommission's authority is deemed to be more beyond mere "advisory authority" He added that AOC legal counsel had preliminarily determined that the Commission's authority was more than advisory authority since it regulated and disciplined mediators. AOC will keep the Commission posted on this matter. Next, Judge Steelman noted that it appeared that the American Arbitration Association would be the administrator for the State's new Disaster Mediation Program. Some Commission members wondered how this decision was made and there were concerns expressed about provisions in the new legislation that deviated from the MSC and FFS legislation.

Mr. Criner reported for the Mediator Certification and Training Committee. His Committee addressed an appeal of a staff denial. Ms. Ratliff denied an application by a magistrate for Superior Court certification. The application was denied because the applicant had been licensed to practice law only 4 ½ years. The applicant argued that he had satisfied MSC Rule 8.B.(1) in that he was licensed and had more than five year's experience as a magistrate that it did not matter if some of the experience was gained prior to his law licensure. Mr. Criner reported that the Committee affirmed the denial. They read the experience requirement set by MSC Rule 8.B.(1) to mean experience acquired post licensure as an attorney. However, the Committee agreed the Rule was vague and to avoid further confusion proposed revising MSC Rule 8.B.1.(b) and FFS Rule 8.A.(2) to expressly state that the five year's experience is to follow licensure. The Commission unanimously agreed to recommend the revisions to the Alternative Dispute Resolution Committee of the State Judicial Council.

Next, Mr. Criner reported that Ms. Ratliff had expressed concern to the Committee about an MSC training program certification application filed by Western Carolina University. Specifically, she was concerned about the time frame for the 40-hour portion of the training (there will also be a 20-hour agricultural mediation component), which was scheduled to be conducted over the course of several months, *i.e.*, a weekend session in November, a Saturday in December, and then two sessions in February. Ms. Ratliff feared momentum and flow would be compromised over such a long period. The Committee, he reported, was also concerned and had advised the trainer that the 40-hour portion must be completed in 30 days. Mr. Criner presented a proposed revision to both the MSC and FFS Trainer Guidelines that would require a 40-hour course to be completed within 30 days. Professor Morris stated he was concerned about the course exception being limited to courses affording 3-hours credit. He thought two credit hours was more reasonable. The matter was tabled and Ms. Ratliff was asked to contact some law schools to inquire about credit hour values for courses.

Judge Lee reported that the Program Oversight Committee had not met, as there were no matters pending before it.

Ms. Bernholz reported for the Standards, Discipline and Advisory Opinions Committee. She began by notifying the group that a mediator was appealing sanctions imposed on him by her Committee. She asked whether she or members of her Committee could or should attend the proceeding, though they may not actually participate. Mr. Criner said that he thought the presence of those who had reached the initial determination could have a chilling effect. Judge Steelman noted that he thought it was best that they not be present during the hearing before the full Commission. He praised the Committee's work to date and Judge Curran added that the Committee's role was to do what it thought was right and not be concerned with what the Commission might ultimately do. Next, Ms. Bernholz requested the Commission consider the matter of the posting of sanctions on the Commission's website and in its newsletter. Ms. Ratliff was asked to track the NC State Bar's policy relative to disciplinary postings on its website. The posting would appear once in the Commission's newsletter.

Next, Ms. Bernholz called attention to proposed Advisory Opinion 06-10, which addresses mediator authority to control attendance. After discussion, the Opinion was unanimously adopted minus the two optional paragraphs appearing at the end of the draft Opinion. The discussion then returned briefly to the upcoming appeal. Mr. Hay asked whether he could hear the appeal. He is a new member of Ms. Bernholz' Committee and was not involved in the determination. Judge Steelman stated that he saw no reason for Mr. Hay's recusal. Ms. Bernholz next called attention to proposed Guidelines for Recusal that her Committee had developed for use in helping members determine whether they should hear matters on appeal to the full Commission. They were unanimously adopted. Ms. Bernholz next reported that her Committee was considering proposed major revisions to the Standards of Professional Conduct for Mediators.

Finally, Ms. Bernholz told the members that the NC State Bar had requested Commission comment on a matter, *i.e.*, whether an attorney/mediator is obligated to report attorney misconduct that s/he learns of in mediation to the State Bar pursuant to Rule 8.3 of State Bar Rules of Professional Conduct. The Commission's Standards, she noted, would prohibit such reporting because of confidentiality. She noted that this issue, as well as the larger issue of conflicting professional standards in general, is a topic of considerable interest within the national mediation community. Ms. Bernholz noted that the ABA's Dispute Resolution Section will issue an Advisory Opinion on this subject and the Commission could submit this issue to the ABA, rather than addressing it. Mr. Beason reported that Alice Mine at the State Bar was prepared to recommend that mediator/attorneys not be required to report attorney misconduct. Judge Turner had a different view. He suggested that what happens in mediation has to take second place to what happens in the larger legal context. He felt attorney/mediators were obligated to report attorney misconduct. Messrs. Beason and Little suggested that preservation of confidentiality was essential to the mediation process. They are also very concerned about mediators being put in a position where they are called on to judge what is and what is not unethical attorney conduct. Professor Morris responded that some things are not gray and the key word is "knowing". If a mediator "knows" the conduct is unethical, s/he is obligated to report it, that it is in the public interest to do so and the public expects it. Judge Turner asked whether there will be a different standard for non-attorney mediators. At this point, Judge Steelman stopped the discussion and called for liaison

reports. He asked everyone to read the majority/minority reports on this issue and come prepared to discuss them on Saturday morning.

Judge Steelman next called for liaison reports. Ms. Anderson reported for the Dispute Resolution Section Council. The Council, she said, had discussed the State Bar matter and that the issue was hotly debated with no consensus. Mr. Laney reported that the physical offices of the Fourth Circuit Mediator were closing and that mediators would conduct business from their homes. Mr. Minor reported that the Network is restructuring and revising its by-laws. They have also added at-large board members to the Network Board. Professor Morris reported that the Mediation Institute at Central Law School was considering a new certification program so that law graduates would receive not only a law degree but a certificate in dispute resolution. Ms. Wrenn, in reporting for the Judicial Support Staff Conference, explained some of the reporting gaps in the MSC caseload statistics and noted that AOC staff is looking into automating reporting. She added that Ms. Ratliff would be speaking at their spring conference. Ms. Wrenn then took a moment to thank the Commission for welcoming her, and by extension the membership of Judicial Support Staff Conference, over the past six years.

Before recessing for the day, the Commission agreed on the following dates and locations for upcoming meetings: February 2 (Durham), May 18 (Charlotte), August 10 (Greensboro), and November 2-3 (Blowing Rock).

8:30 a.m., Saturday, November 4

Ms. Bernholz began by highlighting the differences between the majority and minority reports. She noted that the majority report acknowledges that mediators can report crimes or fraud, but stops short of requiring reporting of other unethical conduct in favor of protecting confidentiality. The minority would require reporting of all known unethical conduct. Ms. Bernholz asked whether an attorney/mediator who suspects unethical conduct has a duty to make inquiries. Ms. Conley responded that once a mediator starts to investigate, s/he is no longer neutral. Mr. Little believes the Commission should not encourage mediators to be judgmental. Professor Morris countered that the Commission should not protect unethical lawyers or even give the appearance that it is doing so. Mr. Little believes that Rule 8.3 is too vague. Professor Morris is sure the public expects attorney mediators to report unethical attorney conduct. Ms. Conley asked what would happen if a mediator reported unethical conduct and the State Bar determined that there was no substantial ethical violation. Does the lawyer then report the mediator to the Commission? Mr. Laney, added, will they take my license if I don't report? Mr. Criner is concerned about the idea of "knowing". Since people posture and sometimes even lie during negotiations, he is not sure that mediators are typically in a position to "know" what someone has done. Mr. Little reminded everyone that they were not just talking about lawyers; there are therapist mediators, psychologists, social workers and others with their own professional codes. He suggested the Standards of Professional Conduct for Mediators need to "cleaned up" to clarify that mediators have a duty to report crime and fraud to the court. Ms. Anderson noted that she would like to take the reports to the next meeting of the Council (December 7) and have them debated

there. The Commission members concurred. There being no consensus on this issue, Judge Steelman sent the matter back to Ms. Bernholz' Committee for further discussion and recommendations to the Commission.

There being no further business to be brought before the Commission, Judge Steelman thanked everyone for coming and adjourned the meeting.