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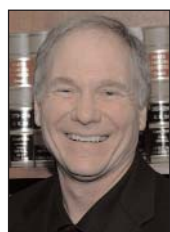
# THE PEACEMAKER

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## The Chair's Comments

A Word from Kenneth P. Carlson, Jr.

So it's a new year – a new decade! From a dispute resolution perspective, what strikes me most when entering the second 10 years of our new millennium is how fortunate, yet unfortunate we are. Fortunate in that our many technological and social advances continue to bring us closer together; unfortunate in that the closer we become, the more exposed are the problems that often keep us apart.



Ken Carlson

While certainly true that the best way to resolve those differences is first to understand them, one thing I've learned in trying, mediating and arbitrating lawsuits is that differences usually remain regardless of the understanding. In the court system this

tends to be true no matter who "wins" a dispute through motion, trial or appeal, and no matter how disputes are "resolved" through mediated settlements or other forms of ADR. So here are some thoughts on addressing what I consider one of the most frustrating and perplexing challenges of alternative dispute resolution: actually resolving disputes rather than simply settling cases. Not coincidentally, this is also the overall theme of our Annual Meeting and CLE on March 19.

First, the macro approach starting with an initial, simplistic view. Especially in our increasingly smaller and more populated world, the importance of getting along as individuals, societies and nations seems to grow in proportion with the speed of technological advances, population growth and dwindling/changing natural resources. That being said, we humans do have a way of surviving and thinking of new, creative ways of doing it. So while the scenario in the film *Waterworld* may be a reality in ages hence, at least for now we can hope that it won't actually come to pass and that somehow we'll all find a way to hang together. Within that context, perhaps there is no greater opportunity for what we do as mediators and arbitrators than the world as we know it now – and arguably there is no greater calling than to be the peacemakers of that world as our aptly named newsletter encourages us to be.

From a micro view things really get tougher, because this is where optimism often runs arm-in-arm with naïveté. I do think true dispute resolution – or conflict resolution as it's often called – means more than just understanding or even accepting someone or something for what they are. Rather, I remain optimistic (naïve?) enough to think that in most situations there are

common grounds which, if recognized and cultivated, can go to the very heart of what understanding and acceptance mean. But for that process to be meaningful, it must be done in a manner that also maintains the enduring principles of truth and justice which keep those concepts of understanding and acceptance from regressing into mere appeasement of what should never be appeased.

At least for me, it is at this point where the foundation of true dispute resolution begins – and at least for me, it is at this point where I like to think a four-step approach to actually resolving conflicts might help. It's an approach that, especially in its latter stages, takes more courage than effort, and the effort is strenuous enough. The overview goes as follows:

First, acknowledge the facts on which the dispute is based. Facts as they are, not as we interpret or wish them to be. In other words, what actually happened? When and where, and who was involved?

Second, as a result of those facts why did the dispute occur? In short, how were the facts interpreted and why? How did the parties respond and what ripple effect was then put into motion? And, significantly, what were the consequences and were they intended?

Third, each party should place themselves in the other party's shoes and make a good-faith effort to understand the other's position even if they don't agree with it. In other words, play a game of litigation charades by forcing yourself to be an advocate for your opponent. Challenge yourself with ideas that

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## Comments *from page 1*

are foreign, knowing that if nothing else you'll have achieved a new perspective that touches the core of the dispute you're trying to resolve.

Fourth, and most importantly, if resolution is to occur, acknowledge that humility is a strength, not a weakness, and that in each of us there is a capacity to forgive and to give more than we receive. Of all the steps, this is the most difficult but, frankly, the most needed. In religious terms, it's a form of sacrificial living – a concept that stretches across millennia of faith, and as a general rule across many different religions. But one certainly does not have to be religious to live sacrificially; instead, we merely need the

courage to sometimes place others and their needs over our own.

Which brings me to some concluding thoughts about how this fits into the realities of our judicial system, where most disputes will never end with the parties simply shaking hands, apologizing for any misunderstandings and putting the other party's interests above theirs. But that's for the next edition of the "Chair's Comments" – and meanwhile, feel free to send me any thoughts. With a collective mind, we might actually find more ways to resolve disputes rather than simply settle cases. ■



## Is Your Law Library Complete?

The NCBA CLE department publishes several section deskbooks and manuals that are valuable and useful resources for any law office.

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- N.C. Small Law Office Resource Manual, Fifth Edition (anticipated release in 2010)
- N.C. Workers' Compensation Deskbook, Second Edition (2009)

# Family Mediation at a Dispute Settlement Center

by Frances W. Henderson

North Carolina's Family Financial Settlement and Custody and Visitation Mediation programs follow a long history of family mediation practiced in community dispute settlement centers. North Carolina's mediation roots are in these centers, now accessible to citizens from Wilmington to the Qualla Boundary. Beginning with the Dispute Settlement Center (Orange County) in 1978, these not-for profit agencies serve over 63,000 North Carolinians each year through a variety of court-referred and community programs. The 22 dispute settlement centers are free-standing and vary in services offered.

Family mediation, defined initially as a process for helping married couples develop separation agreements, has expanded to include services to unmarried couples, siblings dealing with eldercare issues, and even "marital mediation" to help improve marital problem solving.

## Our Family Mediation Program in Orange County

At our center, we work with over 200 people a year seeking more collaborative ways to settle issues between former intimates. This motive of good will, along with the often-stated desire to "save on attorneys fees" leads people to us. We are quick to minimize the cost-saving aspect and emphasize the emotional and psychosocial benefits. Also, we strongly encourage our clients to have legal representation. Most of our referrals come from the local bar.

Effective client screening is key. Separate interviews with potential clients look for capacity (including lack of active substance or drug abuse) absence of domestic violence, and understanding of the mediation process. Some cases are not appropriate for mediation and are not accepted.

## Client Diversity

Our clients represent a wide range of

socio-economic levels. Our sliding scale fee based on income accommodates the professor, the high-tech worker, the stay-at-home parent, the grocery store clerk, and the unemployed. Parties pay for each session individually. There may be from one to eight sessions depending on complexity and the parties' needs.

Clients may be married or unmarried, gay or straight. Intake (including marketing materials) which is sensitive to these

**“ a mediator . . . must remember [her] role as a guardian of the process rather than commentator on the substance. ”**

differences makes an enormous difference. Other clients may prefer a Spanish speaker (the largest second language group in our area) or someone reflecting their ethnicity.

Religious and lifestyle issues outside the ken of a mediator can present special issues, as the discussions in divorce mediation may well appropriately touch on these. A mediator unfamiliar with Wiccan practices or three-way families, for example, must remember her role as guardian of the process rather than commentator on the substance.

Our mediators (staff and volunteers) have at least 60 hours of mediation training, plus an apprenticeship and continuing education. Many have much more, and several are practicing attorneys as well. Using a co-mediator model provides further accountability, and a chance to reflect male-female or other diversities in the mediation room.

What is our motivation for providing

this intense service on a sliding scale fee basis? The program is consistently a money-loser, subsidized by other sources, yet board, staff, and donors are committed to it. We see the enormous benefits to grieving people who are going through an awful time. We family mediators are privileged to have clients share their struggles in building new, separate lives. There is also strong evidence of the efficacy of family mediation in maintaining good parent-child relationships over time.

We know that mediation cannot put everything right, but it does promote a different way of doing things that can have long-lasting positive effects. The usual way to end a relationship is to angrily say, "I never want to see you again!" Mediation asks parents to do something different for their children's sake, which is to negotiate in a civil manner with their former partner. As family mediation pioneer Dr. Isolina Ricci describes in her book *Mom's House, Dad's House* (1980, 1997 Fireside Books) this development of a businesslike relationship between the divorced parents can ease the pain for children and enable an adjustment. If such a relationship is developed, it sets up a pattern for relating that can continue for decades, as the two divorced parties see their children grow up and have families of their own.

Recent research at the University of Virginia bears out that divorce mediation has positive effects over time. In a landmark study of randomly-selected families over a 12 year period, it was demonstrated that those who mediated ended up with better parent-child relationships. See Emery, R.E., Laumann-Billings, L., Waldron, M., Sbarra, D.A., and Dillon, P. (2001). "Child custody mediation and litigation: Custody, contact, and co-parenting 12 years after initial dispute resolution." *Journal of Consulting and Clinical Psychology* (Vol. 69, 323-332).

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### New Ways with Old Means: Marital Mediation

Some couples in mediating their separation do so well that the mediator may wonder if divorce could have been forestalled. Always careful to practice neither therapy nor law, community mediators are considering the developing practice of "Marital Mediation." Pioneered by Boston attorney-mediators John Fiske and Laurie Israel, ([www.mediationtostaymarried.com](http://www.mediationtostaymarried.com)) marital mediation aims to keep couples together using established family mediation techniques.

In these mediations, parties are encouraged to agree upon the source of conflict in their relationship and develop practical guidelines for behavior change. The mediator may suggest communication techniques. The parties may or may not develop a postnuptial agreement that could be drafted by an attorney.

### Eldercare Mediation

Given the demographics of our population, the need for eldercare mediation is very much upon us. Most areas have Eldercare provider networks, and the practice of elder law is growing. For a community mediator, the issues likely to be presented in eldercare cases are familiar: poor communication over a long period of time, decreased trust, unclear roles in financial and care management, and a looming crisis – the death of the parent(s).

A recent case we had illustrates this. Two brothers, one living locally and one in another state, had a mother suffering from Alzheimer's. The local brother had power of attorney and oversaw health care and finances for his mother. The out-of-state brother felt "out of the loop" and confused about the financial arrangements. As there was a far amount of

money, there were financial advisors and attorneys helping the family. When the local brother called us, he was overwhelmed by his brother's mistrust. The other brother, meanwhile, claimed to lack sufficient information about what was going on. A meeting with the financial advisors was set and tensions were high.

In mediation, the brothers were able to share face-to-face their experience of unclear roles between them. One was burdened with care giving responsibilities, while the other was left to wonder what was going on with his family's money. The mediator normalized role confusion as a source of conflict and encouraged a free exchange of concerns, and a brainstorming of solutions.

By the end of the day, the brothers had hardly healed childhood wounds. But, they had worked out a plan for sharing information about care and finances for their mother, and were ready to have a productive meeting with their financial advisors.

### Conclusion

We've seen an enormous growth in the practice of mediation over thirty years, and new applications continue to develop. Just as the states are the "laboratories of democracy," it could be said that ideas for mediation practice tend to percolate up from local communities.

Your local community dispute settlement or mediation center can be a resource for your clients, as well as for your neighbors and friends. Centers are community-based and publicly supported and should be called upon for help. With the bar's support and involvement over the last three decades, the legislature has supported dispute settlement centers (sadly with a 25% reduction last session.) acknowledging their useful work. ■

*Frances Henderson is the Executive Director of the Dispute Settlement Center (Orange County) and a 1985 graduate of UNC School of Law. For more information, visit [www.disputesettlement.org](http://www.disputesettlement.org). Contact the Mediation Network of NC (919) 663-5650 for referral to a center near you.*



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# Finding an International Mediator

## Identifying Suitable Candidates to Mediate an International Commercial Dispute

by Michael McIlwrath, Diane Levin, Giovanni Nicola Giudice & Jeremy Lack

Once parties have agreed on location and potential dates, they proceed to what is currently the most challenging part of international mediation: identifying candidates and selecting a mediator. Obviously, they will want someone who possesses the qualities and skills they perceive would be helpful in achieving resolution of their dispute. The international character of a dispute will only magnify the difficulties parties already face in locating someone each side will trust and respect. Unfortunately for parties, the identification of suitable candidates and agreement on the appointment of mediators (and arbitrators, for that matter) remains firmly embedded in pre-20th century technology: imperfect information transmitted via word of mouth, and what can be gleaned from a curriculum vitae or an initial discussion with the candidate. Although there are some hopeful indications that this will change as private international dispute resolution grows, it is through these admittedly unreliable channels that parties must generally weigh their considerations about a mediator's suitability for their dispute.

In the case of a dispute between two domestic parties, the ease with which they are able to locate a suitable mediator will vary based on the country in which the dispute arises. In the United States, for example, there are literally dozens if not hundreds of institutions at the national and local levels that can provide parties with names of qualified candidates. By contrast, in countries where mediation has not developed into a robust profession, there may be few or no institutions to provide such a service. For better or for worse, international mediation is more akin to the latter situation, with few institutions even claiming to specialize in the resolution of international commercial disputes. And where such claims are made, parties may want to eye them with suspicion. Just as there are lawyers in some countries who claim to be "mediators" after having attended a conference or heard a lecture on the subject, there are international arbitrators who also hold themselves out as "mediators" despite never having been trained in nor had much experience with the

process. They are not "mediators" as the term is generally used to refer to a specific profession.

### The Opposing Party: Sharing information about potential candidates.

The selection of a mediator is too often confused by inexperienced counsel and parties with the process of selecting an arbitrator, perhaps because there are superficial similarities in appointing a neutral third party in the context of a dispute in which trust will be lacking. In contrast with the adversarial process of appointing someone who will adjudicate a dispute and hopefully be favorable to one side's positions, however, the selection of a mediator should be a collaborative and even congenial one. Indeed, it is in a party's strategic interest to find someone that the other side will like and trust (since settlement is the goal). There are also tactical advantages to deferring to the other side. A savvy party will treat the selection process not as an adversarial one but as genuine collaboration, and use that collaboration to build trust that will be useful in the mediation. It should come as no surprise, therefore, that a meaningful number of cases are successfully resolved by the parties as a result of this dialogue, and before a mediation even takes place.

### Word of Mouth

As with the appointment of arbitrators, what parties really hope to identify in candidates are the soft qualities and skills that are not readily apparent from a curriculum vitae or public listing of the mediator's name and general qualifications. There is no greater selling point than a peer who attributes a past settlement to a particular mediator's skills. But while word-of-mouth recommendations may be useful means of identifying and appointing mediators in the context of disputes between domestic parties, it not usually a very good one in the international context where the issues and parties are likely to vary even more substantially from one dispute to another. While a previous party's satisfaction with a certain mediator is a help-

ful endorsement, it should be considered no more than a starting point in the process of identification of suitable candidates. Thus, while we encourage parties to ask their contacts to recommend candidates, we warn that they may find these recommendations of limited value in practice.

### Institutions

Although an institution may have the experience to appoint someone well-qualified for the dispute (which is not a given, however, in an international case), the parties' failure to reach agreement on a mediator is not a good way for them to start the mediation process. That said, parties should feel perfectly comfortable asking institutions to provide a list of potential mediators to consider. There is no downside to this, and institutions will attempt to identify candidates that meet the selection criteria provided by the parties. Additionally, obtaining a list of names from institutions can reduce the risk of "reactive devaluation" that a party may encounter from the other side when proposing candidates. Ironically, this psychological term is part of the tool kit used by mediators to overcome negative or mistrustful feelings that one side will associate with the other's proposals. When drawing up a list, institutions will have one of two sources for the candidates: a closed pool of mediators maintained by the institution, as is the case with many mediation institutions, and "going to market" to find suitable candidates, an approach usually adopted by arbitration institutions that also offer mediation services.

### Mediation Institutions

Many mediation institutions maintain a closed pool or list of mediators, and often exist as a form of cooperative or partnership for the benefit of the mediators included in this pool. For example, this is the approach followed by the Centre for Effective Dispute Resolution (CEDR) in London, JAMS in the US, and the ACB in the Netherlands, three well-known mediation institutions. In our experience, mediation institutions,

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because of their desire to promote the practices of the mediators associated with them, are generally happy to assist parties by providing lists of suitable candidates, often at no charge. The advantages of this approach, particularly for domestic disputes, is that the institution regulates both the quality of its pool and will likely have the benefit of experiences and party feedback that it can use to help parties find the person most suitable for their dispute. The drawback, of course, is that the pool is likely to be limited for the most part to mediators whose only experience is domestic litigation. In the best of cases, however, the institution's pool may include a handful of highly experienced commercial mediators whose experiences are also international, and parties can benefit from having them on their list. There are also certain institutions that are training or developing neutrals having specific subject-matter expertise for disputes where there is a belief that appointing a specialized neutral may be preferable (e.g., GAFTA for commodities and shipping disputes, and WIPO for intellectual property related disputes). These lists are not necessarily open. (For example, although WIPO publishes its list of domain name panelists on the Internet, this is not the same list it has for mediators and arbitrators, which is not publicly available).

### Arbitration Institutions That Provide Mediation Services

All of the major international arbitration institutions today – the ICDR, ICC, LCIA, WIPO and SIAC – now offer mediation

services in addition to arbitration. This is also true of some leading regional institutions, such as the Chamber of Arbitration of Milan, the Swiss Chambers of Commerce, and the Chamber of Mediation and Arbitration of Paris (CMAP). Rather than maintaining their own pools of mediators, arbitration institutions take a “go to market” approach of attempting to find the most suitable candidate for the parties. The ICDR, for example, will request input from the parties and then refer the matter to regional offices for candidates who may fit the relevant description. The ICC adopts a similar approach, relying on its network of “national committees” to identify suitable mediators. (While the ICC does not in their ADR Rules state that they will provide parties with a list of candidates, they will oblige a party request for one after an ADR proceeding has been initiated.)

Arbitration institutions may also be adept at supporting the parties' administrative and logistical needs, such as negotiating fees with the mediator, arranging for suitable meeting facilities for the mediation, and managing all aspects of invoicing and payment.

There are disadvantages of requesting names from an arbitration institution, however. The first is that unlike mediation specialists who refer parties to their listed mediators, arbitration institutions will charge the parties a fee to conduct their search on the market, i.e., they will not provide a list until the parties have appointed the institution and engaged them in the process. The second is that an arbitration institution will

obviously have much less experience in mediation than an institution dedicated to that purpose. The ICC's national committees, for example, have a substantial reputation and experience in appointing arbitrators, but the total average ICC caseload of mediations conducted is fewer than 20 per year. Still, the “go-to-market” approach adopted by an international arbitration institution, even if not perfect, is in many ways best suited to identifying a mediator for an international dispute rather than relying on the restricted pool of largely domestic mediators maintained by a mediation institution. ■

*This is Part 1 of an abridgment of an article produced collaboratively online as a “knol.” The article may be found in its entirety at <http://knol.google.com/k/finding-an-international-mediator#>. Part 2 will appear in the next issue of *The Peacemaker*.*

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## Save the Date!

The International Committee of the Dispute Resolution Section of the North Carolina Bar Association cordially invites you to the following:

**“International Arbitration from Local to Global Perspective”  
February 18 at noon, Duke Law School (Durham, NC)**

For reservations and more information, please contact  
[sid.eagles@smithmoorelaw.com](mailto:sid.eagles@smithmoorelaw.com) or [andrea.carska@hblaw.eu](mailto:andrea.carska@hblaw.eu)

# Ms. Mannerly Mediator

## Observers Gone Wild

*Dear Ms. Mannerly Mediator:*

*I have been a certified mediator for a number of years. In order to help other mediators become certified, I have allowed a number of people to observe my mediations. The observers have, for the most part, been very well-behaved.*

*I have had, however, a number of people who have not been well-behaved. One person showed up 30 minutes late. Another did not let me know he was not coming. One person tried to take over the mediation. The observer almost never brings the certification form and expects me to provide that form to him or her.*

*In addition, trying to obtain permission from the participants has taken up a substantial amount of time. All of these considerations are making me question whether I should even allow observers. My obligation is to the participants at my mediations and not to the observers. What can I do to prevent this type of behavior?*

*Sincerely,  
Down in Durham*

My, my. Your description sounds a bit like A Few Observers “Gone Wild.” (Of course Ms. Mannerly Mediator is just quoting others who have used that phrase and has no idea about the basis for that quote.)

Ms. Mannerly Mediator applauds your willingness to allow these individuals to observe your mediations. Without experienced mediators allowing observers to attend mediations, those folks would not be able to receive Dispute Resolution Commission certification. Ms. Mannerly Mediator certainly believes that observers understand that experienced mediators who allow observers are graciously performing a professional courtesy and that the occasional bad behavior is just an oversight.

Ms. Mannerly Mediator would assume that observers perhaps are thinking of themselves more as a participant and not thinking of themselves as if they were the mediator’s shadow. Perhaps the following suggestions would be helpful.

First, consider asking the observer to contact the participants to obtain permission to observe the mediation. Getting the observer to make the contact will help the observer understand that their attendance is not man-

dated, but is allowed as a courtesy by the mediator and the participants. Be sure to ask the observer to let you know if permission has been granted and if the observer is attending.

Second, consider providing the observer with a copy of a document that the Dispute Resolution Commission has prepared outlining the requirements for observers. This document is on the Commission Web site and contains outstanding rules of etiquette. Ms. Mannerly Mediator could not have written the conduct rules better herself. The Requirements are set forth verbatim:

### Requirements for Observer Conduct

Adopted by the Dispute Resolution Commission on May 8, 2009.

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

1) Make every effort to be on time for the conference. If your schedule changes and you will not be able to attend, let the mediator know so they do not wait for you.

2) Give your full attention to the conference. Turn off your cell phone and do not attempt to make or take any calls or to text message. If you must make a call, do so only during breaks.

3) Do not try to talk to or to pass notes to the mediator while s/he is working. This disrupts the mediator’s concentration.

4) During the conference, do not inject yourself into the negotiation’s process or attempt to express any opinions unless you are expressly invited to do so by the mediator. If one or both of the parties ask you to value the case or to comment on their chances in court during either a joint or a caucus session, advise then that you are there only as an observer.

5) Do not make any suggestions about legal arguments to the attorneys either during or after the conference.

6) Observers, like the mediator, are to remain neutral. Avoid any statements or body language that would display any inclination on your part to favor one side or his/her arguments over that of the other.

7) Mediators are mindful of the clock and

may not want to discuss what is happening with observers between caucus sessions. You should check with the mediator before the conference starts and ask when he or she prefers to take your questions or respond to your comments. For example, the mediator may be willing to talk with you between caucus sessions, during breaks, at lunch or after the mediation.

8) Remember that the mediation process is confidential. You should not reveal any confidential information that you learn in caucus to the other party during the conference or afterward. In addition, you should not speak to anyone after the conference regarding any statements made or conduct occurring there.

9) Observers should not use the mediation session as an opportunity to solicit any kind of business from either parties or attorneys present.

Observers who do not follow these Requirements for Observer Conduct, or for any other reason in the discretion of the mediator, may be asked to leave the conference and may have their conduct reported to the Commission.

Finally, providing the certification form to the observer before the mediation, along with these DRC Requirements, may eliminate the extra work for the mediator who is permitting the observation. The observation certification form is AOC-DRC-7 and may be found on the North Carolina Courts Web site. If the observer forgets the form, then you can put the burden back upon the observer to forward the form to you.

Gentle Mediator, you are providing a service to the profession. Please do not let a few observers “Gone Wild” to affect your willingness to provide this opportunity to help others.

With kindest regards,  
Ms. Mannerly Mediator ■

*Ms. Mannerly Mediator is the nom de plume of a mediator in Pilot Mountain, NC, who would like to remain anonymous. Further enquiries can be submitted to annander-son681@hotmail.com.*

# A Random Walk Down Tech Street

by Len Benade

Recently I closed an e-mail to an attorney with the question, “Would you believe I’m sending this from my office computer while sitting in my car waiting for my wife to have her teeth cleaned?” The reply was “Len, no, I couldn’t even begin to imagine using that kind of technology.”

To the contrary, I can’t begin to imagine doing what I do without it. I have very little time these days to waste. I generally have some 50 cases in progress and one of the things I want to do as this year’s Technology Committee chair is to describe the technology I find critically important in helping me keep up with the work load.

In this instance, as soon as my wife got out of the car and walked toward the dentist’s office, I moved my seat back, reached into the back seat, grabbed my laptop tray, and turned on my notebook computer. When it had booted up I plugged my broadband modem into a USB port and connected to the Internet. Using a program called LogMeIn, I connected to my office computer and began to operate it by remote control. There were e-mails to send and receive and phone calls to make.

I can operate my office computer from my cell phone as well. A folding BlueTooth wireless keyboard (last year’s Tech Chair Steve Savia introduced me to this great gadget) and ThinkOutside wireless mini-mouse make this easier, but it’s much more difficult to read the screen and whenever possible I prefer to use the notebook. The smart phone I had preferred was the HTC TouchPro, but keeping up with rapid pace of today’s technology is daunting; I offer the following as an example of how you can take a short nap and wake up feeling like Rip Van Winkle. When I got the Touch Pro last January it was so new that the Verizon store didn’t have any accessories for it yet, and the techs were for the most part unfamiliar with it. In July a tiny bubble appeared on the upper right side of my touch screen. I watched in curiosity as it gradually grew in size over the next two weeks. One day the touch screen stopped working – in effect rendering the phone all but inoperable. I assumed I might have been too rough on the phone and decided to treat its replacement very carefully. Nevertheless, earlier this month after I had written up to

this paragraph, a similar bubble appeared in virtually the same spot as the first. I watched now in horror as the process repeated itself. Ten days ago the second phone was on the fritz and I scrambled to get another, this one through insurance since the one-year warranty had just expired. The software that came with it had changed for the worse from “ActiveSync” (incompatible with Windows 7 64-bit) to “Windows Mobile Phone.” I could not selectively sync subfolders of my Office Contacts – a major step backwards and a nightmare. Some googling revealed that the “ink bubble” was a manufacturer’s defect common in the Touch Pro. Two succeeding versions totally changing the phone had come along. In one year’s time my phone was so outdated that the Verizon store didn’t carry accessories and the techs were now unfamiliar with this relic of the past. So, yesterday, I got a phone that most of you are familiar with – a Blackberry. Specifically, I got the Curve 8350 that has a touch pad. I was told that there have been problems with the track ball on the Blackberry Tour. Operation of the phone is intuitive. Easy syncing of contacts and calendar is all I need. I never used Word, PowerPoint, and Excel on the Touch Pro – I’ve got my notebook for that.

I couldn’t manage my cases without QuickBooks Customer Manager (QBCM), an inexpensive database program which I’ve customized into a very effective mediation case manager. The latest (and last) version is 2.5. You can find it on eBay for \$40-50. Intuit has tried to turn Customer Manager into an online service which has thus far proved to be a disappointment. QBCM synchronizes with QuickBooks Pro (my accounting program) and, more importantly, with Outlook. Attorneys, Firms, Mediators, Adjusters, Trial Court Coordinators and the like that are entered into QBCM can thus be exported to Outlook and ultimately the cell phone. E-mails can be dragged and dropped into QBCM and linked to names and cases. You can also add notes, phone calls, “To Do’s,” and file shortcuts and link them similarly. I’ve added links to each Firm’s Web page and links to each attorney’s individual page. QBCM has its own internal calendar, but a time-saver is the option to use

Outlook’s calendar directly from QBCM and then drag and drop appointments to QBCM names and cases.

A big productivity booster for me has been the addition of a second flat widescreen monitor to my office computer. I thank Charlotte attorney Ken Raynor for turning me on to this (Ken maintains a paperless office). You can add the monitor without installing a second video card by hooking it up to a Triton See2Xtreme UV200 adapter and plugging it into a USB port. This makes simultaneous working with multiple applications much easier and facilitates all the dragging/dropping. Be careful, however, if you have upgraded to Windows 7. The driver in the installation CD is incompatible. You need to download and install a new Windows 7 driver from the Triton Technologies Web site.

I carry a portable BlueTooth wireless printer to each mediation: the Canon Pixma IP90. That way I can generate the mediation report, invoices, and sometimes a settlement agreement on the spot.

Another device I rely on is a wireless BlueTooth headset. Took me two to get it right. The first, a Plantronics 520, embarrassed my wife because it bore a striking resemblance to the “hearing aid” you’ve seen advertised on TV where grinning idiots listen in on other people’s conversations. People said it sounded like there was a waterfall in the background when I spoke. I’m now using the somewhat pricier Plantronics Voyager Pro and the sound quality is excellent. With both hands on the wheel I can schedule and get new cases while driving from one mediation to another.

Be careful with Windows 7. I needed a new, faster desktop at the office and, of course, that meant coming face to face with Windows 7 after years of XP – I had totally avoided the disaster that was Vista. Windows 7 is OK, but there are going to be issues for a while, an example of which I cited above. Windows 7 has a flaw they’re working on that randomly disconnects your computer from the Internet while leaving you on the network. You have to reboot. This, needless to say, is a real problem if you’re away from the office and attempting to connect. Another hassle – it won’t recognize my wire-

less HP Laser printer as a wireless device. You'll just have to accept the reality that for the present, here and there you'll find an incompatible driver or application with Windows 7.

The best thing for now is to harness the power of a new Windows 7 desktop computer, but keep a laptop with XP in your office as well. Use a lightweight notebook/netbook

to take to your mediations. I have a new gigantic 18.4" laptop with Windows 7 at home and use that to work the office computer by remote control.

Today's technology is amazing and indispensable but often frustrating. Perhaps by my next article things will have settled down. On the other hand, there may be a new array of wonders that will require a learning curve.

Perhaps I'll be sheepishly eating my words of praise for the things I've described above. Let's wait and see. ■

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# Rule Changes Proposed

by Leslie Ratliff, Executive Secretary of the N.C. Dispute Resolution Commission

The Dispute Resolution Commission is making recommendations for revisions to the Mediated Settlement Conference, Family Financial Settlement and Clerk Mediation Program Rules. In addition, the Commission is recommending changes to the Standards of Professional Conduct for Mediators and to the Rules for the Dispute Resolution Commission. The Commission's recommendations have already been approved by the Dispute Resolution Committee of the State Judicial Council, and the Council has forwarded them to the Supreme Court. The Court has ultimate authority over rules for court based mediated settlement conference programs.

## Proposed MSC, FFS, and Clerk Rule Changes

Likely to be of most interest to certified mediators is a proposed increase in the rate that court appointed mediators may charge for their professional services. Mediated Settlement Conference, Family Financial Settlement Conference, and Clerk Rule 7.B. all currently provide for a \$125 cap on the hourly rate which court appointed mediators may charge for their professional services. The rules also provide for a \$125 one time, per case administrative (case scheduling) fee. (Court appointed mediators may not charge for mileage, windshield time, or lodging.) Proposed revisions to these program rules would increase both the hourly rate and the one time, per case administrative fee to \$150.

Given the current economic situation in North Carolina, the Commission appreciates that this is a difficult time to raise fees on parties who are ordered to participate in a court ordered mediated settlement conference. However, the Commission also recognizes that if this proposal is adopted, it will represent only the second increase in mediator fees to occur since the inception of the

superior court's Mediated Settlement Conference Program in October of 1991, nearly 20 years ago.

The original 1991 MSC program rules authorized Senior Resident Superior Court Judges, in consultation with the Administrative Office of the Courts, to set an hourly compensation rate for court appointed mediators working in their districts. In 1995, the MSC program rules were amended to establish a standardized fee for court appointed mediator services. The new rule set the fee at \$100 per hour and established a \$100 one time, per case administrative fee. In June of 1999, the court increased both the hourly rate and the one time, per case administrative fee to \$125. That \$125 cap has remained in place over a decade.

In commenting on the proposed increase in the rate, the Commission's chair, Senior Resident Superior Court Judge W. David Lee, noted that, "Our court-appointed mediators work hard. Very often the cases they mediate involve *pro se* parties or attorneys who are not communicating or who are, at best, disinterested in the mediation process. Scheduling often poses a challenge and parties are more likely to fail to appear. Often fee collection becomes an issue. These mediators have been patient and are long over due for an increase." Judge Lee also noted that over the past few years, court staff have expressed concern to the Commission that some of our State's more talented and respected mediators have been leaving court appointed mediator lists because they could no longer afford to serve. It is imperative, he believes, that experienced and successful mediators be available for court appointment in all judicial districts.

In addition to recommending an increase in the hourly rate and one time, per case administrative fee, the Commission is also asking that MSC, FFS and Clerk Rule 5 be revised to address situations where parties

refuse to pay mediator fees. Proposed revisions provide that any person required to pay a portion of a mediator's fee who fails to do so without good cause, shall be subject to the contempt powers of the court. Following notice and a hearing, monetary sanctions including, payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference, may be imposed in a written order which states findings of fact and conclusions of law. These rule changes are intended to reflect and reinforce amendments to program enabling legislation which occurred last year. Those statutory revisions authorized a court to impose sanctions on a party who fails to pay in the same way that the court was already authorized to impose sanctions for a failure to attend.

Relying on their inherent authority, some judges already find parties in contempt for willful failure to pay. Responding to requests from mediators in such districts, the Commission has developed forms to assist with fee collection. (See Motion and Order for Show Cause Hearing, AOC-CV-815, and Order of Contempt For Non-Payment Of Mediator's Fees, AOC-CV-816 (MSC and FFS mediations) and Motion and Order for Show Cause Hearing, AOC-G-305T816 and Order of Contempt for Non-Payment of Mediator's Fees, AOC -G-307T (Clerk Program mediations).

## Proposed Revisions to Standards of Conduct

The Standards of Professional Conduct for Mediators were first adopted by the Supreme Court in 1998. Since their initial adoption, there has been piecemeal revision of individual standards, but no comprehensive review of these rules as a whole or their impact on practicing mediators, *i.e.*, a review

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of how well the Standards were holding up to real life situations. Since the Standards have been in place now for more than a decade and several mediators had recently expressed concerns about some aspects of the Standards and their impact on mediator practice, the Commission determined that it was time for a comprehensive review. Judge Sanford Steelman, then Chair of the Commission, established an *ad hoc* Committee to undertake this assignment and chaired the effort himself. The Commission adopted the Committee's recommendations earlier this year and, as with the program rules, the Standards are now before the State Judicial Council.

Many of the changes being recommended are in the nature of fine-tuning only, but others were more substantial. Proposed revisions to Standard II.C., for example, clarify that when a party objects to a mediator's serving on the grounds of lack of impartiality, the mediator need not step aside immediately, but may discuss the matter with the party(ies). However, if the party continues to object following discussion, the mediator should decline to serve or withdraw.

Proposed changes to Standard III clarify that mediators can tender copies of agreements reached in mediation to referring entities in instances where a statute mandates such tender. This change was largely intended to address referrals from Clerks that

involve guardianship or estate matters. Clerks are, by law, required to review such agreements.

Proposed revisions to Standard IV.C. provide additional guidance to mediators in determining whether a party has consented to mediation in such a manner that the mediation may proceed. It provides that in making the determination, the mediator may consider the issues in dispute and whether any modifications or adjustments could be made to facilitate the party's participation. Such circumstances as whether the party has been accompanied by a supporting individual, such as a spouse or child, and whether he or she is represented by counsel may also be considered. This new language is intended in part to address situations that are likely to arise in guardianship mediations where a frail, ill or medicated individual may be a participant.

Proposed revisions to Standard VII.C., which addresses conflicts of interest, clarify that not only a mediator, but his or her professional partners or co-shareholders are prohibited from advising, counseling or representing mediation parties in future matters concerning the subject of the dispute, an action closely related to the dispute or an outgrowth of the dispute. Conversely, a mediator who is a lawyer, therapist or other professional is prohibited from mediating a dispute in instances where the mediator or his/her

professional partners or co-shareholders has advised, counseled or represented the parties in any matter concerning the subject of the dispute, an action closely related to the dispute, a preceding issue in the dispute or an outgrowth of the dispute. It was also clarified that such conflicts arise only in situations where the mediator, his partner, co-shareholder, or staff has engaged in substantive conversations with any party to the dispute. The proposed revisions define the term "substantive conversations" as conversations that go beyond the discussion of general or administrative issues and include conversations in

which a party has disclosed information that he or she might expect to remain confidential. Changes to Sections E. and F. of that same Standard are also being recommended. Proposed revisions to Standard VII.E. would prohibit mediators from using not only information gained, but also relationships formed during a mediation for their own personal gain or advantage. This particular revision was a response to a situation brought to the Commission's attention by a Clerk. The Clerk had ordered a mediation of an estate matter where the parties were arguing over who should serve as the estate's Administrator. During the course of the mediation, the mediator agreed to serve as the Administrator. The Commission was principally concerned about how the public might perceive such an arrangement, *i.e.*, that the mediator could be viewed as having manipulated the mediation process for his/her own financial gain. In response, the Commission has recommended the change in Standard VII.E. and issued an Advisory Opinion (#08-15) discouraging such conduct. In addition to the conduct noted above, a similar situation was brought to Commission's attention involving a certified family financial mediator who agreed to serve as the parties' Parenting Coordinator, a position for which he would have been compensated and that might involve making decisions for the parties.

At the same time the *ad hoc* committee, under Judge Steelman's direction, reviewed the Standards, the Commission's Standards, Discipline and Advisory Opinion Committee tackled an additional ethics issue brought to its attention by the NC State Bar. The State Bar had asked the Commission to comment on a conflict between Standard III, which addresses confidentiality, and Rule 8.3 of the State Bar's Rules of Professional Conduct. Rule 8.3 requires attorneys to report a colleague whom they know has committed a Rule 8.3 violation, *i.e.*, a serious ethical violation that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness to practice. Rule 8.3 would require a report even if the attorney was acting as a mediator when he learned about the conduct in question. Standard III, on the other hand, requires mediators to protect the confidentiality of all information communicated to them during a mediation. The only exceptions to that mandate involve situations where public safety is an issue, *e.g.*, a credible threat by one mediation participant to maim

The Dispute Resolution Section Council approved amendments to the Section's By-Laws at its Jan. 22, 2010 meeting. The Council will make the amended By-Laws available to Section members prior to the Dispute Resolution Annual Meeting and CLE scheduled for March 19, 2010 at the Grandover Resort in Greensboro. If approved at the annual meeting by a majority vote of the Section present and voting, the amendments will be presented for final approval to the Board of Governors of the Association.

or kill another or a statute requires the report, *e.g.*, G.S. 7A-301 which mandates the reporting of child abuse or neglect. After debating the issue for more than three years, the Committee recommended to the Commission that it ask the State Bar to consider creating an exception to exempt attorney-mediators from reporting Rule 8.3. violations when they become aware of the violations during the course of conducting a mediation. The Commission accepted the Committee's recommendation and agreed to bring the matter before the State Bar. In requesting the exemption, the Commission affirms the importance of confidentiality and neutrality to the integrity and success of the mediation process as well as the importance of having mediators focused on the mediation process as opposed to policing the conduct of participating attorneys. The matter is now before the State Bar.

As noted above, the Commission devoted significant time and attention to the conflict between Standard III and the State Bar's Rule 8.3 and to how that conflict could best be resolved. The Commission recognizes that this particular conflict, as well as the larger issue of what happens when a mediator's ethical responsibilities bump up against the ethical requirements of some other group or profession to which he or she also belongs, has significant ramifications for the practice of mediation and is largely unexplored territory. The Commission felt it was extremely important to look very carefully at the issue and make a thoughtful recommendation to the State Bar.

### Commission Rules

Given that the Commission devoted a good deal of time this past year to conducting a comprehensive review of the Standards of Professional Conduct for Mediators, it only made sense to also undertake a review of the Rules for the Dispute Resolution Commission. Those Rules not only provide for the Commission's operations but also establish procedures for enforcing the Standards and for addressing ethical issues that arise in the context of certification and certification renewal applications. Former Commission Chair Judge Steelman charged the Standards, Discipline and Advisory Opinion Committee with undertaking this task. In particular, that Committee's Chair, Professor Mark Morris, wanted to explore whether the formal investigative and hearing procedures set forth in Rule VIII of the current Commission Rules should be supplemented with some more informal alternatives.

Most of the proposed changes to the bulk of the Rules are in the nature of fine-tuning. Only Rule VIII was substantially re-written. Rule VIII provides a framework for addressing issues relating to ethics or conduct that come before the Commission either in the form of complaints filed by the public regarding mediator conduct or in the context of applications for certification or certification renewal. While the Commission proposes to preserve the current formal investigative and hearing procedures, it is recommending that Rule VIII be revised to also incorporate some less formal and less adversarial options for addressing complaints and issues raised in applications. These options are, the Commission believes, more in keeping with the ideals of conflict resolution.

The proposed revisions will first allow Commission staff to offer the option of conciliation to a party who complains about the conduct of his or her mediator. This option would be available in instances where staff believes that the complaint involves a misunderstanding between the mediator and the complaining party, raises best practices concerns rather than rule violations, or involves technical or minor violations of the rules or Standards. While staff cannot require a mediator or a party to participate in conciliation, if they are willing, an opportunity is created for the mediator and the party to discuss their concerns and, hopefully, resolve them. If conciliation is successful, a mediator will avoid having a formal complaint filed against him or her and the party may gain a deeper understanding of the mediation process and feel better about his or her participation in that process. Theoretically, conciliation could work in many of the complaints heard by Commission staff. One of the more common complaints, for example, involves the notion of pressure applied to parties to settle. A party may mistake a mediator's efforts to get him or her to think realistically with an effort to force a settlement. Conversely, a mediator may not understand that an elderly party or one on medication, who is physically and emotionally taxed by a marathon mediation session, may feel pressured into signing.

Staff refers complaints that appear to have merit to the members of the Standards, Discipline and Advisory Opinions Committee. Under the current rules, that Committee may either dismiss a complaint or impose sanction. Under the proposed new rules, the Committee, like staff, will have some new tools at its disposal. If the complaint involves professionalism or best practices issues, the Committee may, if it elects to

do so, send one or more of its members out into the field to counsel with the mediator and to offer suggestions to help him or her avoid similar complaints in the future. The Committee may also elect to refer the matter to the Chief Justice's Commission on Professionalism which has agreed to assist the Commission. In instances where the Committee is concerned that a mediator's conduct or the conduct of an applicant for certification or certification renewal reflects significant concerns about his or her mental stability or mental health, suggests a lack of mental acuity or the presence of dementia, or suggests problems with alcohol or substance abuse, the Committee may, if the proposed changes are adopted, refer the matter to the North Carolina State Bar's Lawyer Assistance Program for evaluation and possible treatment. In the event that the applicant or mediator is a non-attorney, the proposed rules provide for the Commission to refer him or her to an appropriate physician or mental health practitioner.

In redrafting Rule VIII to put these options at the Standards, Discipline and Advisory Opinion Committee's disposal, the Committee was, in essence, codifying at least one practice that had evolved informally. Committee members have on at least two occasions met informally with mediators, and in one case a trainer, to discuss best practices concerns with them. In both situations, the Committee felt the issues raised should not simply be ignored, but acknowledged that they did not rise to the level of rule violations.

The State Judicial Council adopted the Commission's proposed revisions at its December 4 meeting and forwarded them to the Supreme Court. The revisions may be considered by the members at their January meeting. Assuming they are adopted by the Court, the Commission will notify all certified mediators of the changes and provide them with copies of the revised program rules and Standards. Copies of the revised Commission Rules will be posted on the Commission's Web site at [www.ncdrc.org](http://www.ncdrc.org). Once adopted, Commission staff will be available to answer any questions that certified mediators or others have about the changes. ■

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## LIVE PROGRAM

Friday, March 19  
Grandover Resort &  
Conference Center  
Greensboro

CLE Credit: 6.0 Hours,  
includes 1.5 Ethics/  
Professionalism

Registration: 8:15–8:50 a.m.  
Program: 8:50 a.m.–4:30 p.m.

## Alternative Dispute Resolution: Beyond Settling Cases

### 2010 Dispute Resolution Section Annual Meeting

Grandover Resort & Conference Center • 1000 Club Rd. • Greensboro

Planned by the NCBA Dispute Resolution Section

This year's annual CLE program presents participants with a new perspective on ADR beyond settling cases. Our speakers are experienced attorney and non-attorney mediators, professors and instructors who will emphasize the need for ADR professionals to use their skills to go beyond just settling cases and to get involved in disputes pre-litigation, when core issues can be explored and opportunities for reconciliation and restoration of relationships exist. Business to business conflicts, disputes between businesses and their customers, international conflict as well as community or neighbor disputes can all be addressed in a pre-filing environment.

- Enjoy a Thursday evening pre-meeting movie. **"End Game"** starring William Hurt is "a real-life political thriller about the mediated negotiations that led to the end of apartheid in South Africa and the release of Nelson Mandela. Seemingly doomed to failure, the secret talks show that peace is possible."
- Both new and seasoned professionals in the field of alternative dispute resolution will find the session on "Is Mediation a Profession?" of great interest.
- Professor Anthony Miller of Pepperdine University who speaks on how to become involved in international ADR.
- Select your breakout sessions – Family Law; Non-Profit Mediation; or Community based ADR.

Register online: [www.ncbar.org/CLE/programs.aspx](http://www.ncbar.org/CLE/programs.aspx)  
Or call (919) 677-8745 or (800) 228-3402 (ask for CLE)