DISPUTE RESOLUTION

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*** *The Intermediary: The Newsletter of the Dispute Resolution Commission starts on page 9.*

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THE CHAIR'S COMMENTS

AS WE BEGIN ANOTHER YEAR OF THE Dispute Resolution Section, we will be called upon to look back as well as forward. Thanks to the hard work of several members of the section—John Schafer, Carmon Stuart, Jackie Clare, Frank Laney, Andy Little, Ralph Walker, to mention a few. We, along with the Dispute Resolution Commission, will be distributing our ADR book. The book will chronicle the history of ADR in North Carolina, providing us with a glimpse of how we got where we are and it will show exactly what we are—the many shapes and forms of alternative dispute resolution in North Carolina. It will also provoke thought as to where we are going—about which there are several philosophies. When you receive your copy of the book, please take time to read it and ground yourself and your practice in our history.

We also look forward. Those of us who advocate alternative methods of resolving disputes are always seeking new areas in which to introduce ADR. My thoughts along these lines changed somewhat this summer when I was told that a person's way of resolving disputes (by reason, by bullying, by denial, etc.) is determined by the time he/she is four or five years old. This information, if born out by research, is both disturbing and challenging. It is disturbing because so many young people are reared in families that do not provide positive models for set-

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The Use of Mediation in the North Carolina Business Court

BY HON. BEN F. TENNILLE

IN 1995, THE NORTH CAROLINA SUPREME Court created the position of Special Superior Court Judge for Complex Business Cases to expedite business cases filed in the Superior Court. I have filled that position since January of 1996.

At the time I was a certified mediator and had extensive experience with arbitration, having worked in the textile industry where the arbitration of commercial disputes is commonplace. Because I had managed the litigation for a large corporation, I was familiar with the internal corporate decision-making process and believed that mediation and other forms of ADR would help resolve complex business cases. My six years on the bench have confirmed that belief.

Use of Mediation and ADR in the Court

When a case is assigned to the business court I require the parties to prepare a case management report. That report provides the court with the initial road map for the litigation. As a part of that report I require counsel to estimate the cost of litigation through trial. I find that few lawyers will underestimate the costs involved because they do not want to explain to the client later why the cost exceeded the estimate.

Next, I require the parties and their counsel to attend a case management conference. For corporations I require someone with responsibility for the litigation or the business person with responsibility for the problem be present. I explain to the clients at that conference that we are there to decide how their money will be spent through trial and that I believe they should be present when those decisions are made. I also take the occasions to remind them that the case belongs to them and that they will ultimately decide if and how it will be settled.

At each case management conference, I explain to the parties that most cases settle and that their case is probably not an exception to that rule. The question they should be considering is how much they wish to spend before getting to that point. I explain that they will be required to mediate at some point and that the sooner they can get there the better off they will be. I have had cases settle during the case management conference and others require the expenditure of millions of dollars before they are resolved. I also explain that the parties are free to talk to each other about resolution, particularly in the protected context of mediation.

The majority of mediated cases settle either in mediation or as a result of having been through the process. Mediation of corporate disputes is successful for several reasons.

First, mediation and other forms of ADR give business executives a better opportunity to assess the risks, rewards,

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From the Editor

Welcome to the Dispute Resolution Web site and the Fall 2003 newsletter. This issue contains:

*Message from the section's chair, Betsy McCrodden
*Article on mediation by Judge Ben F. Tennille of the North Carolina Business Court
*ADR case law update by Ken Carlson
*Excerpts from a panel discussion of mediation sponsored by the Forsyth County Women Attorneys Association.
*Calendar of meetings

To have an informative and thoughtful newsletter that is helpful to the section's members, the editor heartily encourages readers' comments, as well as suggestions and submissions of material for future issues. Please send any materials to me at *nharkavy@aol.com* or Nahomi Harkavy, P.O. Box 29269, Greensboro, NC 27429.

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tling disputes. It is challenging because it sets the stage for programs that may help young people adopt constructive dispute resolution mechanisms that will carry them through their lives.

But let us look back again. For several years now, the council has discussed peer mediation in the schools. We have had the notion that perhaps trained mediators, i.e. we, could enter the school system and help children develop their own mediation systems. From what we have gathered, however, this is not as easy as it seems. Beyond the obvious barriers—the need to assure administrators that we are there in good faith, the lack of permanent resources to carry on a project, problems with turf-fighting, to name a few—is the fact that most of us are not educators by training and we have few clues about how to incorporate positive dispute resolution techniques in the educational curriculum.

Look forward again. What if we, with the cooperation of the State Board of Education, could be the catalyst for one small pilot project, in one small school district, that would capture young people in pre-kindergarten and provide them with good dispute resolution skills that would be reinforced throughout their school years? We don't go into the schools ourselves, but we help educators incorporate a dispute resolution program. A pilot project. Small to begin with. Think about it. ■

- SECTION CHAIR, BETSY MCCRODDEN

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MEDIATION *from page 1*

costs and time commitment involved in litigation. Having assessed the risks, they often invest additional energy in alternative solutions.

Second, mediation helps narrow the issues. Mediation usually results in the business clients focusing on the basic issues they need to resolve from a business, rather than a legal, perspective.

Third, mediation helps business people use their negotiation skills to find practical solutions. Unlike most people caught in the litigation web, business people are comfortable with the process of negotiation. Litigation leaves negotiation to the lawyers, whose adversarial culture often makes negotiated settlement more difficult to reach. While business people are often uncomfortable in the witness box or in litigants' roles in the courtroom, mediation encourages them to assume their accustomed role of negotiating to solve problems. Most importantly, it reinforces the notion that this is a business problem, not a legal one, and ultimately, business rather than legal issues must shape the settlement. Mediation makes the client reassume responsibility for the problem—responsibility that had been temporarily transferred to the lawyer.

Once clients take responsibility for resolving the business problem, they often discover ways to resolve disputes that are practical, rather than legal, solutions. The opportunities for resolution in a business context are broader and more flexible than in the legal context because legal relief is generally limited and circumscribed. Neither judge nor jury can fashion creative business resolutions, but mediation encourages companies to control their own destiny and craft business results that cannot be achieved in the courtroom. As mediators, I encourage you to challenge the business executives who participate in the mediation process to think of business resolutions to their problems.

Mediation also helps executives focus on and understand the risks to all parties in the litigation. Often their focus on risk assessment can lead to earlier resolution and thus cost savings.

One of the other significant benefits of mediation is the opportunity for the executives to meet on neutral ground and actually talk to each other. I have found that this opportunity to communicate directly often eliminates misunderstandings that exist or simply clears the air so that substantive progress can be made toward settlement. Mediation helps an executive understand not just his or her own position, but also the needs or desires of the opposition. It is this understanding of the opposition's position, derived from direct communication, that often leads to creative business solutions. I had one complex business case settle within 10 minutes after the responsible business managers on each side talked directly to each other.

While I do hold settlement conferences at the request of counsel, I firmly believe that mediation offers the best opportunity for settlement.

Mediation provides a safer setting for this important communication. I have found that business people in particular, as well as their lawyers, are reluctant to take some positions in settlement negotiations conducted before a judge. They feel freer to communicate in the mediation process. I try to discourage the parties and their counsel from viewing mediation as the step before final negotiations before the judge when the case is called for trial. I believe that if parties fail in mediation with a good mediator, my job becomes to try the case.

I encourage the parties to use mediation at any point in the dispute process, from before the suit is filed to after trial. I do not have a fixed schedule. I rely on the lawyers to tell me, sometimes with a little prodding, that they are ready to go to mediation. Since I have management responsibility for the entire case, I can more effectively determine the right timing for mediation to begin and can send the parties back for another round if I think it would be beneficial.

I use mediation for many purposes. Its use is not limited to resolution of the entire case. Mediation can be used to resolve costly discovery disputes, to settle some but not all of the issues or to agree upon alternative dispute resolution mechanisms such as arbitration or submission of technical issues to a panel of experts. I encourage the parties to be flexible in their approach to the use of mediation.

I regularly remind clients that productive use of mediation offers an effective means of reducing the increasing costs of business disputes.

There are still some improvements that can be made in the mediation of business disputes. First, few business executives are yet available as mediators. Although lawyer mediators can do a fine job in most cases, they often lack the business perspective and credibility that senior executives can bring to the dispute resolution process. Business managers will deal more openly with other business managers than they will with lawyers. In complicated business disputes, it may well be advisable for the experienced mediator to include a business neutral in the mediation process. I firmly believe that there are significant benefits to doing so and that mediators are not at risk of losing any business if they do so.

Second, too few executives are aware of how to use mediation and other ADR techniques to avoid litigation all together. Not only do we need more business executive mediators, but we also need to encourage executives to use mediation earlier and more often.

Appointment of Mediators

Once a case is assigned to the Business Court, the Business Court assumes responsibility for controlling the mediation process and cases are not controlled by the local rules governing mediation. In the entire time I have been on the bench, I have not selected a mediator for the parties in any case. The parties and their counsel have made the mediator selection in every case and I believe that is the best way to assure a meaningful mediation. I do encourage the parties to select mediators who might have some particular

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ADR in the Courts

By Kenneth P. Carlson Jr.

Cases regarding arbitration and mediation in our state and federal courts continue to explore the parameters of alternative dispute resolution. In particular, arbitration cases tend to concentrate on a two-fold inquiry of whether arbitration was properly or improperly ordered, or if the "right" to arbitration was somehow waived. As for mediation, the inquiry has a different focus—especially given its mandatory nature in our state and certain federal courts. The key mediation inquiry often involves whether the mediation process was properly followed, and whether the parties reached a sufficient mediated settlement agreement that can be enforced if a party contests the settlement. The following cases are a sampling of decisions that have addressed these and related ADR issues since our last newsletter update. Please note that for whatever reason, many cases addressing arbitration and mediation are designated as "unpublished." Yet they concern issues important to ADR, and therefore are discussed below with a similar deference as published decisions.

Arbitration

Sloan Financial Group Inc. v. Beckett, ___ N.C. App. ___, 583 S.E.2d 325 (Aug. 5, 2003).

Plaintiffs sued various individuals involved in an international private equity investment fund that went bad. Claims ranged from fraud to breach of contract to conversion and unfair and deceptive trade practices, with multiple business entities and written contracts at issue. One of those contracts was the initial fund operating agreement that included an arbitration clause for any controversy or claim "arising out of or relating to this Agreement." Defendants moved to enforce the arbitration clause, but the trial court ruled that only one claim fell within the operating agreement, and therefore denied the motion for all other claims. Defendants appealed, but the Court of Appeals affirmed. Through a detailed analysis, the Appellate Court addressed the critical two-fold inquiry of whether a dispute is subject to arbitration: First, is there a valid agreement to arbitrate? Second, does the dispute fall within the scope of this agreement? Significantly, the court said that the second inquiry is not even reached until the first is satisfied—an important distinction when citing, as defendants did, the "presumption" of favoring arbitration by North Carolina courts. Here, the majority noted that most of the claims did not arise from a challenge to the fund's operating agreement, which contained the arbitration clause, but rather from a "partnership agreement" that more directly addressed the powers that plaintiffs alleged were abused. Since the partnership agreement did not contain an arbitration provision, the court ruled that there was no agreement to arbitrate those claims. Combined with its opinion that these claims were not encompassed by the operating agreement, it affirmed the trial court's denial of defendants' motion to compel arbitration.

Two other related issues were also included in the opinion, one of which was side-stepped by the court and one of which was addressed. The first involved defendants' contention that non-signatories to the operating agreement were nevertheless bound by its provision to arbitrate based on overlapping ownership, claims and estoppel. Rather than address this issue, the court punted to its ruling that the arbitration agreement does not encompass the current dispute. The second involved whether the trial court erred by failing to stay all claims not ordered to arbitration, pending the results of the one claim that was arbitrable. As observed by the court, "we hardly see how the interest of efficiency could be served by forcing the main portion of a lawsuit be put on hold while a side item is arbitrated." So at least we have guidance on the second "side" issue, while the first has been reserved for another day.

Park v. Merrill Lynch, ___ N.C. App. ___, 582 S.E.2d 375 (July 15, 2003). Investors sued Merrill Lynch and a number of its employees for various securities violations, negligence and breach of fiduciary duty regarding a cash management account and IRAs. Defendants moved to compel arbitration and the trial court denied the motion. Applying New York law due to a choice of law provision in the brokerage agreements (which the court said was closely analogous to North Carolina law), the court of appeals reversed and remanded. Key to the decision was the fact that each plaintiff had signed a securities brokerage agreement that included an arbitration clause for any disputes arising from it, and the fact that these were valid contracts that "involved" interstate commerce due to the underlying securities transactions they contemplated. Therefore, the Federal Arbitration Act (FAA) applied, which mandates the enforcement of arbitration agreements that involve interstate commerce. In an interesting distinction, the court also noted that even when the FAA governs, "state law generally governs issues concerning the formation, revocability, and enforcement of arbitration agreements." The FAA pre-empts these state rules of contract formation only when they "single out arbitration clauses and unreasonably burden the ability to form arbitration agreements ... with 'conditions on (their) formation and execution ... which are not part of the generally applicable contract law.'" Here, the arbitration agreements were valid under New York law, as they would be under North Carolina law, since plaintiffs signed them and therefore knowingly "consented" to their application. Absent some showing of fraud, duress, coercion or unconscionability, rules of contract construction make them valid and enforceable, and therefore the trial court erred in not granting the motion to compel arbitration.

Carter v. Cook, No. COAO2-1215 (N.C. App., July 1, 2003) (unpublished). Plaintiff was injured in an automobile collision and sued for underinsured motorist coverage (UIM) when defendant's liability insurance did not adequately cover the monetary extent of his injuries. After filing his complaint, receiving discovery requests and having his deposition taken, plaintiff finally moved to continue the case from the court's trial calendar and demanded arbitration under his UIM policy. The trial court denied the demand, and plaintiff appealed. In affirming the trial court's denial, the Court of Appeals observed that plaintiff did not demand arbitration until the day his right to do so expired. As stated in the UIM policy's arbitration clause, any demand for arbitration must occur "within the time limit allowed for bodily injury or death actions in the state where the accident occurred." This three-year period in North Carolina expired on Jan. 20, 2001, which was the exact day plaintiff made his demand to arbitrate. As a result, the trial court held his demand was untimely, and the Court of Appeals affirmed. In its ruling, the court distinguished between an "untimely demand" to arbitrate, and a "waiver" of the right to arbitrate. Since arbitration is a contractual right, it can be waived through delay or other actions taken which are inconsistent with arbitration and which a subsequent order to arbitrate would cause prejudice to the opposing party. However, an untimely demand is when the demand for arbitration occurs outside the time specified in the arbitration agreement, and therefore does not satisfy the contractual requirements to even invoke an arbitration proceeding. Since the trial court based its denial upon an untimely demand, there was no error and the Court of Appeals affirmed.

Yost v. Westchester Specialty Ins. Svcs., No. COA02-883 (N.C. App., Aug. 5, 2003) (unpublished).

Contrary to the **Carter** case, Yost directly involves whether a right to arbitrate has been waived. Plaintiff bought a used Land Rover from an automobile dealer and purchased a vehicle service contract issued by defendants. The contract included an arbitration provision that said, in pertinent part: "If You [plaintiff] or We [defendants] fail to agree on any matter concerning this Contract, each must demand in writing from the other that the matter be arbitrated." After about seven months, the Land Rover lost power due to a failed radiator hose, which according to plaintiff caused a head gasket to fail which then caused almost $6,000 of damage to the engine. Plaintiff made a claim under the vehicle service contract, but defendants denied the claim. Plaintiff and his attorneys followed this denial with a substantial number of written and verbal communications with defendants demanding arbitration and volunteering the name of their selected arbitrator. However, defendants never responded in any material way to these demands, which eventually led plaintiff to file suit. Within days, defendants responded to the suit with a designation of arbitrator, and then proceeded to answer the complaint and simultaneously file a motion to compel arbitration. The trial court denied the demand, ruled that defendants had waived their right to arbitrate, and defendants appealed. The Court of Appeals affirmed based on a thorough discussion of what constitutes "waiver" of the right to arbitrate under North Carolina law. Key to the court's decision was that even though North Carolina has a "strong public policy in favor of arbitration," this public policy must be understood within a larger context of whether the opposing party would be prejudiced in some way. Citing earlier precedent, the court cited with approval the following standard:

A party may be prejudiced by his adversary's delay in seeking arbitration if (1) it is forced to bear the expense of a long trial, (2) it loses helpful evidence, (3) it takes steps in litigation to its detriment or expends significant amounts of money on the litigation, or (4) its opponent makes use of judicial discovery procedures not available in arbitration.

The Appellate Court found that defendants had not only violated the express terms of the arbitration clause by not demanding arbitration in writing, they had also prejudiced plaintiff with their unjustified delay. Then without identifying the exact prejudice suffered, the court used some excellent language for anyone trying a waiver argument based on the actions of their opposing party: "Having an arbitration clause in a contract does not allow a party to ignore a dispute, refuse to acknowledge same, or wait until the other party, in frustration, files suit." Since defendants had committed these actions, they waived their right to arbitrate and their motion was properly denied.

Mediation

McClure Lumber Co. v. Helmsman Constr. Co., ___ N.C. App. ___, ___ S.E.2d ___, 2003 WL 22037729 (Sept. 2, 2003).

Plaintiff is a subcontractor who filed four lawsuits against defendant general contractor over various mechanic's liens. The cases were consolidated for mediation, where a handwritten settlement agreement was executed. A subsequent typewritten mediated settlement agreement was then executed which was substantially similar to the original handwritten version. Defendants made payments under the agreement and then stopped doing so after plaintiff refused to authorize the release of a letter of credit and one of its liens as required by the agreement. Plaintiff moved to enforce the mediated settlement agreement, and the trial court denied the motion. The Court of Appeals affirmed and addressed two primary arguments by plaintiff. First, plaintiff argued that the trial court's denial "undermines" the purposes of ADR and court-ordered mediation "to make civil litigation more economical, efficient and satisfactory to litigants and the state." Yet because plaintiff merely stated these general legal principles without showing how the trial court's order violated them, the argument was considered abandoned. Second, plaintiff contended the trial court erred

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Mediator's Viewpoints

Editor's Note: The following material is excerpted from a Sept. 17, 2003, program sponsored by the Forsyth County Women Attorneys Association. The audience of lawyers posed questions to a panel of mediators consisting of Ellen R. Gelbin of Winston-Salem, Ralph A.Peeples of Wake Forest University School of Law, and Nahomi Harkavy of Greensboro.

Question: Based on your experience as mediators, what factors do you think are important in selecting mediators for particular cases?

Panelist A: I think you use different mediators for different situations. The trick is to know enough about your case before you recruit a mediator. If you fear some recalcitrance on the other side, maybe you want someone who's got a reputation for doing some blunt evaluating and doesn't mind putting pressure on. On the other hand, if you've got a client you think needs to understand the risks of litigation a bit more subtly, you want a mediator who can explain that. Also, I've talked to a number of counsel who say, when I pick the mediator, the main thing I have in mind is, will he or she have any credibility with the other side.

Panelist B: I would add to that, you want a mediator who has experience in the area of law in which you're practicing. It is a waste of time and very frustrating to be in a mediation when you have to educate the mediator as to what the law is. A mediator who knows the applicable law helps the process go so much more quickly and smoothly.

Panelist C: You [the attorney] need to consider what you know about your client and what what you might know about the mediator's style and background because mediation is a very personal process. The object is to let the party feel that he or she is in control of the situation, and to do that, the party needs to feel comfortable with and be able to work with the mediator. ■

Calendar of Meetings

Nov. 13, 2003
Council Meeting at Bar Center*
Jan. 9, 2004
Council Meeting at Bar Center*
March 19, 2004
Annual Meeting** and All-day CLE at Bar Center
May 6, 2004
Council Meeting at Bar Center*

*Section members who wish to attend council meetings should notify Jane Weathers at the Bar Center *jweathers@ncbar.org* in order to be counted for lunch.

**More information about the Annual Meeting is forthcoming in the next newsletter.

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background or expertise in the business area involved. I find that a knowledgeable mediator can get to the business resolution more quickly and with more creativity and credibility. I deal with a significant number of family disputes and find that often the impediments to settlement are not business but personal issues that have to be addressed before the business issues can be resolved. Mediators with experience in dealing with family issues can often prove successful in this type of situation.

Summary

Mediation is an integral part of the dispute resolution process in the Business Court. It should be more effective in business cases than in other types of cases. The parties chose the mediator in the Business Court, but do not have a choice about whether to mediate. The court is flexible with respect to the timing of mediation. Expertise in business issues, particularly knowledge of the industry, is helpful, but not required to mediate business disputes. ■

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by concluding its actions regarding the letter of credit and lien breached the mediated settlement agreement, and therefore was a condition precedent to defendants performing under the agreement and a valid excuse for their not making additional payments. The Court of Appeals disagreed, and again affirmed the trial court's ruling. So what does all this mean for ADR purposes? That mediated settlement agreements and final settlement agreements that incorporate their terms matter. So be sure they are complete enough to withstand judicial scrutiny.

Ricks v. Abbott Laboratories, 65 Fed. Appx. 899, 2003 WL 21246623 (4th Cir. (Md.), May 30, 2003). After plaintiff mediated her race, sex and age discrimination claims, the parties informed the court that the case had been settled. The court then dismissed the case without prejudice, giving the parties 30 days to reopen the lawsuit if settlement was not consummated. Assuming no reopening, the dismissal would then be with prejudice. Plaintiff within the 30-day deadline filed a pro se motion to reopen the case, claiming that settlement had not been consummated and that any further efforts to settle her lawsuit would be futile. The District Court allowed plaintiff's counsel to withdraw, and then found that a binding settlement had been reached and denied plaintiff's motion to reopen. The 4th Circuit reversed and remanded, citing established precedent that when a factual dispute exists over whether a settlement agreement has been reached, or whether the attorneys had authority to enter into the agreement, or over the agreement's terms, "the District Court may not enforce a settlement agreement summarily ... Instead, the District Court must hold a plenary evidentiary hearing to resolve the dispute." ■

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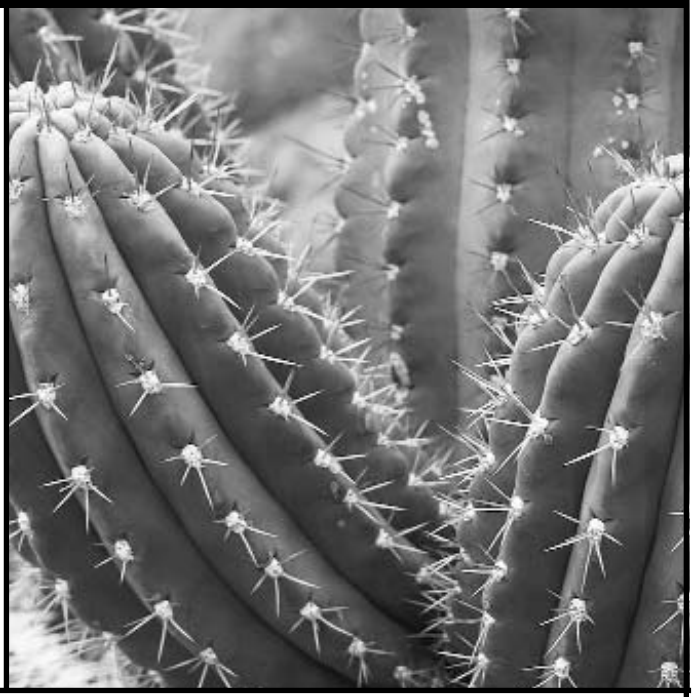

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The Intermediary

A Bridge between the Dispute Resolution Commission and N.C.'s Certified Mediators

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From the Chair

J. Anderson "Andy" Little

The Commission has been very busy this last quarter responding, in large measure, to concerns or suggestions that have come from you. Mediators have asked the Commission for guidance on how long they should retain their mediation files and how they can advertise as mediators. They have called and expressed their frustration with geographic restrictions that bar them from appointment in some court districts. You can read in detail about the Commission's response to each of these matters and others in this edition of *The Intermediary*. As Chair of the Commission, I want to thank all of you for making your concerns known. The members of the Commission will continue to listen and, when appropriate, to take action.

If you have not done so already, you will soon be receiving in the mail a copy of the book, *Alternative Dispute Resolution in North Carolina: A New Civil Procedure*. The Commission is providing the book to all certified superior and district court mediators at no charge. The book is the brainchild of former Commission member Carmon J. Stuart. For those of you who don't know Carmon, he is a former FBI agent and Clerk of the Federal Middle District. He was also one of the principal architects of the arbitration program that has operated in our district courts since 1987.

Some four years ago, Carmon decided that it was time to record the history of dispute resolution in North Carolina. He wanted to leave a record for those who follow us so they will know how and why we got where we are today. Carmon interested others in his idea and the Commission and the Dispute Resolution Section of the NCBA formed a committee and started to raise the funds necessary to publish a volume that would serve both as a history and a practice manual. Carmon and John Schafer served as the co-chairs of that Committee.

Many mediators, attorneys and court officials volunteered to write chapters for the book. Raleigh mediator, Jacqueline "Jackie" Clare, served as editor and worked hard to create a unified whole from the many individual contributions. Now, four years later, Carmon's dream has become a reality.

In addition to providing copies to mediators, we are also distributing the book to judges, legislators, and other non-elected government officials. During a tough financial year when some dispute resolution programs came under fire, we hope that the book will generate more awareness of dispute resolution processes and programs and the benefits that flow from them. Copies of the book are also being

(continued on next page)

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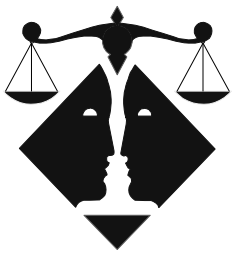
The Commission invites its readers to comment on any articles presented in *The Intermediary* or to write articles for inclusion. Send your thoughts to the editor, Leslie Ratliff, at leslie.ratliff@nccourts.org. We look forward to hearing from you!



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provided to Chief Justices and law libraries across the United States. North Carolina has been a pioneer and we want others to be able to benefit from the work that has been done here.

For those of us who worked on it, *Alternative Dispute Resolution in North Carolina: A New Civil Procedure* has been very much an adventure and a labor of love. The Commission is proud to share it with you and hopes that you will both enjoy the book and learn from it.

Model Mediator

Appointment Policy

The Commission has adopted a model mediator appointment policy and shared it with Senior Resident Superior Court and Chief District Court Judges across the State. The policy is a response to numerous calls and letters the Commission has received from certified mediators. Those who contacted the Commission expressed frustration with judicial districts that denied them court appointments. The districts in question maintained "short lists". Those lists frequently imposed geographic restrictions, limiting appointments to local mediators. Less frequently, non-attorney mediators were excluded from participation.

Mediated Settlement Conference Rule 2.C. provides for Senior Resident Superior Court Judges to establish and set out in their district's local rules a procedure for appointment of mediators in instances where the parties do not select their own. Similarly, Family Financial Settlement Rule 2.B. provides for the court in each district offering the program to adopt a policy and set it out in local rule or order. The Commission determined that many districts had never adopted a formal policy on court appointments.

MSC Rule 2.C. and FFS Rule 2.B. provide for the Commission to furnish its list of certified mediators for the consideration of Senior Resident Superior Court Judges and Chief District Court Judges. Final authority to determine how appointments are made and which mediators are selected rests with the judges. In an effort to address mediator concerns, the Commission has offered its model policy to the districts. Those that do not have a policy in place have been asked to adopt one and to consider the model policy as they draft. Districts that have adopted a local rule or order that varies from the model policy have been asked to re-consider it in light of the model.

The model policy provides for judges to rotate down the list the Commission provides and to make appointments without respect to whether the mediator is an attorney or a non-attorney. While the policy contemplates that judges may impose some geographic restrictions, it also provides for participation of mediators who live at farther distances provided that they first notify the judge in writing of their interest in serving and of their familiarity with the district's local mediation rules and willingness to comply with them and the Supreme Court's Rules.

Commission Adopts Advertising Guidelines

The Commission has now adopted the following guidelines for mediator advertising. The Guidelines are intended to answer questions that the Commission's office has frequently fielded from recently certified mediators:

Advertising Guidelines

(Adopted by the Dispute Resolution Commission on May 16, 2003)

When advertising that s/he is certified by this Commission, a mediator shall specify certification by the NC Dispute Resolution Commission, Dispute Resolution Commission, NCDRC or DRC. A mediator should not identify him/herself as certified by the Administrative Office of the Courts or the Courts. Because of the number of mediation programs now operating in the North Carolina courts, it could be misleading to the public and the bar for a mediator simply to offer him/herself as "certified" without specifying the program or the type of mediation to which the certification pertains. Thus, a mediator shall also identify that s/he is certified to conduct mediated settlement conferences for superior court, district court, or both. A family financial mediator certified by the Dispute Resolution Commission shall not offer him/herself as certified to mediate custody or visitation matters.

Although both the Superior Court and Family Financial Settlement Programs now provide for a number of dispute resolution alternatives, certification pertains only to the mediated settlement conference option. Because the DRC does not certify arbitrators, neutrals, or presiding officers, a mediator who offers such services shall not hold him/herself out as certified by the Commission in one of these areas.

If a mediator allows his/her certification to lapse, *i.e.*, the mediator does not renew prior to June 30th of any given fiscal year, the mediator shall immediately remove any certification designation from his/her letterhead, business cards, and/or other advertising. If a mediator voluntarily relinquishes his/her certification and notifies this Commission or if this Commission revokes a mediator's certification, the mediator shall immediately remove the certification designation from his/her letterhead, stationery, and/or other advertising.

APPROVED EXAMPLES:

NCDRC Certified Mediator – Superior Court & Family Financial
NCDRC Certified Superior Court Mediator
DRC Certified Mediator – Superior Court
DRC – Certified Family Financial Mediator

Newsletter Goes On-Line

This edition of *The Intermediary* is the first to be distributed on-line. The Commission is making this change principally to avoid the substantial costs involved in printing and mailing its newsletter.

Over the past few years, the Commission has been working hard to develop its web site to make it a valuable and easily accessible resource for North Carolina's certified mediators. Publication of the newsletter on-line represents the Commission's latest effort to further enhance its site.

If you have not done so already, the Commission hopes that after you read the newsletter you will take some time to explore the other materials posted on www.ncdrc.org. While principally designed with the interests of mediators in mind, the web site also contains information that can benefit others. For example, mediator contact and availability information is listed primarily for the purpose of assisting attorneys engaged in selecting a mediator. Basic information about how the mediation process is designed to work is also included and intended largely to benefit litigants.

The Commission will appreciate your assistance in helping to spread the word about its web site and how it can be used by members of the Bar, their clients, and others.

Inactive Status Policy

Since its inception, the Commission has received calls each renewal period from mediators asking whether the Commission has adopted an inactive membership category. Often, the caller has taken a position with an entity that prohibits outside employment or he or she has been stricken with a serious illness that precludes active practice at least for the foreseeable future. These mediators do not want to lose their certification, but at the same time are reluctant to pay renewal fees each year when they are not actively mediating. In response to such calls, the Commission has now adopted an Inactive Status Policy. Mediators will be permitted to apply for inactive status only during the annual renewal period and not during the balance of the fiscal year.

Dispute Resolution Commission

Policy on Inactive Status

(Adopted by the Commission on August 1, 2003)

I. Application for Inactive Status and Fees.

A. On an annual basis any certified mediator may apply for inactive status as follows:

1. By giving notice to the Commission together with completion of annual renewal forms;
2. By paying inactive status fees of
   a. $35 for single certification; or
   b. $50 for dual certification.
3. Any certified mediator may apply for an abatement of fees upon a proper showing of hardship.

B. During the period of inactivity a mediator may not mediate any Superior Court or Family Financial matters, whether selected or appointed, or hold him/herself out as a certified mediator.

II. Resumption of active status.

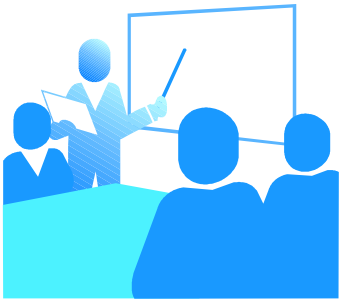
A certified mediator on inactive status may resume active status upon notifying the Commission in writing of his/her desire to resume active status provided that the mediator has complied with all reporting and other Rule requirements that prevailed during the period of inactivity.

Family Program Packets Available

Any Chief District Court Judge interested in offering the Family Financial Settlement Program (ED Mediation) in his or her district may contact the Commission's office and request a packet of materials designed to assist with start-up. In addition, the Commission and the Dispute Resolution Section of the North Carolina Bar Association have volunteer mediators available to travel to new districts to meet with local attorneys to explain how the mediated settlement conference process and the Family Financial Settlement Rules are designed to operate. Administrative Office of the Courts' staff also stand ready to provide support to you and your staff.

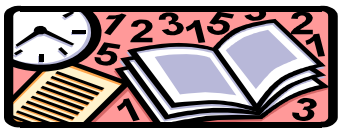
Mediator Disciplined

The Commission has suspended a mediator's certification for six months and required the mediator to complete additional training on mediator ethics. The State Bar found that the mediator had mediated a separation agreement for a couple experiencing marital difficulties, including drafting a separation agreement. The agreement was never signed and the mediator proceeded to represent the husband in the ensuing divorce litigation. The Commission determined that the mediator's conduct was a clear violation of Standard VII.C. The Standard provides that: "A mediator who is a lawyer or other professional shall not advise or represent either of the parties in future matters concerning the subject of the dispute." Moreover the Commission believes that such conduct also serves to violate Rule VII of the Supreme Court's Rules for the Dispute Resolution Commission. Rule VII provides that mediators are not to act in such a way that brings discredit upon the mediation process or the mediated settlement conference programs.



Upcoming Meeting

The Commission's next meeting is scheduled to be held on Friday, November 7th, in Raleigh. Mediators, attorneys, and interested members of the public are welcome to attend. Anyone interested in attending or in addressing the Commission should contact the Commission's office to obtain additional information.



Upcoming Training

SUPERIOR COURT TRAINING

American Arbitration Association: No training currently scheduled in NC. For information, contact Kristina Morrison at (800) 982-3792. Web site: www.adr.org.

Beason & Ellis Conflict Resolution, LLC: 40-hour superior court mediator training course, November 12-16, 2003, and February 4-8, 2004, in Durham, NC. For more information or to register, call (919) 419-9979. Web site: www.beasonellis.com.

Intercede Mediation/ADR Services: 40-hour superior court mediator training course, October 30-November 3, 2003, in Charlotte, NC. (A Mecklenburg County Bar, 26th Judicial District CLE Course. For information, call (704) 375-8624, or go to www.meckbar.org.) Web site: www.intercedemediation.com.

Mediation, Inc: 40-hour superior court mediator training course, November 12-16, 2003, in Raleigh, NC. For more information or to register, contact Thorns Craven at (336) 777-1477 or (800) 233-5848 (NC only). Web site: www.mediationincnc.com.

FAMILY FINANCIAL TRAINING

Atlanta Divorce Mediators, Inc: 40-hour family mediation training course, October 16-20, in Murphy, NC; October 23-28, in Nashville, TN; November 13-17, in Montgomery, AL; December 4-8, in Atlanta, GA. For more information, contact Dr. Elizabeth Manley at (800) 862-1425. Web site: www.mediationtraining.com.

Carolina Dispute Settlement Services: 16-hour family mediation training course, December 4-5, in Raleigh, NC. $450.00. Space limited. For more information or to register, contact Diann Seigle at (919) 755-4646, Ext.25, or (800) 960-3062.

Mediation, Inc: 40-hour family mediation training course, October 15-19, 2003, in Raleigh, NC. See above for contact information.

6-HOUR MSC/FFS COURSE

No training currently scheduled. See www.nccourts.homestead.com. for future course offerings.

ADDITIONAL TRAINING OPPORTUNITIES

Atlanta Divorce Mediators, Inc: *Advanced Training for Experienced Mediators*, October 16-19, 2003, in Murphy, NC; *Advanced Training in Child Issues: Mediating Parenting Plans*, November 15, 2003, in Atlanta, GA. *16-Hour Advanced Divorce Practicum*, October 23-24, 2003, and December 11-12, 2003, in Atlanta, GA. See above for contact information.

Georgia Commission on Dispute Resolution; Alternative Dispute Resolution Section, State Bar of Georgia; Georgia Office of Dispute Resolution: 10th Annual ADR Institute and the 2003 Neutrals' Conference, *Celebrating 25 years of ADR: A glance back, a look forward*, November 20-22, 2003, in Lake Lanier Islands, GA. CLE and neutral CE credit available to participants. For additional information, contact Leila Taaffe at (404) 463-3785. Web site: www.gadr.org.

Golden Media: 90-minute practice development teleseminars, including *Entrepreneurship for mediators* and *Setting up shop*. For program descriptions and online registration, see http://golden-media.com.

Source Education: *Mediating in 3-D*, January 29-30, 2004, in Raleigh, NC. For information and registration, contact Marilyn Shannon at (919) 362-7133 or Deborah Isenhour at (919) 942-3675.

Commission Welcomes New Trainers

The Commission welcomes two new programs to its list of certified mediator training programs. **Carolina Dispute Settlement Services (CDSS)**, based in Raleigh, has been certified to provide the abbreviated 16-hour family course to mediators who are already certified to mediate in superior court. In addition, CDSS has teamed with **North Carolina Central University School of Law** to offer the 40-hour superior court training program. This course will be directed primarily at Central law students. Welcome CDSS and Central !!

Mediator Submissions

The Commission is very pleased that three certified mediators have submitted two articles for publication in this month's edition of The Intermediary. The first article entitled, The Energy of Conflict: An Emerging Paradigm, addresses a new mediation model which seeks to harness the energy that is produced by conflict and to use that energy to work toward resolution. In the second article, Mediation With A Foreign Language Participant, the author warns about pitfalls that can occur when non-English speaking participants are involved in mediation and what can be done to avoid problems. The editor thanks the authors for sending their articles and invites readers who have comments to forward them so that they can be shared in the upcoming edition.

The Energy of Conflict: An Emerging Paradigm

Marilyn Shannon
and
Deborah Isenhour*

How do you see conflict? For most of us, we experience conflict as a heavy burden and an energy drain. In fact, as mediators, we often see the weight of conflict in very tangible ways as we look at and listen to the parties involved in a dispute. And, when a conflict is resolved, we have all seen the visible difference in the parties' moods, facial expressions, and even posture. Changes in mood, behavior, and circumstances are inevitable. In fact, the one thing we can count on is change as the weight of conflict lifts. When we remember that conflict arises from previously peaceful situations, we can begin to envision a new place where peace can be restored. We encounter evidence daily that conflict in a room has a very different 'feel' before, during, and after mediation. Yet, this is an aspect of conflict that is quite difficult to quantify or even describe. We call this phenomenon 'the energy of conflict'.

The subject of energy is obviously complex. The medical profession is just now beginning to understand the connection between energy and the physical body. Bioelectromagnetics is the emerging science that studies how living organisms interact with electromagnetic fields. According to a report entitled *Bioelectromagnetics Applications in Medicine* by a panel of doctors chaired by Beverly Rubik, Ph.D. (a biophysicist who served as a member of the Advisory Panel to the National Institutes of Health (NIH)), the electrical impulses in our bodies create electromagnetic fields of energy. According to the report, the physical body can also be affected by other fields of energy outside the body in both positive and negative ways. For example, we have all heard about the detrimental effects of high voltage power lines on the health of nearby residents. And we also know the positive benefits from radiation therapy. So what about the effect of *your* emotions and energy on *my* mood and behavior and vice versa?

The ability to harness our own energy and direct it in purposeful ways has been the basis for healing through alternative therapies and is now a whole field of medicine called Energy Medicine. Energy Medicine uses the term bioenergies to describe something ancient traditions have called chi, ki, prana, etc. Many of these alternative therapies are becoming increasingly popular and appear to involve the flow of these energies through the dense physical body. In addition, it is traditionally accepted that expansions of consciousness often are related to changes in subtle energies that cannot be quantified. To be sure, there is a strong interrelationship among the emotions, the physical body, and the spirit.

There are three basic ways in which we manifest our individual energy: through emotions with an emphasis on relationships, through actions and an emphasis on results, and through creativity where the emphasis is on vision. Each person manifests these basic three energy components at different times and with varying degrees of intensity. We can improve our mediation practice by recognizing which energy component is present and becoming aware when energies are stuck or out of balance. The best opportunities for revelations and resolution occur when balance exists among these three energy components.

Being aware of our own energy as mediators is also a vital component to maintaining neutrality. When energy is stuck in emotions, little headway can be made until that energy is released and/or re-directed. According to Tamar Frankiel, Ph.D., author of *The Gift of Kabballah*, emotion is energy traveling faster than thought. Conversely, sometimes we may be able to see that disputants have been 'spinning their wheels' and stuck in 'doing'. Most often in conflict, little energy has been given to the vision of what's possible. As mediators, we might envision ourselves as conductors of an orchestra encouraging and emphasizing certain behaviors and/or remarks while re-directing and softening other remarks – all done in an effort to facilitate a balanced and harmonious result.

As Albert Einstein said, "You cannot solve a problem in the same level that it was created, you must rise above it to the next level." It is only when we have a higher vision, a call to something greater, that change happens. And so it is when we abandon the comfort of traditional ideas that we can open ourselves to the relativity of energy allowing a shift in our existence toward an uncharted course.

**Marilyn Shannon and Deborah Isenhour are mediators and trainers in Raleigh, NC. As co-founders of Source Education, they have developed Source Mediation™, a mediation model based on energy. Marilyn is co-chair of the Spirituality Section of ACR.*

Mediation with a Foreign Language Participant

Grover Prevatte (Jack) Hopkins*

Hispanics now constitute over two percent of the population of North Carolina. In addition to the usual cases of automobile accidents and Workers' Compensation claims, many Hispanics have resided in the U.S. for an amount of time sufficient to establish themselves and become permanently employed, thereby provoking cases in family court dealing with issues of custody, visitation, support and equitable distribution.

As we are all very aware, mediation often requires a delicate and subtle use of language to nudge the participants slowly toward a resolution. Although conceptually possible, it is a virtual impossibility for an interpreter, irrespective of substantial academic abilities and vast experience, to follow the nuances of a rapid fire exchange.

PITFALL #1: **Speaking two languages does not qualify one as an interpreter.** Supposing an individual bilingual since childhood and a graduate of law school, both in the United States and in a Latin American country, this person would be totally inept at a conference regarding electronics, chemistry, architecture and other areas of activities in which the individual has no formal academic training. The terms of art and specialized vocabulary of any area of professional activity are so extensive in both languages, that an individual not regularly employed in a given area would be unable to adequately serve as an interpreter.

PITFALL #2: The selected **interpreter understands the requirements and standards** to be employed by a professional interpreter. As in any professional

human activity, there are standards of ethics and professionalism which have been promulgated for the public protection. One example is that interpretation should be done aloud so that everyone in the room can hear. Frequently, one may witness in the North Carolina criminal court system the phenomenon of the "whispering interpreters" who mutter quietly in the ear of the defendant while the Judge or the District Attorney are speaking. Such practice does not allow the possibility of an individual present in the room and understanding both languages to cry "foul" when the interpretation is inaccurate or incomplete or biased.

He said, “fill-in-the-summation" is not a valid and appropriate interpretation. Comments in the first person should be translated in the first person so that the actual thoughts and intentions of the speaker are rendered in the most accurate and comparable form in the target language.

PITFALL #3: **Bi-illiteracy.** While an individual may be bilingual, that same individual can be **functionally illiterate in two languages.** An example of this effect is, an individual who completes eight grades of education in Mexico and finishes four years of high school in the United States. The lack of formal education in Spanish limits the individual's capacity to adroitly express subtly, in Spanish, nuances of communicated expressions in English and, because of a limited academic preparation in English, limitations of vocabulary and knowledge of terms of art, understanding of what was actually said in English is impeded before the attempted translation.

PITFALL #4: **Incompatibility of usage level.** While a given interpreter may very well speak an erudite and cosmopolitan version of two languages, the same individual might be totally devoid of any understanding of the street language or slang of one or both languages.

PITFALL #5: **“Affection doth make him false.”** Cousins, friends, siblings, parents and helpers with their own hidden agenda are almost guaranteed to compound a disaster. The bias and predisposition of this type of so-called "interpreter" invariably prompts miscommunication or even worse, learned advice in lieu of translation.

PITFALL #6: **My client speaks English well enough.** The client's ability to engage in pleasant social banter, discuss the weather, wife and kiddies, and answer questions as to date of birth, social security number and address does not necessarily guarantee that detailed, specific and esoteric communication regarding the problems and legal issues will be grasped by the client. Too often, the first true communication between the attorney and the client is achieved at the time of mediation, when the mediator is bilingual.

THE SOLUTION: There is none.

RISK REDUCING STEPS:

1. Selection of a bilingual and qualified Attorney Mediator. A list of Spanish-speaking attorneys in North Carolina is available on the web page of the North Carolina Academy of Trial Lawyers and at www.jackhopkins.com.

2. Do not accept as an interpreter at a mediation conference, an individual who is related by blood or paycheck to any of the participants.

3. Prior to employing an interpreter, personally checkout their knowledge of the subject matter and their knowledge of the source language. Have a native speaker of the target language give you some evaluation of the proposed interpreter's adeptness in the target language.

4. Verify that the proposed interpreter has at least a broad general knowledge in the area to be addressed at mediation. Presently employed clerks at Wal-Mart most likely will not be able to adequately translate discussions on contributory negligence, third party beneficiaries, assumption of risk, documents under seal, the distinction between the level of proof required in criminal and civil case, statutes of limitation, summary judgment, request for admission, probable cause hearings, jury nullification, etc. ad infinitum, ad nauseam.

In summary, it is most respectfully submitted that mediation without adequate safeguards to provide for the highest achievable level of communication, renders mediation hollow and ineffective and will, more often, compound problems of understanding which are required to reach any resolution.

**Mr. Hopkins is a certified superior court mediator who practices mediation and law in Tarboro. He is fluent in Spanish, Russian, and German.*