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The Chair's Comments



Ann Anderson

I have enjoyed serving in the role of section chair this year. Throughout these first few months I have observed how excited mediators and arbitrators are about their careers. When mediators and arbitrators discuss their craft, there are many common questions, experiences and concerns. I believe that our section offers its members one of the best networking opportunities of any of the sections. Perhaps networking is easier because of the training, which requires observations, or perhaps networking results because of the types of practitioners who join the section; whatever the reason I encourage you to get to know your fellow Dispute Resolution Section members and to take advantage of the knowledge and skills that they have to share.

The section is also fortunate to have many experienced practitioners in dispute resolution who are continuing to remain active in shaping the future of this developing career. As mediation continues to expand in existing programs and as additional programs are added, we have the opportunity to influence in a positive and progressive way the profession of dispute resolution in

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Confidentiality vs. Mediator's Authority to Report Certain Conduct

BY ZEB E. (BARNEY) BARNHARDT JR.

What is an attorney-mediator to do when an attorney representing a party at a mediation settlement conference violates the Rule of Professional Conduct? The NCBA Dispute Resolution Section's Ethics and Professionalism Committee ("Committee") is searching for a resolution to a dilemma that attorney-mediators may face.

Assume the following scenario: Attorney A, serving as mediator in a mediation settlement conference, becomes aware that Attorney B, who represents one of the parties, has committed a clear violation of the Rules of Professional Conduct in the course of the matter being mediated. What action, if any, must Attorney A take vis a vis reporting the violation?

A conflict exists between the North Carolina Rules of Professional Conduct ("RPC") that govern the conduct of attorneys and the Standards of Professional Conduct for Mediators ("SPCM") that govern the conduct of mediators certified by the Dispute Resolution Commission ("DRC"). Both sets of rules were approved or promulgated by the N.C. Supreme Court.

Rule 8.3 of the RPC requires an attorney to report violations of the RPC to the State Bar. Rule 8.3 refers to Rule 1.6, which contains certain exceptions to the reporting requirement, based on the attorney-client confidentiality doctrine. Standard III of the SPCM requires mediators to keep confidential all information learned during the course of a mediated settlement conference and, with certain limited exceptions, not disclose anything that occurred. None of the exceptions addresses the scenario posed. Mediators who are not attorneys have no duty to report conduct of participants to the State Bar.

In the scenario presented, if Attorney A discloses the violation to the State Bar, then he or she has breached Standard III of the SPCM; but, if Attorney A maintains the information as confidential pursuant to the mandate of the SPCM, then he or she has breached Rule 8.3 of the RPC. How can this conflict best be resolved?

Background

This is a genuine case of first impression and an issue of national significance. The N.C. State Bar has this issue formally before it and has requested input from both the Section and the DRC. As best the Committee can determine, no state has made a ruling on it. The ABA has a study of the issue in process, but that is moving slowly. The DRC has a committee examining the issue, a number of the members of which are, also, on the Section's Committee.

Committees Address the Issues

The DRC's Standards and Discipline Committee has been addressing the issue parallel to the work of the Section's Committee. There are liaison representatives serving on both committees, so each has been informed as to what the other has discussed. There are differing positions.

One position favors the notion that two factors should cause the SPCM to override the RPC in this instance: (1) the public policy of assuring confidentiality to the mediation process and (2) the notion that the playing field should be level for all participants in the mediation process as to

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Agricultural Mediation Blossoming in Western Carolina

BY JAYNE ZANGLEIN

A new mediation program is underway at Western Carolina University's College of Business.

NCAMP

The North Carolina Agriculture Mediation Program (NCAMP) was approved by Gov. Easley last summer. In August, the United States Department of Agriculture (USDA) certified the NCAMP as the mediation service provider in the state of North Carolina to assist in the resolution of disputes between participating USDA agencies and their program participants.

To be certified as an agricultural mediator, mediators must take the 40-hour Superior Court Mediation training, plus an additional 20 hours of specialized training in USDA program issues. At the February training, NCAMP certified 24 agricultural mediators.

Types of Mediations

The program was established to assist farmers in resolving disputes with the Farm Service Agency (FSA). The mediations are challenging and interesting, in part, because of the diversity of farmers in North Carolina. Disputes can involve Christmas tree farms, nature conservations, spas, and fish farms. The issues are also wide-ranging. Recent mediations have focused on valuation issues, geographic information systems, and loan repayment plans.

Currently, NCAMP has a contract with the Farm Service Agency to mediate FSA cases, but agreements are being negotiated with the Natural Resources Conservation Service (NRCS) and the Rural Development Agency. Rural Development mediations will involve single-family and multi-family housing programs, community facilities programs, and rural business-cooperative service programs. For example, the USDA reports that as a result of a mediation involving a \$1.3 million Business and Industry Direct Loan to a convalescent home, foreclosure was avoided.

Conservation Issues

NRCS mediations may involve wetland determinations and highly erodible land conservation. Mediation may be successful even when the NRCS does not have regulatory flexibility. For example, the USDA reports that as a result of a mediation

conducted between a farmer and NRCS, the farmer avoided prosecution for violating "swampbuster" laws which forbid a farmer from clearing wetlands for agricultural use. If the farmer was found to have violated the law, he could have lost \$35,000 annually in subsidies.

It has also been reported that during a mediation, a farmer stated that he cleared the land before the effective date of the federal wetlands laws. In an effort to pinpoint the date the land was cleared, the parties searched for aerial photographs of the land. When the photographs were found, it became clear to the farmer that he had cleared the land after the ban was in effect. The

mediator helped the parties focus on mitigating and restoring the land.

In this case, the USDA representative involved felt that mediation was effective because "the mediator can help explain the situation in a way we can't. The mediator will also ask questions that the landowner won't ask. The producers need face to face contact to feel like they are being listened to."

Benefits of Agricultural Mediation

Claudia Kelsey, an NCAMP mediator, has enjoyed facilitating agricultural mediations: "The farming community appreciates the mediation

2007-08 NCBA/NCBAF Committee Service

Much of the work of the North Carolina Bar Association/Foundation is accomplished through its committees, and it will soon be time to begin the committee appointment process for 2007-08.

Committee participation affords an excellent opportunity to meet and work with attorneys across our state and to make a significant contribution to the legal profession.

The number of members on each committee is obviously limited, but we try to place as many people as possible.

If you would like to serve on an NCBA/NCBAF committee for the coming year, click on www.ncbar.org/about/committees/memberForm.pdf to download a Committee Preference Form and committee description list.

Please complete and return the Committee Preference Form by April 13, 2007.

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process as an opportunity to sit down and discuss issues that are immensely important in their lives. For them, farming is not just an occupation; it's a way of life. A dispute with the USDA affects every aspect of a farmer's life—his job, his livelihood, his home, his future and his entire family."

Kelsey's intuitive comment is supported by research: an article published by the National Association for Rural Mental Health cited the program's mental health benefits.

She continues: "I have been inspired by the farmers. They make a sincere effort to be clearly heard and understood. They are always well-prepared, articulate and incredibly resilient. These North Carolina farmers consistently bring creative solutions to the table."

Campus Mediation

Farmers and the USDA are not the only ones to benefit by Western Carolina University's mediation program. Students benefit, too.

Next month, WCU plans to launch a Campus Mediation Program (CMP) to resolve disputes between students and other members of the WCU community. The Campus Mediation Program will mediate interpersonal disputes between two or more students in an interdependent living or working situation. Examples include disputes involving roommates, neighbors, coworkers, and student organizations.

So far, 20 students and five faculty members have been trained as mediators in two community mediation courses offered on campus. The mediation program will operate out of the Department of Student Judicial Affairs. Walter Turner, the Director of Student Judicial Affairs, is a recent supporter of mediation. He says: "The Campus Mediation Program will be a wonderful addition to the student judicial process by providing an alternate route to resolution. The program will help us achieve some of our primary goals: education, student development, and behavior change. Further, the Department of Student Judicial Affairs is impressed with the level of collaboration between faculty, staff, students, and the community as the Campus Mediation Program has been developed."

Courtney Howard, a student, has been selected to run the program. Howard, who has been a mediator since last April, says: "We expect that the campus mediation will have a profound impact on the process students take to resolve minor conflicts. It will help them learn how to resolve disputes without sacrificing friendships."

Conflict Resolution Minor

WCU's administration is currently reviewing a proposed interdisciplinary minor in Conflict Resolution and Cross-Cultural Communication.

The Interdisciplinary Minor in Conflict Resolution will allow students to take courses across the curriculum that will give them a solid interdisciplinary understanding about conflict resolution and cross-cultural differences.

Students will be required to take three courses: Business Communications in a Multi-Cultural Environment, Community Mediation, and a Cooperative Learning Seminar. Students also will take two elective such as Labor-Management Relations, Ethics, or Negotiation. Students will be required to participate in at least 10 hours per week of an approved cooperative learning experience, which involves direct, hands-on mediation or facilitation practice and guided reflection on service learning activities. To meet this requirement, students can work with NCAMP, the campus mediation program, or the local community mediation group-Mountain Mediation Services.

For More Information . . .

For more information about any of these programs, contact Jayne Zanglein at (828) 227-7191 or jzanglein@email.wcu.edu.

ZANGLEIN TEACHES IN THE COLLEGE OF BUSINESS AND HAS BEEN A MEDIATOR SINCE 1994. PREVIOUSLY, PROFESSOR ZANGLEIN TAUGHT MEDIATION, CROSS-CULTURAL COMMUNICATION, AND ALTERNATIVE DISPUTE RESOLUTION FOR 10 YEARS AT TEXAS TECH UNIVERSITY SCHOOL OF LAW WHERE SHE WAS AN ENDOWED PROFESSOR OF LAW. SHE HAS EXTENSIVE EXPERIENCE IN DEVELOPING MEDIATION TRAINING PROGRAMS AND SERVES AS NCAMP'S TRAINING DIRECTOR.

DON'T FORGET...

**Dispute Resolution
Section Annual Meeting
and CLE
March 22
N.C. Bar Center, Cary**

Save the Date!

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