

## Inside This Issue:

- 3** Book Review: *3D Negotiation*
- 4** Professionalism for Mediators
- 6** Agricultural Mediation  
Blossoming in Western Carolina
- 8** Memo Regarding New Local Rules
- 11** Open Meetings Law and Mediation  
Involving Local Governments

## 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

See **COMMENTS** page 2

# 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

See **CONFIDENTIALITY** page 2

# DISPUTE RESOLUTION

VOL. 21, NO. 2  
MARCH 2007

Published by the NCBA's  
Dispute Resolution Section

## Editor

Danae Woodward

## Editorial Address

P.O. Box 3688  
Cary, NC 27519

## SECTION OFFICERS

### Chair

Ann Anderson

### Immediate Past Chair

Jon Harkavy

### Vice Chair

Lynn Gullick

### Secretary

LeAnn Nease Brown

### Treasurer

Ellen Gelbin

### Board Liaison

Rosemary Kenyon

## SECTION COUNCIL

Judge Gerald Arnold  
Joey Barnes  
Ken Carlson Jr.  
Jan Cole  
Joe Diab  
George Doyle  
Shirley Fulton  
Pamela Glean  
Frank Goldsmith Jr.  
Hezekiah Goodson Jr.  
Dorothy Hairston  
Nahomi Harkavy  
Nancy Hemphill  
Patricia Holland  
Judge David Q. LaBarre  
Lesley McCandless  
Fred Morelock  
Judge Nancy Norelli  
Jack Ogburn  
Patricia Poole  
Larry Ross  
Steven Sizemore  
Scott Taylor  
Danae Woodward

©N.C. Bar Association 2007.

No portion of this publication may be reprinted  
without permission.

Views and opinions expressed in articles published here-  
in are the authors' only and are not to be attributed to  
**Dispute Resolution**, the Dispute Resolution Section or  
the NCBA unless expressly stated. Authors are respon-  
sible for the accuracy of all citations and quotations.

## Comments *from page 1*

North Carolina. A number of issues about media-  
tion practice and ethics issues that arise during  
mediation will be addressed by the Dispute  
Resolution Commission and the North Carolina  
State Bar. Please let your section council members  
hear your input, so that your knowledge and expe-  
riences will be reflected in the discussions that our  
section council members are able to contribute to  
the decisions that these bodies make.

If you would like to become more active in the  
section, feel free to contact me. Our CLE and annu-  
al meeting will be March 22, 2007 at the N.C. Bar  
Center in Cary. We welcome your attendance and  
also encourage suggestions for future CLE topics.

We further invite you to submit articles for the  
newsletter.

And, as an element of thinking outside the box,  
I am trying to compile a listing of "inspirational"  
music for mediation. If you have a song that reflects  
either your mediation style or a mediation that you  
have held, send it to me. Our current listing  
includes such songs as: "We Can Work It Out,"  
"You Can't Always Get What You Want," "Money,  
Money," "I'm Not Ready to Make Nice," "I Wanna  
Talk About Me" and "All You Need is Love."

Please let us hear from you. My e-mail address  
is [annanderson681@hotmail.com](mailto:annanderson681@hotmail.com). □

## Confidentiality *from page 1*

what should be expected from mediators, since all  
mediators are not attorneys. The proponents of  
this position have suggested that the N.C. State Bar  
should amend Rule 1.6 of the RPC to extend the  
privilege of confidentiality to persons in Attorney  
A's position. The concept is that there is an attor-  
ney-client relationship between a mediator and  
the parties who have engaged the mediator to  
serve in that role in a particular matter. A similar  
exception contained in Rule 1.6 already applies to  
participants in the assistance programs approved  
by the State Bar or the N.C. Supreme Court for  
attorneys and judges. The proponents further sug-  
gested that the SPCM Standards should be amend-  
ed to eliminate inconsistent language and clarify  
the mediator's duty of confidentiality.

Another position favors making no change to  
the RPC, affirming that the attorney-mediator  
would be required to report the conduct in fulfill-  
ment of the obligation undertaken as a licensed  
attorney, and the SPCM should be clarified in that  
regard.

A third position interprets existing Standards  
to permit attorney-mediators to report violative  
conduct to the State Bar.

## New Focus

Both committees and the Section Council have  
had lively discussions on the issues raised. A new  
focus has now emerged. After exploring the ques-  
tion as to what the best rule would be for all con-  
cerned, a consensus emerged from the Section's  
Committee that it would be preferable to have a  
reporting standard that applies to all mediators, as  
a forward-looking guideline, as opposed to being  
left to interpreting existing rules after an incident  
occurs.

The DRC's committee received input from the

N.C. State Bar and others, resulting in clarification  
of interpretations of Rule 8.3 and Rule 1.6. The  
DRC determined that certified mediators come  
from a variety of professional disciplines, some of  
which may have their own rules for reporting non-  
conforming conduct. According to the DRC, there  
are approximately 160 certified mediators who  
are not attorneys.

As a result of the committees' deliberations,  
there appears to have emerged a further consen-  
sus that all mediators should report clearly repre-  
hensible conduct and that the standard permitting  
that reporting should include permissive disclo-  
sure that may not be mandated by a specific  
statute, rule or standard. The questions then are:  
What is such reprehensible conduct? To whom  
should a report be made?

Thus, the issue has changed from  
"Confidentiality vs. Obligation to Report" to  
"Defining the Obligation to Report." Further, the  
issue has expanded to include all mediators and  
all conduct by any participant in a mediation set-  
tlement conference.

## Next Steps

Based on information received to date, the  
committees have reason to believe that the N.C.  
State Bar would favorably receive a proposal to  
revise Rule 1.6 of the RPC as stated above, com-  
bined with a proviso that the exception applies as  
long as the attorney-mediator complies with the  
reporting requirements contained in the  
Standards.

Members of the committees and of the Section  
Council have been requested to submit their indi-  
vidual suggestions for revising Standard III to

See **CONFIDENTIALITY** page 3

# Book Review

## *3D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals*

BY JAYNE ZANGLEIN

Title: *3D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals*

Author: David A. Lax and James K. Sebenius

Publisher: Harvard Business School Press

Length: 286 pages

Retail Price: \$29.95

**3D Negotiation** can be summed up in three words: “Prepare, prepare, prepare!”

Twenty years after writing their seminal book, *The Manager as Negotiator*, Lax and Sebenius return with *3D Negotiation*. They assert that most negotiators are one dimensional; that is, they focus solely on using negotiating tactics at the bargaining table. A 3D negotiator operates in three dimensions: She uses effective bargaining tactics at the table, but she designs deals that meet the parties’ underlying interests, and then sets up the negotiation through extensive preparation.

### The Third Dimension: Setup

Although labeled as the third dimension, setup is the key to an effective negotiation. A 3D negotiator is prepared. He “sets the table” by “ensuring that the right parties have been approached, in the right sequence, to deal with the right issues that engage the right set of interests, at the right table or tables, at the right time, under the right expectations, and facing the right consequences of walking away if there is not a deal.” Sounds good, right?

### Map Backwards

How does a negotiator prepare? Lax and Sebenius recommend that negotiators “map backwards.” To map backwards, the negotiator must determine where she wants to end up and then map the route to get there. This is, perhaps, the most beneficial advice the authors give. Mapping

requires the negotiator to create a map of “all of the parties, their interests, and no-deal options.”

Novice negotiators often object to preparing for a negotiation. They claim it is impossible to prepare if you don’t know what the other side will do. I heard this complaint often from my students when I taught negotiation in law school. I would require students to map out their negotiations using the worksheets developed by Fisher and Ertel in their *Getting Ready to Negotiate* book. Students would complain until it became clear that the best prepared negotiators tended to get the best deals.

Thorough preparation for negotiation often takes longer than the negotiation itself. But the end result is much better for both parties. If you are looking for a practical guide to mapping the negotiation, I highly recommend *Getting Ready to Negotiate* as a companion to *3D Negotiation*.

### Get the Parties Right

A 3D negotiator sets up the negotiations right. This requires the negotiator to get the parties right. The negotiator should ask the following questions: Does my map include the highest value players, potentially influential players, potential blockers, agents who do not have my best interests at heart, the decision-makers, the person with settlement authority, and the implementers? If you have consulted the right parties, the negotiation will be more effective.

**Get the Interests Right.** The negotiator must also get the underlying interests right—both yours and theirs. As mediators, we are familiar with the techniques Lax and Sebenius recommend: ask, listen, and probe; use public sources such as the Internet to research the other parties and their interests; tap internal sources for information; and tap knowledgeable advisors.

As Fisher, Ury and Patton said in *Getting to Yes*, “don’t deduce their intentions from your fears.” That’s great advice for both novice and experienced negotiators.

One of Lax and Sebenius’ anecdotes reminds me of a faux pas I committed when I was a law clerk. My boss, the city attorney, asked me to write a memo on liability issues involving a culvert running alongside a road. I wrote a detailed memo on sovereign immunity issues, thinking that the city maintained the culvert and that my boss was representing the city.

When I presented the memo to my boss, he commended me on a job well done. “Now I know what I’m up against!” he said. It turned out that he was representing a client who was suing the county, which maintained the culvert. Although I was mortified that I had written the memo from the wrong perspective, it turned out to be a blessing in disguise. My boss was better prepared because he could anticipate the county’s arguments.

**Deal or No Deal?** Sometimes the best solution is to say, “No deal.” At least that’s what a lot of folks tell Howie Mandel!

But before you say “No deal,” you need to know your options. That’s the beauty of the show “Deal or No Deal.” The contestant has all the relevant factual information on a scoreboard in front of him. He’s got an actuary who tells him the odds. In addition, the contestant has at-the-ready, personal advisors who remind him of his goals: a new house, a great vacation, a million dollars. But still, the surge of adrenaline makes most contestants say “No Deal” one time too many.

In negotiation, you must have a Best Alternative to a Negotiated Agreement (BATNA). Your BATNA keeps you on course so that you don’t accept a bad deal. To determine whether to say “deal” or

See **BOOK REVIEW** page 4

---

## Confidentiality *from page 2*

specify the guidelines that would define the permission or obligation of certified mediators to report abnormal conduct. The objective is to devise a Standard that applies to all mediators with respect to reporting conduct of any participant in a mediation settlement conference.

Your input will be helpful, and the Committee invites your suggestions. Please e-mail your proposals to me at [zbarnhardt@madisonriver.biz](mailto:zbarnhardt@madisonriver.biz). □

BARNHARDT IS A CERTIFIED MEDIATOR, ARBITRATOR AND SOLO PRACTI-

TIONER. HIS MAILING ADDRESS IS 2008 STANCHION STREET, HAW RIVER, NC 27258. HE CAN BE REACHED VIA PHONE AT (336) 270-7474, OR SEND A FAX TO (866) 414-1492.

# Professionalism for Mediators from a Mediator's Perspective

BY LYNN G. GULLICK

The legal landscape in North Carolina has been reshaped by the advent of the mediated settlement conference. Indeed, we have a new profession: mediators. We come from all walks of life and our practices are as varied as our background. Some of us are full-time, some of us are part-time, some of us are attorneys or judges, some of us are former adjusters, some of us are psychologists and some of us are counselors. Our diversity is certainly our strength, but also a challenge to our future. We bring those unique background skills to each settlement conference and generally to our practice, and bar association section. Because we share such a unique practice area and we still are developing as a profession, our dedication to professionalism is critical for each of us individually, as well as a corporate body and as a section.

In a mediated settlement conference, we share a critical commonality: for many participants, apart from their own lawyers, we are their first introduction to the legal system. As mediators, we

are responsible for setting the stage for the introduction to a legal conference for the parties. It is essential that we, as mediators, take our professional role seriously and consciously communicate the significance of the conference. Because each mediation presents unique facts, we are always faced with a changing landscape. I believe most mediators take their responsibilities very seriously and are aware of potential problems they face and the skills necessary to preserve the integrity of that settlement conference.

What is a professional in the field of mediation and what does professionalism mean in our work? We are striving for both professionalism and for accountability in each settlement conference. The New American Webster Dictionary contains the following definition for *professional*: "one working for pay, not an amateur." While each of us recognizes and appreciates the financial rewards of mediation, I do not believe that is the primary motivating factor for any mediator. I believe we, as

mediators, are engaged in a vocation—a calling; a new profession. As part of that vocation, we must strive to continue to improve our skills, knowledge and expertise.

In order to be part of the mediation profession in North Carolina, we are required to successfully complete a minimum training program, pass a test and observe the requisite number of mediated settlement conferences. Furthermore, we are required to complete an annual certification to ensure our continued competence. These requirements, however, are the minimum requirements. In order to expand our skills, we must commit to improve those skills, through an active participation in our bar association section activities, attendance at seminars or professional development activities and observation of other mediators.

The professional conduct of mediators, especially attorney-mediators, is the subject of much scrutiny and recent debate. The purpose of this

See **PROFESSIONALISM** page 5

---

## Book Review *from page 3*

walk away, the negotiator must (1) determine the potential zone of agreement; (2) convince the other party that you are willing to walk away; (3) protect your BATNA; and (4) use your understanding of both parties' BATNAs to determine when negotiation should be terminated.

### The Second Dimension: Deal Design

Deal designers "know how to probe below the surface to uncover the sources of economic and noneconomic value." Essentially, the authors urge negotiators to probe for underlying interests, a technique well known to mediators.

The authors characterize the 3D negotiator as "a master at the kinds of cooperative, problem-solving skills that uncover joint gains, and thereby create value for all sides relative to no deal." Fisher, Ury, and Patton would call this "inventing options for mutual gain."

Lax and Sebenius set forth two design principles. Neither principle is new. The first principle is to "dovetail differences to create value." This is the old technique used in labor negotiations:

Make concessions that are easy to give and are valuable to the other side. The second principle restates Fisher and Ury's maxim: "Expand the Pie." A small slice of a larger pie may more than half of a tiny pie.

### The First Dimension: Tactics

Toward the end of the book, the authors give practical advice on how to negotiate. They stress the need to prepare by ascertaining your zone of potential agreement (ZOPA) and discovering the other party's ZOPA. They cover common questions in negotiation: how a first offer tends to anchor the negotiations and shift the "negotiators' perceptions of the bargaining range;" how to use flexible, extreme offers and non-offers to anchor; how to do the "negotiation dance;" and how to close the deal. Another chapter gives tips on how to solve joint problems to create and claim value.

### Recommendation

*3D Negotiation* is a useful book. It is full of excellent examples of how to implement 3D negotiations and map backwards. For example, the

authors use the 2002 longshoremen's negotiation in California to illustrate how the Pacific Maritime Association (PMA) negotiators were able to negotiate a collective bargaining agreement with the all-powerful International Longshore and Warehouse Union. After the 1999 Longshoremen strike, PMA's chief executive Joseph Miniace was not looking forward to the 2002 negotiations. Yet, without knowing it, Miniace used 3D techniques to negotiate a six-year contract that resulted in a 10 percent increase in production and 800 new jobs for longshoremen.

I recommend *3D Negotiation* for a thorough understanding of the value of preparation in negotiation. The book is a great supplement to several books written by the authors' Harvard colleagues: Fisher, Ury, and Patton's *Getting to Yes*, Fisher and Ertel's *Getting Ready to Negotiate*, and Fisher and Shapiro's *Beyond Reason: Using Emotions as You Negotiate*. □

ZANGLEIN TEACHES BUSINESS LAW AND MEDIATION AT WESTERN CAROLINA UNIVERSITY.

## Professionalism *from page 4*

article is not to specifically address the subject of that debate, but, more broadly, to emphasize our unique role as mediators in the legal system, and our responsibilities as mediators. Regardless of our substantive background, we have an obligation not only to conduct ourselves as professionals during the mediated settlement conference, but also to conduct ourselves as professionals in all dealing with the public. We have a continuing obligation to improve our skills, to ensure mediation is available to all, not just to those who can pay for the services, and to promote broad public knowledge of and confidence in the mediation program.

The skills necessary to be an effective mediator not only depend on proficiency in the basic substantive skill areas but also on proficiency in the process of mediation. I believe the majority of mediators are acutely aware of and sensitive to the dilemmas encountered in our daily practice. We work to ensure the mediation process is fair, confidential and of value to the participants. We want the experience of the settlement conference to meet the potential promise inherent in the process. We have an obligation not only to the participants but also to the court system.

If you have not recently reviewed the Standards of Professional Conduct for Mediators, I urge you to seriously review the Standards, along with the Preamble. In addition to the Standards, the Rules of the North Carolina Supreme Court for the Dispute Resolution Commission specifically broaden the scope of those standards. Those Rules address any conduct which negatively affects the courts, the mediation process or the mediator. As representatives of the courts, it is both a privilege and a responsibility to ensure our compliance with those Rules and Standards.

As mentioned earlier, in addition to those Standards and Rules, we have an obligation to the court. We have an obligation to schedule the conference, communicate with the court and send in the final Report. The new Report of Mediator requires a signature from the party sending in the final documents. If that signature is not on that form, the court personnel have to follow-up with the parties. I understand there have been some problems with mediators not scheduling the conference, not sending in the Report and not ensuring the form is correct. As a group, we must commit to ensure compliance with the court system requirements and processes. The failure to do so imperils your opportunity to mediate in the court system, and also imperils our professionalism as a group.

After we complete our minimum certification requirements, I urge each of you to improve your skills and knowledge of the mediation process. I

challenge each of you to contact a fellow mediator and ask to observe one of his or her mediations. The observation will improve your set of tools, and it will serve to provide valuable insight to the observed mediator. We are routinely faced with dilemmas which test our skills and knowledge. If we have had the experience of another set of eyes on our process skills, we will be able to incorporate the observer's skills and abilities into our skill set. That experience will improve us both individually and collectively.

The very nature of mediation as an unstructured free-flowing process, can also present the most challenges to its legitimacy, unless we, as mediators, continue to improve our skills and knowledge. We have transformed the legal landscape and now as a developing, maturing profession, we must continue to work. The quality of the settlement conference is determined, to a great extent, by the skill of the mediator. If we do not continue to improve and develop those skills, we lose the respect for our mediated settlement conference program. If we lose the respect of the participants, or the lawyers or the court system, we

will lose our profession. We will be viewed as amateurs, not worthy of consideration as professionals. We may lose the professional status which allows us to have the privilege of listening to the story of the participants, and the experience of the magical moment of a resolution of the claim.

If we lose those things, we will suffer a personal loss, but the loss to our profession is even greater. We will have sacrificed the hard work and foundation laid by all those who pioneered and championed the mediated settlement conference program in North Carolina. That loss will be irreplaceable. So, in closing, I challenge you: Treat your work as a mediator seriously, improve your skills, comply with the court requirements, and act as if someone is watching you because you are representing each one of us in each and every mediated settlement conference. □

GULLICK IS A FULL-TIME MEDIATOR AND ARBITRATOR. SHE IS A MEMBER OF THE NORTH CAROLINA BAR ASSOCIATION, DISPUTE RESOLUTION COUNCIL, AND VICE-CHAIR OF THE DISPUTE RESOLUTION SECTION.

## Q. What is a patron?

**A.** *Any member of the NCBA Foundation who contributes \$100 or more to the annual Patron Campaign.*

### Why should you become a Patron?

Many services of the North Carolina Bar Association Foundation operate at a loss. The Lawyer Referral Service panel memberships cover only a portion of the operating expense. IOLTA grants only partially fund the statewide Volunteer Lawyer Program. Since Patron contributions are unrestricted, they help fill the gaps in several important service areas.

Your annual gift of \$100 or more to the NCBA Foundation makes you a Patron. And since the North Carolina Bar Association Foundation, Inc. is a 501(c)(3) charitable organization, your Patron gift is tax-deductible within the limits of the law.

**25<sup>th</sup> ANNIVERSARY**  
**PATRON CAMPAIGN**  
1982 - 2007

NORTH CAROLINA  
FOUNDATION  
BAR ASSOCIATION

For more information on the NCBA Foundation Patron Campaign, call 1-800-662-7407, or in Wake County, 677-0561.

# 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](http://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.

NORTH CAROLINA  
BAR ASSOCIATION  
SEEKING LIBERTY & JUSTICE

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](mailto: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!*

NORTH CAROLINA  
BAR ASSOCIATION  
SEEKING LIBERTY & JUSTICE

# Memo Regarding New Local Rules

Mediators in Guilford County recently received the memo below from Senior Resident Judge Catherine C. Eagles. The memo is a good reminder to all mediators of the Supreme Court Rules and new Local Rules in effect for civil cases in the 18th Judicial District and has been reprinted here with Judge Eagles' permission.



*State of North Carolina*  
*General Court of Justice*  
*18th Judicial District*  
*Superior Court*

SENIOR RESIDENT JUDGE  
CATHERINE C. EAGLES  
  
GUILFORD COUNTY COURTHOUSE  
P.O. Box 3008  
GREENSBORO, NC 27402

RESIDENT JUDGES  
HENRY E. FRYE, JR.  
LINDSAY R. DAVIS, JR.  
R. STUART ALBRIGHT  
  
GUILFORD COUNTY  
COURTHOUSE  
P.O. Box 3008  
GREENSBORO, NC 27402

JOHN O. CRAIG, III  
COUNTY BUILDING  
P.O. Box 2434  
HIGH POINT, NC 27261

To: Mediators Currently On the List for Court-Appointed  
Mediation Work in Guilford County

From: Catherine C. Eagles

Re: New Local Rules and Other Mediation-Related Matters

Date: January 26, 2007

Please be advised that there are new Local Rules in place effective January 1, 2007, for civil cases in the 18<sup>th</sup> Judicial District. The rules most relevant to mediators are attached to this Memo. I draw your attention particularly to the last phrase of Rule 4.1, to the second sentence of Rule 4.6, and to Rule 4.8. The complete Rules are available online at [nccourts.org](http://nccourts.org) or you can pick up a hard copy in chambers.

For years, Judge Albright used a list of twenty or thirty experienced and responsible mediators when he had to appoint mediators, and for years we had very few problems with court-appointed mediators. As required by the new Supreme Court Rules, the Court is now appointing mediators by going down the very long list of those who wish to mediate cases in this district. Since making this change, we have had concomitant increasing problems with mediators not following the rules. I do not know why this is so, but the result is unnecessary work for my staff and for me. The Supreme Court Rules allow the Senior Resident Judge to "skip" mediators who do not comply with the Supreme Court Rules or with the Local Rules, and I intend to do so.

**SUBSTITUTIONS AFTER APPOINTMENT:** Once you are appointed, you are the Mediator until the Court allows you to withdraw. If the parties want to "select" someone after you have been appointed, you are entitled to an Administrative Fee and I require that it be paid. If parties ask you to waive this fee, you can tell them that I require it be paid regardless of whether you do or not. I will not allow substitution until you are paid the Administrative Fee, and you remain responsible for scheduling and holding the Mediated Settlement Conference ("MSC") in the absence of a court order substituting another mediator.

**SCHEDULING DIFFICULTIES:** The Supreme Court Rules make it clear that the Mediator is responsible for scheduling a court-ordered MSC even if the parties do not agree on a date, time, and place. See Rule 6(A)(3). Under those same Rules, the parties are allowed to dispense with a Court-Ordered Mediated Settlement Conference only if the Court so Orders. If you send in a Report that the MSC was not held because the parties would not cooperate in scheduling, that report will not be accepted, you will likely be removed as Mediator in that case, and you will likely be removed from the appointment list. If the parties don't cooperate, it is your job to schedule the MSC anyway, to appear at the date, time and place scheduled, to conduct a mediation with those who show up if that is possible, and to inform the Court of who did and did not appear. If parties don't show, the Court has a number of options available.

**PEOPLE WHO DON'T PAY:** Do not send the Court copies of letters to parties asking for payment. If you want the Court to take action, use the AOC/DRC form designed for this. (AOC-CV-815). Deliver it to my office (in Greensboro or High Point as appropriate) along with a calendar request for the next Administrative Session.

**TIMELY FILE YOUR MEDIATOR REPORTS:** Mediators who do not timely hold MSCs and who do not timely file their reports will be removed from the appointment list without notice. Extensions to hold the conference are routinely granted so long as they do not delay trial; use the AOC/DRC form (AOC-CV-835) for this purpose. Because of the volume of these requests, my staff will no longer prepare this paperwork.

**COMPLETE THE MEDIATOR REPORT COMPLETELY:** Remember that the Report of Mediator has a place to note the party who will file the Dismissal or Judgment and a place for the date by which these documents will be filed. This is important information we need to get the case closed, and if we do not have it, someone has to either return it to YOU for it to be completed or call you to get the necessary information. This makes a lot of unnecessary work for the Judges' Staff and for you, and it also means you may be removed from the appointment list if there are recurring problems.

**NON-RESIDENTS:** If you do not live or practice in the 18<sup>th</sup> Judicial District, note specifically the information in Rule 4.8 concerning staying on the list for court appointments. All requests go to Amanda Leazer, and one request covers both Greensboro and High Point. Remember that appointed mediators do not get paid for travel time. If you are not willing to comply with the Supreme Court Rules and our local procedures, please don't ask to be appointed.

**THE AOC/DRC FORMS:** The Dispute Resolution Commission has spent a lot of time and energy preparing forms appropriate for managing the mediation process. If there is a form available, please use it rather than a letter. They are usually much easier for both you and for my staff, and they usually cover all the bases. If you don't like something about a form, please direct your written comments to the Dispute Resolution Commission.

**IF YOU NEED HELP:** Faye Byrd in High Point (801- 5370) and Sharon Allgood in Greensboro (574-4300) handle much of the paperwork associated with mediation. Please feel free to call either of them if this office can be of any help to you.

See **MEMO** page 10

**Local Rules/18<sup>th</sup> Judicial District**

**4.0 MEDIATION**

**4.1** Upon the filing of a responsive pleading, all eligible cases shall be ordered into Mediation. The Senior Resident Superior Court Judge will follow the Supreme Court's rules on appointment of mediators when the parties do not select a mediator, and retains discretion to depart from the general list in particular circumstances, such as, *inter alia*, the appointment of one mediator to multiple related cases, or to skip a mediator who has not followed Local or Supreme Court Rules.

**4.2** The Court expects the parties to observe all deadlines in the Supreme Court's Rules governing mediated settlement conferences. Counsel/parties shall cooperate with the mediator in scheduling mediated settlement conferences.

**4.3** Any party filing any designation of mediator or any pleading concerning mediation shall file the original in the Superior Court Judges Chambers, where staff will then place a copy in the Court file.

**4.4** The deadline for completion of the Mediated Settlement Conference will usually be 120 days from the date of the Order sending the case to mediation. Short extensions will be granted for good cause shown so long as neither setting a case for trial nor trial itself is delayed. AOC Form AOC-CV-835 should be used for this purpose.

**4.5** Requests to dispense with mediation are not favored and will not be allowed absent extraordinary circumstances.

**4.6** Litigants are encouraged to select a mediator appropriate for the case. Once a mediator is appointed by the Court, motions to substitute a different mediator will only be allowed if promptly filed, the appointed mediator has been paid the Administrative fee, and such substitution is otherwise appropriate.

**4.7** If parties wish to delay discovery until after mediation, then the parties should promptly schedule the mediated settlement conference and may ask the Court for an early Order sending the case to mediation. Failure to complete discovery while "waiting on" mediation is not good cause to delay setting a case for trial.

**4.8** Mediators who do not live or practice in Guilford County and who wish to be appointed to mediate cases in which the parties do not select a mediator must annually so advise the Trial Court Coordinator by letter between March 1 and May 1 of each year, for the upcoming Fiscal Year beginning July 1.

# Mediation Involving Local Governments Not Subject to Open Meetings Law

BY BURTON CRAIGE

In **Gannett Pacific Corporation v. City of Asheville**, 632 S.E.2d 586, 2006 N.C. App. LEXIS 1642 (2006), the North Carolina Court of Appeals rejected a claim that a mediation involving two local governments was subject to North Carolina's Open Meetings Law.

The City of Asheville and Buncombe County were involved in negotiations concerning the termination of their Regional Water Authority Agreement. The City and County arranged an all-day mediation. The City Council and the County's Board of Commissioners met in separate rooms at a hotel in Asheville. Each governmental body voted to close its session in order to consult with its respective attorneys. Throughout the day, the City and County sent one representative, along with one or more of its attorneys, to another hotel room to meet with a mediator. The two representatives and the attorneys reported back to their respective bodies. Each body then met separately in a closed meeting to discuss the negotiations. The two representatives and the attorneys periodically returned to the mediation. The mediation was closed to the public.

Plaintiffs, a newspaper and television station, demanded that defendants City and County cease the closed meetings and mediation sessions, which were alleged to violate the Open Meetings Law. Defendants refused. Plaintiffs filed suit, seeking declaratory and injunctive relief. The trial court rejected the claims.

On appeal, plaintiffs conceded that the separate meetings of the governmental bodies were covered by the attorney-client exception of the Open Meetings Law. N.C.G.S. Section 143-318.11(a)(3). They argued, however, that the mediation sessions should have been open to the public.

In a unanimous opinion authored by Judge McGee, the Court of Appeals disagreed. The court found that the mediation sessions did not meet the statutory definition of an "official meeting," which requires the presence of a majority of members of the public body. N.C.G.S. Section 143-318.10(d). At no time did more than one member of the City Council or Board of Commissioners participate in the mediation. Nor was the mediation "called or held to evade the spirit and purposes of [the

statute]," triggering coverage under the Open Meetings Law. *Id.* Instead, the purpose of the mediation was to facilitate negotiation between the governmental bodies in "a carefully structured meeting," organized in accordance with the advice of the mediator, Professor John Stephens of the Institute of Government.

**Gannett Pacific** is sound as a matter of statutory interpretation and public policy. The court presumably recognized that opening mediation sessions to the public would effectively prevent government officials from participating. In a mediation

involving a governmental body, the mediator should consider proposing Professor Stephens' model. By carefully structuring the process to avoid an inadvertent violation of the Open Meetings Law, the mediator can help the parties preserve the benefits of confidential attorney-client communications and candid settlement discussions. □

CRAIGE IS A MEMBER OF PATTERSON HARKAVY LLP IN RALEIGH. HIS AREAS OF PRACTICE INCLUDE CIVIL RIGHTS, MEDICAL MALPRACTICE AND MEDIATION.

The Dispute Resolution Section of the North Carolina Bar Association cordially invites you to a reception in conjunction with the 15th Dispute Resolution Section Annual Meeting.

Wednesday, March 21  
6:00 - 8:00 pm  
The Home of Frank Laney  
409 Accolade Drive  
Cary, NC 27513  
(919) 460-0835

RSVP by Monday, March 19 to Frank Laney at  
[Frank\\_Laney@ca4.uscourts.gov](mailto:Frank_Laney@ca4.uscourts.gov)

We hope that you will be able to attend the reception and the CLE and annual meeting on Thursday, March 22. You can register for the program by visiting <https://www.ncbar.org/cle/programs/index.aspx?id=339DRM> or by calling (800) 228-3402.

## "You Can't Always Get What You Want"

During the Dispute Resolution Council meeting on March 8, the council voted "You Can't Always Get What You Want" as the section's song.

NORTH CAROLINA BAR CENTER  
PO Box 3688  
Cary, NC 27519-3688



## From A to M – Arbitration and Mediation in North Carolina

15th Dispute Resolution Section CLE Annual Meeting  
**LIVE PROGRAM**

Thursday, March 22

N.C. Bar Center

Cary

**CLE Credit: 6.25 Hours**

- The Mandate for Alternative Dispute Resolution: A Judicial Perspective
- State of ADR in North Carolina
- ADR Caselaw Update and Guidance on Drafting Enforceable Mediation Settlement Agreements
- Roundtable Discussion: Walking the Line – How Far is Too Far When the Mediator’s Opinion Becomes Improper Advocacy?
- Mediating International Disputes – Reflections on Resolving the Balkan Crisis  
*General Donald L. Kerrick (retired)*, West Palm Beach, Fla.
- Recognizing the Potential For, and Possibly Preventing, Violence in ADR  
*Kitty G. Grubb*, Seminole, Fla.
- Agreements to Arbitrate – What they Are and What They Aren’t

To register: [www.ncbar.org/cle/programs/index.aspx?id=339DRM](http://www.ncbar.org/cle/programs/index.aspx?id=339DRM)  
(800) 228-3402 or (919) 677-8745