DISPUTE RESOLUTION SECTION COUNCIL MEETING

Friday, May 4, 2012, at 11:00 a.m. Conference Call

MINUTES

The Council convened at the date, time and place indicated above.

Members Participating: Thornwell F. Sowell, III

James L. Bell, Chair

Saunders M. Bridges, Jr. Other:

Danny Crowe William L. Howard, Sr. Sean F. Keefer Joan S. Brown, Bar Staff

<u>Call to Order, Roll Call and Welcome</u>: Mr. Bell called the meeting to order, called the roll and welcomed those participating.

<u>Approval of Prior Minutes</u>: The Section Council received the Minutes of the February 24, 2012, meeting and adopted them by motion, second and unanimous vote.

Reports/Old Business:

ADR Commission Update: Judge Howard reported as follows:

- 1. Judge Kinon had received an email from Brenda Shealy, Chief Deputy Clerk of the Supreme Court, asking whether the Commission wished to update its earlier recommendations regarding the DSS Abuse and Neglect Mediation program and the Hearing Officer program. Two years ago the Commission had decided to focus on the Hearing Officer program since the Supreme Court's Docket Management Task Force was working on the DSS Abuse and Neglect issue. Judge Howard said he had discussed the DSS Abuse and Neglect Mediation program with Chief Justice Jean Toal recently, who had told him that the Docket Management Task Force Task report was due in two weeks. He was to be back in touch with the Court thereafter to learn its recommendations on this issue.
- 2. The Commission had crafted amendments to the S.C. Court-Annexed ADR Rules and submitted them to the Supreme Court. The Court had agreed with most of the proposed changes, with slight modifications, and submitted them to the S.C. Legislature. The ultimate results were approved and expected to have been available in the Advance Sheets soon. The significant changes were as follows:
 - a. The addition of a requirement for non-certified mediators to disclose their non-certified status to the parties, who would sign the approved form acknowledging such. The reasoning behind the rule was that the Board had received complaints against mediators based upon misunderstandings as to the proper role of a mediator. Typically, when the complainant learned that a mediator was not certified, that issue was thrown into the complaint. There was also the probability that this requirement may motivate people to become certified.

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- b. Rule 5 was added to the Probate Court rules establishing mediation as part of the probate process. This rule in effect created the first statewide mediation program. Certified circuit and family court mediators would be eligible for court appointment in the probate court.
- c. The associate membership status in the South Carolina Bar had recently been abolished by the Supreme Court. Since the S.C. Court-Annexed ADR Rules had contained a provision that a lawyer must be at least an associate member of the South Carolina Bar to be certified, the rules were amended to provide that a lawyer must be in good standing in his or her own state(s) to qualify for certification. The lawyer would be subject to the Supreme Court's disciplinary power and must provide annual certificates of good standing from the other state(s).
- 3. The Mortgage Intervention Program ordered by the Supreme Court did not provide particular notice language or a form. A crucial question was how to get borrowers to apply for the program since they typically viewed a letter from the bank's lawyer as a negative. Judge Howard had attended a symposium in Charleston, where the speakers had discussed and evaluated notice forms that would effectively reach the borrowers. They had looked at the historical participation ratio and even details such as the benefits of certain colors for the form. The Commission saw that notice letters were inconsistent as to content. One proposal was to have the clerk of court issue the letter, which could be burdensome to the clerks. The Commission had taken no action.

The Council expressed interest in statistics, which would be costly to collect. Mr. Bell and Judge Howard were to look at Greenville County's program, as well as the magistrate and probate court programs for data.

Convention Seminar Update: The Council discussed the 2012 seminar and the hour of allotted time that had not been filled. The members requested that Ms. Brown obtain the results of the seminar evaluations and put this matter back on the Agenda for the next meeting. Mr. Crowe suggested the topic, Dealing with Impasse...Strategy for Mediators, to be included in the 2013 Bar Convention Seminar. He said it would be a good issue for drawing attendees, plus he had Andy Little, a pioneer of ADR in North Carolina, in mind to speak on the topic. He also had Mr. Sowell, Mr. Gallivan and Frank Schuler on board to speak. Other topics and speakers he listed were the "State of Practice of Mediation in Probate Court" with Cathy Kennedy and a shorter segment on "Mediation as a Business and How to Transition to Full-Time." Judge Howard suggested Mike Glenn, Rob Hassold and Dawes Cooke, Jr., as possible resources. Mr. Crowe added that the CLE presentation was a work in progress and that there were forms to be filed regarding such matters as time and expenditures. Upon proper motion and second, the Council voted to spend up to \$2,000 for expenses.

<u>Progress on Goals</u>: The Council requested that Ms. Brown modify the Goals to change references to "ADR" to "Dispute Resolution."

1. Collaborative Law: Mr. Keefer reported that recently lawyers were refocusing on collaborative law. Although there was contact with Charleston practitioners, there were not a lot of new faces. He posed the question, "What can the Council do to take collaborative law into family court and other areas, such as probate court?" He reported that there were people who still did not know about it or those that did but did not understand it even though they thought they did. The topic had been discussed in the last two seminars, but Mr. Keefer said his primary goal was to get his article finished and scheduled to run in the edition of the *South Carolina Lawyer* directly preceding the Bar Convention.

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2. Mr. Bell stated that John Freeman had requested the Ethics Advisory Committee to revise Opinion 10-04 regarding a mediator's right to provide names of the parties to the mediation. Judge Howard stated that if a newspaper called asking who was involved in a mediation, the mediator may disclose the names only. This can be done because the names were already public knowledge.

3. Suggestions for other projects:

- a. Judge Howard suggested that the Council consider the implications to banks' lawyers in mortgage intervention matters. The current rule puts a big burden on them. Issues include the confidentiality rules and the practice of bankers not attending the mediations. Ms. Brown was to place this issue on the agenda for the next meeting.
- b. Judge Howard also requested that an additional goal be added that if the Section saw counties that may be ripe for mandatory mediation to give that information to the Commission. He explained that the Chief Justice did not want to expand into a county without the clerk of court, judges and the majority of lawyers onboard. Ms. Brown was to add the topic, Expansion of Mandatory Mediation, to the agenda for the next meeting.
- 4. Article on Payment of Mediators Mr. Bell was currently trying to put the article together and had about fifty percent of it completed. He stated that it should be ready within 45-50 days. Ms. Brown was to send the Bar's requirements for publication to Mr. Keefer and Mr. Bell.
- 5. Mr. Bell also discussed the Ethics Advisory Committee's online FAQ stating that non-payment of mediators was an ethical violation. This item was to be addressed in his article.

New Business:

Replacement of Robert Sowinski on the Section Council was discussed. Mr. Sowinski had been an associate member of the South Carolina Bar prior to the amendment of Rule 410 discussed in 2.c. above. Ms. Brown explained that pursuant to Section 1.4(b)(2), of the SC Bar Constitution, associate members of the Bar could serve only as nonvoting members of sections and committees. Therefore, even if Mr. Sowinski were still an associate member of the Bar, he could not serve on the Council. Nominations were then opened for his replacement, who would serve out the remainder of Mr. Keefer's term, to terminate June 30, 2013. Upon proper motion and by unanimous vote, the Council selected Thomas L. Stephenson of Greenville to serve. Mr. Gallivan was to contact him and ask him if he would consent to do so.

Next Meeting:

The Council voted that the next conference call meeting would be held at 11:00 a.m. on Friday, July 27, 2012.

Adjournment: There being no further business, Mr. Bell adjourned the meeting.

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