

# North Carolina Superior Court Mediation—A Retrospective

BY ROY BAROFF

**N**orth Carolina lawyers participate in mediated settlement conferences each and every day. Most of us have represented clients in mediation and many of us are mediators. We started with mediation in Superior Court back in 1991 and now have mediation programs for Family Financial, Clerk of Court, North Carolina Industrial Commission, Office of Administrative Hearings, the North Carolina Court of Appeals, our federal courts, bankruptcy court, and the list goes on and on. It is safe to say that mediation is part and parcel of our legal system in North Carolina. It's now part of how we do our work as lawyers, but this was not always the case.

This anniversary issue of the *State Bar Journal* provides an opportunity to do a retrospective on court-ordered mediation even though it is only 17 years old. So, let's turn back the clock to review the beginnings of court-ordered mediation in North Carolina to consider how far it has come, and its impact on our practice as lawyers.

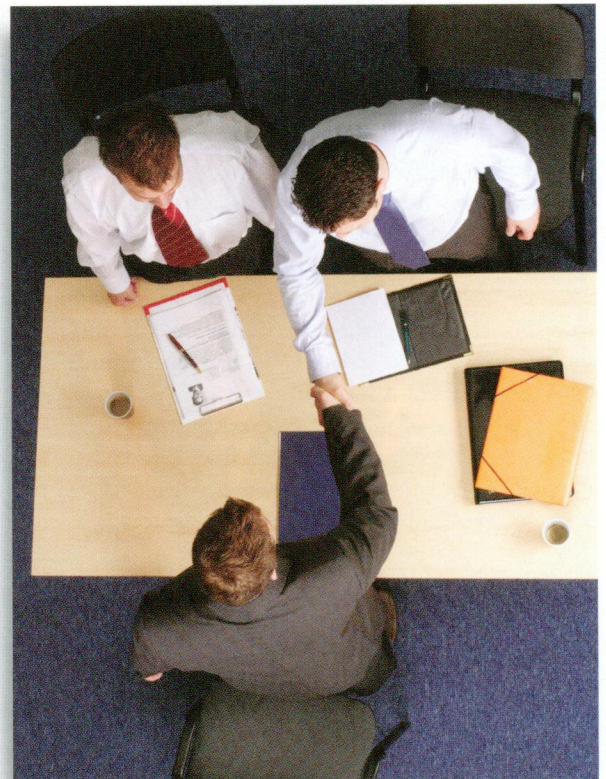
First, let's return to the mid 1980s and the Standing Committee on Dispute Resolution of the North Carolina Bar Association. In 1983, the committee had completed a study of various dispute resolution practices and

sponsored court ordered arbitration in district court. However, by the late 1980s the next "big thing" was mediation.

A lawyer who practiced in North Carolina and Florida, Robert Phillips, started telling folks on the NCBA Mediation Subcommittee about a mandatory mediation program in Florida. The Mediation Committee listened and then a number of members went down to Florida to learn about their program. Upon this group's return the Mediation

Subcommittee started working to make mediation in North Carolina a reality. Enabling legislation was enacted in June 1991 and rules were adopted later that year. Superior Court Judge Jim Long, now retired, from Stokes and Surry County, agreed to do a pilot program and began ordering cases to mediation in late 1991.

One important difference between the



Florida and North Carolina program centered on the Mediation Subcommittee's decision not to include a "good faith" negotiation requirement. Such a requirement was in place in Florida (later removed) and had created "second generation" litigation about "good faith" in mediation. The Mediation Subcommittee determined that if the appropriate people attended and the mediator had proper training, then the process should be allowed to work without participants second guessing (or litigating) actions taken at mediation. Thus, the focus was on attendance as opposed to requiring specific activities at mediation. This early decision paved the way for acceptance of mediation by the bar and, to this day, no one is forced to make proposals or settle their case at mediation. As a mediator, I still hear folks exclaim about someone not negotiating in "good faith." I remind them that "good faith" generally depends upon which chair you are sitting in, and then we get down to the business of settling claims. (For additional details on the origin of mediation, review *Alternative Dispute Resolution in North Carolina—A New Civil Procedure* published by the North Carolina Bar Foundation and the North Carolina Dispute Resolution Committee in 2003.)

Going back to the pilot phase, I recently spoke with retired judge Jim Long about his early experiences and he noted that, "there was considerable resistance from attorneys at the beginning who thought we were adding another layer to the litigation process." He also explained that, "as attorneys tried mediation and settled cases, they started asking that their case be ordered to mediation." Judge Long noted that he initially screened cases, trying to select those for mediation that seemed favorable toward settlement. He also described how many lawyers would ask him not to send their case to mediation, that it just wouldn't settle. Well, these same lawyers ended up settling these very same cases. They'd end up back in Judge Long's courtroom at trial calendar call saying that the case was now settled. So, Judge Long decided to stop screening and just send them all to mediation. Today most all Superior Court cases are ordered to mediation without screening.

Additionally, one of the early concerns for the program was whether there would be enough mediators. However, this proved not to be an issue as training programs filled and continue to do so today. According to the NC DRC list of mediators, there are currently (as

of 6/10/2008) 1,169 superior court certified mediators in North Carolina. Further, many attorneys complete the mediation training to augment their representation in mediation and negotiation skills. Moving forward in time, mediation expanded to additional judicial districts in 1993 and then went statewide in our superior court in 1995. Since then, based on statistics from the AOC, it is this author's belief that over 60,000 mediations have been completed since the program began in 1991.

In conjunction with the development of the mediation program, a governing body, the North Carolina Dispute Resolution Commission, was created to oversee mediator certification and program oversight. In its most recent statistical report covering 7/1/2005 - 7/1/2006, the DRC reported that there were 6,686 mediations with 55% of completed mediations reaching settlement at the conference. While rates of settlement are not the only measure of mediation success, this figure coupled with cases still pending suggests that the program is quite effective in helping resolve cases.

#### **Representing Clients in Mediation - A Tale of Two Approaches**

It was in the early days of mediation, back in 1992, when I was appointed mediator in a land condemnation case. Bill Thorp, a highly respected attorney for land owners (now deceased), represented the landowner and an experienced Department of Transportation attorney represented the condemning agency. I got a call from counsel for the DOT. It seemed that he and Bill wanted to meet with me before scheduling mediation to learn more about this new "mediation" process.

So, one afternoon I went over to Bill's office and met with him and the DOT attorney. I explained how mediation worked—how we would meet together and then meet separately to discuss the case and how it might be resolved. I explained that the entire mediation was confidential and also noted that when I met with folks privately, then any information shared would stay private unless they gave me permission to share it. (This is my approach to caucus confidentiality, while mediators also use other approaches.)

With that description, the DOT lawyer good naturedly exclaimed, "You know, I'm not going to tell you about my case in a private meeting. Because even if you keep it to yourself, when you walk into Bill Thorp's

room, he is going to see a gleam in your eye and learn something about my case!" That was that. We reviewed many other aspects of mediation, but this is the comment that stuck.

When we met for mediation several weeks later, Bill and the DOT lawyer took very different approaches to their representation. Bill brought his land planner and basically presented his case to the DOT lawyer and his colleague from Right of Way. And the DOT lawyer, true to his word, never told me about his case, even in private caucus. I would meet with Bill and his client, we would analyze some aspect of the case, I would head over to the DOT room, explain Bill's reasoning, raise a question or two, and then I would be sent out of the room. I'd be called back in and another counter offer made. I never did learn anything about the case from the DOT, but they reached a settlement.

Thus, even with two very different approaches, the mediation process was and is flexible enough to accommodate all. Today, most attorneys recognize mediation as a powerful opportunity to make choices about their cases. Obviously, the main choice may be to settle the case; however, mediation can also help narrow issues in a case and provide an opportunity for parties to take an active role in discussing their case. In our current mediation practice, attorneys are generally quite thoughtful about how to use their time in mediation. They approach their representation in many different ways and each can work in mediation.

While the mediation described above was the first mediation between Bill and the DOT attorney, there were many more to come. They asked me to serve as mediator in a number of cases and along the way I saw the interactions between these fine attorneys change. When we started they were hard and fast adversaries with very little trust. As we mediated cases, they began to interact in a different way. They were cordial to each other and worked together to get information ready for mediation. We shared lunches at mediation. And soon enough, they started to exchange their thinking on the case. The DOT lawyer even shared his thoughts with me!

I believe that the mediation process helped change their relationship. They met face to face with a third person with the prescribed goal of discussing a settlement. They learned to trust each other and showed genuine warmth and respect even while they disagreed

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strongly over the issues in dispute. I very much appreciated working with these and many other attorneys across North Carolina. They have taught me a lot about representing a client's interests, about being a mediator, and about the power of mediation to impact the relationships of lawyers.

Thus, I believe lawyers in North Carolina are more civil, professional, and collegial with each other as a result of the court-ordered mediation programs. Through mediation, they have a chance to meet face to face with their colleagues in a setting that, while adversarial, is focused on settlement, and you have a mediator to help smooth out the communication "bumps" along the way.

#### Mediation Case Law and Implications for Practice

Since its beginnings in 1991 to statewide expansion in 1995 and continuing today, a growing body of case law has developed concerning mediated settlement conferences. An examination of appellate cases that use the word mediation or some variant, i.e., mediator, mediated, etc., (see Table 1 below) show the growth of jurisprudence in this area. (Note that these figures include mediation related cases from the North Carolina Industrial Commission and Family Financial matters as well as superior court mediation.)

| <u>Date Range</u> | <u>Number of Cases including "mediation" or a variant thereof</u> |
|-------------------|---|
| 1991 - 1995       | 5 cases   |
| 1996 - 1999       | 15 cases  |
| 2000 - 2005       | 67 cases  |
| 2006 - 5/27/2009  | 90 cases  |

Several of these cases are worth noting. With respect to sanctions in mediation, we turn to *Triad Mack Sales v. Clement Brothers Co.*, 113 N.C. 405, 438 S.E. 2d 485 (1994), where a representative of defendant did not attend the mediation and the trial court entered a default as the sanction. As a result of this case, the Rules for Mediated Settlement

Conferences were amended to only allow for monetary sanctions for failure to attend. Another case that impacted the rules concerned how to memorialize a mediated agreement. In *Few v. Hammack Enterprises*, 132 N.C. 291, 511 S.E. 2d 665 (1999), where there was a dispute about enforcement, the trial court allowed evidence from the mediator concerning the substance of the mediated settlement agreement. Subsequent to this case the Rules were again amended to provide that mediators could not provide evidence concerning what occurred in mediation other than to attest that an agreement was signed in their presence. The goal of this rule change was to solidify the confidentiality of mediation on the part of the mediator.

While there are many other cases of interest, three others stand out with implications for practice. In *Chappell v. Roth*, 353 N.C. 690, 548 S.E. 2d 499 (2001), the court focused on whether all "material terms" were included in the mediated settlement agreement where the parties reached settlement at mediation; however, post-mediation, when the release was presented for claimant to sign, it included a "hold harmless" clause that had not been part of discussion at mediation. Claimant declined to sign and the court held that the "hold harmless" clause was a material term and since it was not included in the mediated settlement agreement, then the parties did not reach a meeting of the minds and the settlement agreement was not an enforceable contract. Since then mediators and counsel have paid closer attention to the specifics of the mediated settlement agreement, even going so far as to write out specific release language.

More recently, the specific actions to be taken via a mediated settlement agreement received scrutiny in the unpublished opinion of *Bowen v. Parker* (COA05-1340 - May 2006) where adjoining landowners on Topsail Island had a dispute about the use of a walkway and pier on one of the properties. The mediated settlement agreement in question called for the defendants to seek permission from the Costal Area Management Act

(CAMA) to dock a total of five vessels at defendants' pier and dock and to add two boat slips for the benefit of plaintiffs.

The court of appeals affirmed the trial court's dismissal per Rule 12(b)(6) holding that the language in the mediated settlement agreement providing that defendants "agree to cooperate with plaintiff's efforts to obtain such CAMA permit" did not require the defendants to submit multiple CAMA permit applications nor revise the location for additional dock slips. The defendants had submitted an initial CAMA permit application per the Mediated Settlement Agreement, but then declined to submit additional applications when the first CAMA review rejected the application and required revision to the dock location and number. The court explained that "[t]he agreement consistently refers to the permit and permit application in the singular tense, and does not refer to multiple permits or applications." Thus, in mediation practice, drafters of mediated settlement agreements are now paying even closer attention to the language and acts required by the agreement.

Finally, a case that shows the flexibility of the mediation process is *Gannett Pacific Corp. v. City of Asheville and County of Buncombe*, 178 N.C. App. 711, 632 S.E. 2d 586 (2006). In this case the court held that mediation conducted between the city and county concerning their Regional Water Authority Agreement did not violate North Carolina's Open Meetings Law. The parties and their mediator created a process where the two boards met separately in closed meetings to "consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, or arbitration" per N.C. Gen. Stat. § 143-318.11(a)(3)(2005). Once the closed meeting was finished, one representative from each board and their counsel would meet with the mediator. During this time both boards stood in recess and conducted no official business. This process continued until a settlement was reached around midnight.

The court noted that since no more than

one member of each board met with the mediator, then these sessions were not "official meetings" under the law. This coupled with the attorney-client privilege outlined in section N.C. Gen. Stat. § 318.11(a)(3) provided the basis for the court's decision. Thus, in today's mediation practice, counsel and mediators are partnering to develop case specific processes.

### Future Mediation Issues and Conclusion

So, what's the next "big" thing as it relates to mediation? In terms of developing case law, while there will always be a new issue for the courts to review, for the most part the program Rules are now well settled. As for our practices in mediation, I believe we will see greater partnering between counsel and mediators in devising a process that is case specific. It will still look, feel, and sound like mediation, but as the *Gannett* case demonstrates, there is much flexibility in the process.

I also believe that we will see more volun-

tary mediation at an earlier stage of the case, i.e., before a lawsuit is filed. There may also be more mediation conducted where the parties are present by phone or video conferencing. There is a new wave of online mediation, quite different from our superior court form that may impact the shape of mediation in the future. This coupled with the price of a gallon of gas may encourage parties to seek ways to reduce costs and still have an effective mediation process.

In conclusion, mediation has fit quite well into our legal system and continues to reap benefits of both case settlement and collegial relations. While a retrospective cannot capture all the significant points of interest, the tapestry that is painted by mediation is rich with history and continues to hold a bright future for North Carolina attorneys and their clients. ■

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*Mediation Subcommittee dating back to the later 1980s and into the early 1990s, and a former chair of the NCBA Dispute Resolution Section. He is the current chair of the NCBA Lawyer Effectiveness and Quality of Life Committee and a member of the North Carolina Academy of Superior Court Mediators.*

## Woody Teague (cont.)

April of '46. I had not tried any Superior Court cases then, but my background in insurance got me in with these insurance companies and insurance work. It was three or four years before I started trying lawsuits anywhere. In about 1951 or 1952, we started trying lawsuits in eastern North Carolina. There weren't many law firms in eastern North Carolina at the time doing defense work. And so these companies would get me. I tried cases all over Goldsboro, Kinston, Little Washington, Wilmington, not too much Elizabeth City, but Nashville. I tried a hell of a lot of cases, so, that was the time I enjoyed the most until I just got too old.

### Q: Your memory seems incredibly sharp on all of these details. Your secret?

Teague: Yeah, I ain't but 95, see. One thing I learned in trying lawsuits and in being a trial lawyer is that you need a good memory. Back then, I didn't have a computer where I could push something and have it come back up. I had to keep it up here. And you had to remember what the man had said the day before. You had to make yourself have a good memory. In my opinion, memory is trained. It's something you learn to do.

One of the tricks of memory is to tie events to ten things you do when you get up. Let's say you brush your teeth, you do this, and you do that. Whenever you want to remember something, you tie that thing to one of the ten. And then, when you want to remember it, you go back and it will flash out at you.

### Q: Any secrets to the practice of law?

Teague: One thing I found in the practice of law is that most people don't listen. While you're talking to them, they're thinking about what they want to say in response to what you just said. You learn to listen by just concentrating on what somebody is saying. Lyndon Johnson said you've got two ears and one tongue. You ought to listen twice as much as you talk, which is true. Particularly in court testimony, listen to what the witness is saying or what the judge is saying. And put it back there so you can pull it back out. I'm single minded. If I'm doing anything, I'm doing that thing, the hell with anything else. Concentrate on that thing, and you will remember what you did. That's the truth.

### Q: You have seen the practice of law evolve. Do you see good things ahead in the next 25 years?

Teague: Up until maybe five years ago, I

was on the Board of Visitors of Wake Forest Law School. If you asked a first year law student why they wanted to practice law, they would say it was because of money. But in the last five years, I think that has turned around. I believe now they want to render a service. Also, a lot of people who take law now go into business. They don't want to try cases. I think the practice of law, insofar as using it in business, is going to increase. The study of law has changed and is going to continue changing dramatically. It's going to go from Blackstone and all the old stuff into brand new areas. That law library we have around the corner is useless now, completely useless. Nobody goes in there; they all have computers. If they want to know how many fall-down cases occurred in the last ten years, they punch it in the computer and it spits out the answer. You don't have to Shepardize it like you used to.

I don't think the practice of law is going to be as pleasant in the next 25 years. I think I practiced law from 1955 to 1975 or '80 in the Golden Age. One of my partners here says I wouldn't like it now. It's not civil and you don't trust the man on the other side and it just isn't as pleasant as it was. Old Willis Smith Jr. and I had a hell of a time. We had a damn good time trying cases. We really did. ■