

MINUTES: JANUARY 31, 2008, MEETING
GEORGIA COMMISSION ON DISPUTE RESOLUTION

Judge Joseph Iannazzone called the meeting to order. In addition to Judge Iannazzone, Commission members present were: Judge Charles Auslander III; Judge Debra Bernes; Sen. William Cowsert, Esq.; Alan Granath; Dale Hetzler, Esq.; Marti Kitchens; Elizabeth Manley; Edith Primm, Esq.; Raye Rawls, Esq.; and Judge Cynthia Wright. Bobby Glenn, Esq., participated by phone.

GODR staff members present were: Shinji Morokuma, Esq., Director, and Nicky Davenport, Deputy Director.

1. Visitors:

Judge Iannazzone welcomed the visitors, who were: Patti Anderson, Cobb County ADR Program; Elmira Barrow, Coweta Circuit/Carroll County ADR Program; Debbie Blanton, DeKalb County ADR Program; Tracy Johnson, 6th District ADR Program; Melissa Heard, 7th District ADR Program; Tena Helms, Macon and Houston Circuits ADR Program; Cheryl Hicks, Coweta Circuit ADR Program; Jennifer Matte, Vermont Law School; Linda McClellan-Horvath, 10th District ADR Program; Nancy Parkhouse, Clayton County ADR Program; Bonnie Powell, Fulton County Landlord/Tenant Mediation Program; Laura Lynn Swafford, Gwinnett County ADR Program.; and Jerry Wood, Fulton County ADR Program.

2. Minutes:

The minutes from the November 15, 2007, meeting were approved without amendment.

3. Swearing in of New Members:

Judge Iannazzone administered the oath and swore in Sen. William Cowsert, Esq.; Dale Hetzler, Esq.; and Edith Primm, Esq., as members of the Commission.

4. Director's Report: Shinji Morokuma

a. New Commission and Committee membership, directory

Mr. Morokuma reported that Commission members have been provided with an updated list of Commission members, committee assignments, and member contacts to put in their desk books. Printed copies of the updated ADR Rules also were available at the meeting to those who wanted them, he said, but the rules would also be e-mailed to members to save them from having to carry the paper back to their offices.

[Attachment 1]

b. Legislative Update

Mr. Morokuma reported that he and Debra Nesbit, Deputy Director of the Administrative Office of the Courts, met recently with Sen. Eric Johnson from the Savannah area, who is one of the three senior members of the Senate who meet with three members of the House at the end of the legislative session in Conference Committee to negotiate differences in their respective budget bills. Sen. Johnson's chief of staff was also in the meeting. Mr. Morokuma said he and Ms. Nesbit explained what the Commission and GODR do, and asked him to watch over GODR's budget requests as they pass through the Senate and into Conference Committee this session. Sen. Johnson said he understood the importance of the state's ADR program to the efficient functioning of the judiciary, and he particularly liked the idea of giving litigants the power to resolve their own disputes. He offered to do what he could to support GODR and encouraged GODR's continued communications with the Senate Appropriations Committee's Judiciary Subcommittee, of which Commission member Sen. Cowsert is a member.

Mr. Morokuma said much of the background work that led to the meeting with Sen. Johnson was accomplished by Wendy Williamson, executive director of the non-profit Mediation Center in Savannah, who happens to be Sen. Johnson's campaign treasurer. He thanked Ms. Williamson for making Sen. Johnson aware of GODR's desire to meet with him on budget matters.

Mr. Morokuma reported that there has been one meeting of each chamber's subcommittee that oversees GODR's budget requests – the House Budget Committee's Public Safety Subcommittee and the Senate Appropriations Committee's Judiciary Subcommittee. GODR's budget requests so far have not encountered any resistance from the subcommittees, although there has been some question as to why GODR's registration funds were not used in lieu of state funds for office operations. He reported that Ms. Nesbit and the AOC have been working to give the subcommittees all the information they have requested around the budget. Mr. Morokuma said he was encouraged because he has been able to be more proactive in the budget process this session as opposed to the last.

c. Office Move

Mr. Morokuma reported that GODR moved offices in December one floor down to occupy space in the AOC. The move was particularly difficult during the busy registration renewal season, but staff are settling in to their new offices, he said. Only the office's suite number has changed, but all other contact information remains the same.

d. Budget Update

Mr. Morokuma reported that GODR has received the second of three installment checks from the Georgia Bar Foundation for the \$250,000 grant it received in September 2007. He said GODR is preparing its first required spending report to the Foundation. The

office has exhausted its state funds, he said, and is now operating entirely on grant funds, of which it has spent \$12,500 to date. The move to the AOC has reduced the amount of GODR's office space and therefore its monthly rent. However GODR will need to reimburse the AOC for the costs of building out and wiring the new offices.

e. Letter to Superior Court Judges re HB 369

Mr. Morokuma said GODR sent a letter to all superior court judges and ADR program directors about Georgia's new "parenting plan law," also known as House Bill (HB) 369. A portion of the law expressly authorizes the use of binding arbitration by parties in matters involving child custody and visitation. The problem, he said, is that the Supreme Court ADR Rules contemplate that courts refer parties only to nonbinding processes. The letter pointed out that binding arbitration has been and continues to be available in the private sector, recommended that judges not refer parties to binding arbitration, and suggested that court programs that receive requests for binding arbitration refer parties to any private arbitrators they know of with expertise in child custody and visitation.

Judge Louisa Abbot helped draft the letter, which was sent out electronically and by mail, and sent to the Council of Superior Court Judges e-newsletter. The issue was also discussed at the council's recent meeting in Athens.

[Attachment 2]

f. Staff Update

Mr. Morokuma reported that Shania King, a Georgia State University sophomore majoring in political science, has been hired as GODR's student intern. She succeeds Tynesha Manuel, who was promoted to Administrative Coordinator.

g. Registration Renewal

Mr. Morokuma said GODR extended the neutral registration renewal deadline from December 31, 2007, to January 31, 2008, in hopes later filers would be able to complete the entire transaction online. However, the office continues to test the new online system and work with the vendor to fix bugs and errors. The development and testing of the program has been frustrating because it is more work for the office staff and neutrals to renew their registrations on paper.

h. Program Directors' Retreat

Mr. Morokuma reported that planning has begun for the next Program Directors' Retreat, which will be held in Savannah in late May or early June. Linda Gernay, director of the Eastern Judicial Circuit ADR Program, is helping to organize the event.

i. ABA Judicial Section Mediation Training

Mr. Morokuma reported that the ABA Judicial Section approached GODR with a proposal to hold its next 40-hour mediation training for judges in the Southeast. He said the office and the ABA have agreed to hold the training at the State Bar Conference Center on September 21-25, 2009. The training, which will qualify trainees for Georgia registration, will be led by Prof. Kimberly Kovach of the University of Texas, a nationally recognized mediator and educator. The class size is limited to 32, with four places reserved for judges from outside Georgia. Mr. Morokuma said he believed the 28 Georgia slots would be quickly filled, and asked any judges on the Commission to let him know if they were interested in participating in the training.

Ms. Primm asked if there would any cost to the judges for the training. Mr. Morokuma said the ABA Judicial Section and GODR intend to subsidize the cost, though the training may not be entirely free of charge. Ms. Manley asked if GODR would keep any fees paid by trainee judges. Mr. Morokuma said he was not sure, but he understood that the trainer does not get paid and that the ABA paid only the trainer's expenses.

The training in Atlanta would be the sixth judicial training sponsored by the ABA; the others were conducted in Delaware, Illinois, Arizona, Maryland, and California. The feedback from the trainings has been extremely favorable, according to the ABA. The ABA's Judicial Section and Dispute Resolution Section will be distributing flyers and other publicity material about the training at their conferences.

Judge Wright said she hoped that the Institute for Continuing Judicial Education would be contributing some money to support the training because ICJE has more money than GODR. Mr. Morokuma said ICJE knows of the training and he hoped that some support would come from ICJE. His committing of GODR to pay some costs of the training was to demonstrate that it was supporting the opportunity. Judge Bernes noted that since the Bar facilities were free, the only costs would be for meals and training materials. Mr. Morokuma said mediation coaches also would be needed, and GODR would have to decide whether they should be paid; the Judicial Section has not traditionally paid for coaches for their mediation trainings. Judge Bernes said while it may make sense to charge judges, the training should not be a money-making venture for GODR. Ms. Primm agreed, but said GODR should not lose money either, and she said there were plenty of mediators willing to donate their time to coach judges.

Judge Iannazzone said the training was a good outreach opportunity for GODR and for trainers, and it sounded like GODR would incur little cost to put it on. Ms. Manley suggested that GODR's contribution be to provide coaches for the training, and she agreed with Ms. Primm that many mediators would donate their time to coach. Ms. Primm also said it was a tremendous opportunity for judges from outside Georgia to become familiar with the state's ADR system. Mr. Morokuma added that the ABA would be handling registration for the training, and the office would encourage Georgia judges through each of the judges' councils to sign up once the ABA opens registration. He noted that the ABA training was unlikely to be repeated, but GODR intended to sponsor other mediation trainings for Georgia judges.

5. Committee Reports

Committee on Ethics: Judge Wright

Judge Wright reported that the committee reviewed two applications for neutral registration, and both were approved.

Committee on Training and Credentials: Mr. Glenn

Mr. Glenn asked Mr. Morokuma to report on why the Committee chose not to meet prior to the Commission meeting. Mr. Morokuma explained that GODR is still working to update the Georgia mediator ethics exams, which the Commission voted to require of all neutral applicants who were trained outside of Georgia. The extensive comments of the trainers who were consulted are still being integrated into the new draft of the exam, so it was not ready to be taken up by the committee.

Another topic for discussion was the Ethics Committee's request to the Training and Credentials Committee to explore the idea of creating rules allowing provisional registration of law students who apply as part of an academic mediation course. The need for provisional registration arose because students sometimes have issues in their criminal background check that may delay or deny their registration, preventing them from taking the course. Because the Ethics Committee must act on the issues, that delay or denial of registration can come too late for the students to take alternate classes, putting them behind on credits they need to graduate on time.

Mr. Morokuma said he discussed the problem with the two program directors who regularly train law students to serve as mediators in court – Bonnie Powell of the Fulton County Landlord/Tenant Mediation Program, and Ellie Lanier, who trains University of Georgia students to mediate in Athens/Clarke County Magistrate Court. Both directors felt that a rule change was too drastic and unnecessary. Instead, they proposed an administrative solution. They said that they would submit to GODR the names of students when they are first accepted for their programs, which occurs often months before they receive training and apply for registration. GODR could then run criminal background checks and give the Commission and the students more time in which to deal with any issues prior to the students' applying for registration. That early screening process also would give students the opportunity to enroll in alternate classes if it appeared that their registration was unlikely to be accepted.

Because the rule change was deemed unnecessary by the very programs that would benefit from it, the committee decided that further action by it or the Commission was warranted.

6. New Business

ADR Rule Changes: Judge Auslander

Judge Auslander reported on the recent Georgia Supreme Court decision in the case of *Wilson v. Wilson*, which related to the testimony of a mediator in a hearing to set aside a mediated agreement and whether the mediator could be required to testify. The court carved out an exception to mediator confidentiality under the facts of the case, he said, and Mr. Morokuma asked the Rules Committee whether the ADR Rules needed to be changed to comply with the holding in *Wilson*. Judge Auslander said the Rules Committee would study the issue and report back to the Commission at the March meeting.

Mr. Granath pointed out that the decision highlights the ethical obligation of a mediator to assess whether their parties are competent to make decisions and participate fully in their mediation. Judge Iannazzone agreed that one of the rules to look at was the ethical obligation of a mediator to terminate a mediation if he or she determines that a party is not competent. Ms. Primm said this last issue was important, because judges need to be able to assume that if they are presented with a signed, mediated agreement, then the capacity of the parties is not in question. She added that she was disturbed that the *Wilson* case got to the Supreme Court without GODR knowing anything about it, and she emphasized that mediators needed to be aware of their ethical obligation not to willingly testify before any judge about the contents of a mediation. It is important, she said, for the judge to hear an appropriate argument against the mediator's testifying. Judge Iannazzone said there has already been some discussion of creating an ethical obligation for mediators to notify their local ADR program directors and GODR when they receive a subpoena. Judge Wright suggested the need for a form Motion to Quash a Subpoena. Judge Auslander said the committee also will consider whether mediators should be ethically obligated to file motions to quash subpoenas they receive. He added that program directors need to be aware that GODR can supply them with a form Motion to Quash if necessary. Mr. Morokuma said he will distribute the current form to program directors and trainers for their input. Ms. Primm noted that it was critical for trainers in domestic relations mediation integrate the *Wilson* decision into their training materials.

Judge Iannazzone said he would officially pass the matter to the Rules Committee for further study.

[Attachment 3]

Uniform Parenting Plan Form, Council of Superior Court Judges

Mr. Morokuma presented a draft of a newly proposed uniform parenting plan form, which the Council of Superior Court Judges recently approved as Rule 24.10 and which is scheduled to be reviewed by the Supreme Court in March. The form was designed to fulfill the requirements of HB 369, Georgia's new parenting plan law. Judge Abbot was closely involved in the development of the form, Mr. Morokuma said. She had told him that based on feedback from mediators and program directors, the original form was

greatly simplified; mediators felt the original form unnecessarily created opportunities for party disputes. The approved form is nine pages long, including the judge's signature page. Mr. Morokuma said he is distributing the draft at the Commission meeting to give members and program directors a first look at the form they may be using in the future.

Once the form is approved by the Supreme Court, GODR will make it available for download from its website, Mr. Morokuma said, as well as distribute it to all ADR program directors and trainers. He acknowledged that neutrals and court programs will want some training on the new form; he said he would work with Judge Abbot to identify appropriate people statewide who can train mediators on the new form. That being the case, he said the information required by the court on the new parenting plan form will be no surprise to registered domestic relations mediators, who should always have been including such detail in their mediated agreements.

Judge Wright said the form will be helpful to mediators, parties and judges by letting them use a form for parenting plan information rather than have to write out all of that information. She agreed that the form required information that one should find in any complete mediated divorce agreement.

[Attachment 4]

Registration Requirements for Retired Judges, Experience Attorneys

Judge Iannazzone asked to continue discussion from the previous Commission meeting on the issue of requests by soon-to-be retired judges and experienced trial attorneys to be given exceptions to the training requirements for registration as mediators. They sought credit for their years of experience on the bench or in the courtroom toward their training requirements. Judge Iannazzone acknowledged that there had been considerable opposition to the idea, but said also that he was uncomfortable with the idea of relying on the appeals process to make registration decisions of this nature on a case-by-case basis. He said he was concerned that such a process would lead to inconsistent registration decisions and the perception of unfairness.

Judge Wright suggested that the Commission put the issue on the next meeting agenda, ask for testimony from advocates of exceptions for judges and senior attorneys, and vote on a decision one way or the other. She said she recalled the discussion from the previous meeting, but did not recall that the Commission decided on the matter. Ms. Primm agreed that she would like to hear further discussion of the issue. Mr. Glenn proposed that the Training and Credentials Committee take up the matter at its next meeting and lead the Commission's discussion.

Mr. Morokuma asked Mr. Glenn if the committee did not already vote at the last meeting that it would not create a rule providing for exceptions for judges and senior lawyers. Judge Auslander said he recalled that the committee did discuss the matter and decided not to make a proposal to the Commission to create a new rule. Judge Iannazzone said he sought a motion from the Training and Credentials Committee to the Commission to ratify the committee's decision. Judge Auslander said he felt it was not necessary for the

Commission to approve the committee's decision not to make a motion for a new rule. Judge Wright said she did know that the issue is one that judges at many levels have expressed concern about and interest in. She said there is nothing in that says the full Commission took up the issue and made a decision, and she felt such a decision would be helpful to protect the Commission.

Judge Iannazzone stated that he felt for that reason it was important for the Commission to vote on the issue. Ms. Manley asked if the Training and Credentials Committee would then have to act again. Judge Iannazzone said he thought the issue just needed to be put on the Commission's agenda for a vote. Mr. Morokuma asked if the Commission would like to hear from advocates for the exception. Judge Wright said it might be helpful, as she has heard from several judges who do not understand why their judicial experience by itself does not qualify them for registration.

Next Meeting Dates

Judge Iannazzone set the dates for the next Commission meetings on March 19 and May 20. [Note: these dates were later changed to March 20 and May 22.]

Recognition of Raye Rawls and Ansley Barton

Judge Iannazzone thanked Ms. Rawls for her five years of service on the Commission and presented her with a plaque from the Georgia Supreme Court. Ms. Ansley Barton, who was unable to attend, would receive her plaque in the mail.

The meeting was adjourned.

The Commission went into Executive Session.

Attachments:

1. New Commission and Committee membership, directory
2. Letter to Superior Court Judges re HB 369
3. *Wilson v. Wilson*
4. Draft of proposed Uniform Rule 24.10

[Minutes prepared by Shinji Morokuma, Office of Dispute Resolution]