

MINUTES: NOVEMBER 15, 2007, MEETING
GEORGIA COMMISSION ON DISPUTE RESOLUTION

Judge Joseph Iannazzone called the meeting to order. In addition to Judge Iannazzone, Commission members present were: Judge Louisa Abbot; Judge Charles Auslander III; Ansley Barton, Esq.; Judge Debra Bernes; Wade Coleman, Esq.; Bobby Glenn, Esq.; Alan Granath; Marti Kitchens; Elizabeth Manley; Raye Rawls, Esq., and Justice Hugh Thompson.

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

1. Visitors:

Judge Iannazzone welcomed the visitors, who were: Elmira Barrow, Coweta/Carroll County ADR Program; Bev Bradburn-Stern, DeKalb County ADR Program; Tracy Johnson, 6th District ADR Program; Melissa Heard, 7th District ADR Program; Tena Helms, Macon and Houston Circuits ADR Program; Nancy Parkhouse, Clayton County ADR Program; and Bonnie Powell, Fulton County Landlord/Tenant Mediation Program.

2. Minutes:

The minutes from the September 19, 2007, meeting were approved without amendment.

3. Director's Report: Shinji Morokuma

a. Budget Update

Mr. Morokuma reported that the Georgia Bar Foundation in late September awarded GODR a one-time grant in the amount requested of \$250,000. He said GODR recently received the first of three installment checks for \$83,300 from the Bar Foundation, and showed a copy the grant letter and a copy of the check to Commission members. Mr. Morokuma later thanked all those in attendance for their support while the office's financial future was in question.

[Attachment 1]

b. Staff Update

Mr. Morokuma said the funds from the Bar Foundation allowed GODR to hire Tynesha Manuel, the office's student intern, to fill the Administrative Coordinator position vacated by Ashley Franklin. He said he felt it was prudent and practical to hire Ms. Manuel because she had already been performing many of that job's functions during her internship.

Mr. Morokuma also reported that he intends to hire a Program Coordinator to help the GODR provide trainings needed by the local court programs and to organize more continuing education opportunities for neutrals, particularly in the smaller and more rural court programs statewide. He noted that one of the complaints he has heard from neutrals is that most seminars and programs are held in Atlanta, so he wanted to hold more educational opportunities outside Atlanta. He added that the office was about to hire a student intern from Georgia State University to succeed Ms. Manuel.

c. Office Move

Mr. Morokuma announced that GODR will soon be relocating one floor down to occupy space in the Administrative Office of the Courts (AOC). The move was recommended by Chief Justice Leah Ward Sears, who felt that relocating physically within the AOC would give the office easier access to the AOC's operational and technical support, thus allowing the office to focus its resources toward ADR activities. The move would also bring GODR closer to the administrators of other court commissions. The AOC is building space, and the office plans to move in mid-December. He said the office would try to minimize any disruption to neutrals and program directors during the move.

d. Online database

Mr. Morokuma reported that GODR's online registration and renewal system is unfortunately about a month behind schedule. The system will allow neutrals to renew their registrations completely online and will be more reliable than the old one. Ms. Manuel is constantly and rigorously testing the system for errors. He said he hoped the system would be available to neutrals the following week.

e. Conflict Resolution Week

Mr. Morokuma said GODR participated in celebrating national Conflict Resolution Week during in the third week of October. Together with the Georgia chapter of the Association for Conflict Resolution and Kennesaw State University, GODR sponsored several local activities. Ms. Davenport, president of the Georgia Chapter of ACR, reported that the highlight of the week's activities was held at the Capitol, where Governor Perdue's executive counsel presented a proclamation honoring Conflict Resolution Week. She said among other activities the office sponsored Peace Cafes at a local middle school and a local high school, for which GODR and ACR received a large response and thanks from the local board of education. Peace Cafes also were sponsored for the public at Kennesaw State University, and registered neutrals attending them were offered free continuing education credits. Mr. Morokuma said this year was the first time GODR had participated in Conflict Resolution Week, and he hoped the office would participate annually from now on.

f. ADR Institute and 2007 Neutrals' Conference

Mr. Morokuma reported that the 14th Annual ADR Institute and 2007 Neutrals' Conference, held October 19 at State Bar headquarters, was a great success. Attendees numbered 250 lawyers and non-lawyers -- 80 more than attended in 2006. Overall ratings for the conference averaged 4.3 out of 5. He thanked the speakers, which included the 7th District's Ms. Heard. Plans are already being made for next year's institute, he said.

e. Mediation Study Group

Mr. Morokuma said the Mediation Study Group has finished its discussion of changes to the ethics rules for mediators, particularly around the issues of self-determination, coercion and the giving of professional or legal advice. Only a few more issues are left to discuss via e-mail. He thanked the members of the group for their hard work for the past two-and-a-half years to help GODR update the ethics rules.

5. Committee Reports

Committee on Training and Credentials: Bobby Glenn

-- Mr. Glenn reported that the committee decided that the rule requiring neutrals to apply for registration within 18 months of completing their General Civil Mediation training be expanded to trainings for all other registration categories. Judge Iannazzone clarified that the 18 months would be counted from the completion of a training, not the completion of observations, co-mediations or practicums. Judge Abbot asked if there was a reason why the 18-month rule applied only to General Civil Mediation. Mr. Morokuma said he did not know, but suggested that it may have been an oversight. Judge Iannazzone added that the policy behind the committee's decision was to prevent neutrals' trainings from become too stale before they registered. Judge Abbot asked if trainers routinely tell their students that they must register within 18 months. Mr. Glenn said the two trainers on the committee said that they believed trainers do.

On behalf of the committee, Mr. Glenn presented a motion that the Commission approve the rule change. No second was required. The Commission voted unanimously to approve the rule change.

-- Mr. Glenn said the committee also decided to require that all applicants for registration who were trained out-of-state be required to take and pass an examination on Georgia mediator ethics. Ms. Manley pointed out that GODR currently requires this of out-of-state registrants as a matter of office policy, but that there is no corresponding rule. Because there was some disagreement among the committee members as to the correct answer to some of the ethics questions, Judge Iannazzone suggested that the current exam be passed out to all approved trainers for their feedback.

On behalf of the committee, Mr. Glenn presented a motion that the Commission require registration applicants trained out of state to take and pass a Georgia ethics examination. No second was required. The Commission voted unanimously to approve the rule change.

-- Mr. Glenn said the committee voted also to allow neutrals to fulfill their continuing education requirements though video and online seminars. He noted, however, that the committee felt strongly that video or online instruction were not appropriate substitutes for live instruction in core trainings that lead to neutral registration.

On behalf of the committee, Mr. Glenn presented a motion that the Commission accept online and video instruction for neutral continuing education, with the caveat that only live instruction was acceptable for trainings that lead to registration. No second was required. The Commission voted unanimously to approve the rule change.

-- Mr. Glenn said the committee took up a request from the Ethics Committee to study the need for provisional registration of law students who may have an issue in their criminal background check that may delay or prevent their full registration as neutrals. He said the need arises from programs in which trained law students mediate cases for academic credit. Those students apply for registration once the academic year begins, and if they are unable to register immediately, they risk losing academic credit they need to graduate as planned. Provisional registration, under which students are registered to mediate only in their academic program, would allow those students to earn their academic credits and not jeopardize their graduation even if they would not qualify for full registration. Mr. Glenn said there was no immediate need to address the issue, so he and Mr. Morokuma would study Georgia's "third-year practice act" and make a recommendation to the committee on an appropriate rule change.

Justice Thompson asked if the students in question are supervised by their law schools, as is required under the third-year practice act. Mr. Morokuma replied that the students are trained as mediators and mediate every week in the court for academic credit, and they are required to discuss their cases, make presentations to each other, and are supervised by an attorney who is also an experienced mediator.

Judge Auslander pointed out that his Athens-Clarke County court uses trained University of Georgia law student mediators who are supervised by an attorney trainer. He asked whether the provisional rule would be different for second- or third-year law students. Mr. Glenn said as long as the students are properly trained as mediators, he did not see an issue. Judge Auslander added that his court has benefited from some excellent student mediators through the UGA program.

Ms. Powell clarified that the law students in her landlord/tenant mediation program also mediate small-claims cases, and she assured the Commission that her students are closely supervised throughout the academic year.

-- Lastly, Mr. Glenn said the committee addressed a request by the Commission to study the issue of waiving registration training requirements for experienced lawyers and judges, including exceptions for ADR trainings taken more than 18 months prior to

application and credit for professional experience. He said the committee recognized how difficult it would be to draft any exception to the current training requirements, considering variables such as years of experience, the type of experience, the location of the experience, and whether the experience was earned full-time or part-time that would have to be considered. In the end, he said, the committee declined to draft exceptions to the training rules, particularly since an appeals process is already available to applicants who are turned down for registration by GODR based on training issues.

Justice Thompson expressed concern that the appeals process would result in inconsistent *ad hoc* registration decisions by the committee. Ms. Manley said the committee believed that it was important for an applicant to take the required training, but if the applicant objected to the requirement, he or she could use the appeal process. She said there is a big difference between experience as a judge and experience as a mediator. Justice Thompson agreed that it was a difficult issue. Mr. Granath suggested that reasonably current mediation experience be part of the guidelines in an appeal, not just how current the training was. Judge Iannazzone said that would certainly be a factor for the committee to consider if, for example, an applicant had not been trained but had a significant amount of private mediation experience.

Committee on Ethics: Judge Iannazzone

Judge Iannazzone reported that the committee took up only two neutral applications; one was approved and one was denied.

6. New Business: Judge Iannazzone

Sixth District ADR Rules

Ms. Johnson reported that the Sixth Judicial Administrative District Rules were recently revised. Most of the minor changes involved updating the rules to refer to “ADR” rather than just “mediation.” Also, a new standing order for ADR referrals in the Griffin Circuit necessitated changes. Mr. Morokuma stated that he reviewed the new rules carefully and found no issues with them.

It was moved and seconded that the Commission approve the revised Sixth Judicial Administrative District ADR Rules. The Commission voted unanimously to approve the rules.

[Attachment 2]

House Bill 369

Mr. Morokuma explained that the state’s new parenting plan law, based on House Bill 369, takes effect January 1, 2008. He said the law requires divorcing parents to submit detailed parenting plans on issues such as child custody and visitation during the school

year, the summer, during vacations, etc., information that good domestic relations mediators have always included in mediated divorce agreements. The new law also allows parents to agree to binding arbitration and to select their own “arbiter” in order to settle child custody and visitation matters. The arbiter’s decision would be incorporated into the final divorce order unless the judge finds that it is not in the child’s best interest.

Mr. Morokuma said he was interested to hear the Commission’s thoughts on whether the court ADR programs need to offer binding arbitration. He pointed out that the current ADR Rules contemplate that only non-binding processes be offered through the courts. He also noted that private binding arbitration has long been available to disputants who wanted to resolve their issues outside the courts, so the law states nothing new. Moreover, he said even if the courts offered binding arbitration in these matters, parties would refuse it once they understood the limitations of the process – for example, no right to appeal, no immunity or protection for the arbiter under the ADR Rules, and no standards as to who can serve as the arbiter.

Mr. Glenn said he foresees confusion regarding the issue of judicial review of the arbiter’s child custody and visitation decision. A decision contrary to the best interest of the child is not one of the four bases for setting aside an arbitration award under the Georgia Arbitration Code. People will ask whether this new basis is in addition to the four under the GAC or whether it is the only basis for setting aside the award in custody and visitation matters, Mr. Glenn said. Mr. Morokuma said GODR was not consulted about the provision. He added that program directors are anxious to know whether the court ADR system needs to offer binding arbitration.

Ms. Rawls noted that if the courts offered binding arbitration in these matters, the Commission would have to re-examine the training standards for arbitrators, which currently stand at six hours in an approved non-binding arbitration course. Another six hours would be required to give arbitrators subject-matter expertise in domestic relations matters, she said. Ms. Barton said she did not see why the Commission, which promotes voluntary, non-binding processes, should get involved with this law.

Judge Abbot said the law merely codifies what has always been an option for divorcing parties, but she said she has never been presented with an arbitrated agreement in a custody matter. Also, she said the law codifies the policy that the court cannot delegate and the parties cannot contract away the right of the court to review agreements with an eye toward the child’s best interest. It is illusory, she said, to call the process “binding arbitration” because it is not and cannot be binding on the court. Judge Abbot suggested that the Commission or GODR write to superior court judges and program directors explaining that the court cannot order parties to binding arbitration, and any binding arbitration takes place outside the Georgia Supreme Court rules as a matter of private contract and subject to judicial review. Ms. Rawls said it is important for the Commission to clarify its position on the matter because she has already gotten requests from some program directors to hold arbitration training for child custody matters. Ms. Bradburn-Stern said a letter to the judges would help program directors clarify any confusion for parties and judges. Ms. Parkhouse said she agreed that she did not want Clayton County’s ADR program to be involved in binding arbitration, but she did feel that mediators need training on the new parenting plan law. Judge Abbot noted that the

Uniform Rules Committee of the Council of Superior Court Judges would meet the following day to discuss a proposed standardized parenting plan form for use statewide.

Mr. Coleman said he did not think that the local ADR office should refuse to help if parties called asking to be referred to a child custody arbitrator. Judge Abbot said in her experience whenever parties request an outside mediator or arbitrator, they usually have someone in mind they want to use. She said she believed program directors could pass along names of people who arbitrated child custody matters. Judge Iannazzone said program directors in that situation should make clear that the programs are merely providing names of people who have made their names known to them, and that the office is not involved in any other way. Judge Bernes suggested that the Commission compile data on how often binding arbitration is being used in these matters.

Mr. Granath said that in the interest of promoting informed consent of the parties, mediators need to know what their responsibilities are when they are confronted with parties who say they want to consider binding arbitration. Judge Iannazzone offered that the mediator should write in the mediation agreement that the parties want to submit the issue to binding arbitration. Ms. Manley felt the mediator's job regarding the arbitration would be finished at that point. Judge Abbot asked Mr. Granath if the question was whether the mediator would be obligated to explain to such parties what binding arbitration is. Mr. Granath replied that yes, he thought a mediator should, at a minimum. Ms. Parkhouse said she felt her mediators could simply state that the parties can pick whomever they wish as the arbiter, and that the process takes place outside the court's purview. Mr. Glenn thought it would be more prudent for the court programs and the mediators to simply state that the court programs do not handle binding arbitration. Ms. Parkhouse said the letter that Judge Abbot proposed would be helpful in explaining to mediators what they should say to parties about binding arbitration. Ms. Barton thought it would be fine for the mediator or the court program to give parties a copy of the statute, but she felt that going further was not necessary.

Mr. Morokuma asked the program directors to keep track of how much demand there is for binding arbitration of custody and visitation matters because, as Judge Bernes suggested, there is no data upon which the Commission can act. He said he has heard that binding arbitration of divorces is happening in Georgia, but he has not known of anyone who was involved in one. Ms. Rawls said she arbitrated a divorce years ago.

Mr. Granath noted that it was entirely possible that at the end of a mediation, parties would ask the mediator, who has spent considerable time with the parties and is familiar with the issues, to then serve as the arbitrator for the sake of efficiency – a “med-arb” process. What should the mediator do, he asked. Mr. Glenn said he felt med-arb posed tremendous problems for the courts and that the Commission should have nothing to do with it. The biggest problem with arbitrations today is the arbitrators' failure to disclose potential conflicts of interest, he said, and the Commission should stay away from promoting med-arb or binding arbitration. Mr. Granath said he was concerned about what mediators should say when confronted with that situation.

Judge Iannazzone asked Mr. Morokuma to draft a letter to superior court judges on binding arbitration and circulate it among the Commission members for comment.

Ms. Bradburn-Stern said she attended a training on the new parenting plan law and saw many problems with the form that was used during the training, which she believed was composed by the Collaborative Law Institute. She said in DeKalb County her office has been drafting a form that was more appropriate for mediators. Judge Abbot said the Uniform Rules Committee of the Council of Superior Court Judges was getting ready to approve a form to present to the full council in January 2008. She said she would send the form out to interested parties for comment. She said effort was being made to keep the form simple and consider the needs of *pro se* parties and mediators. She clarified that the goal is for the form to become part of the Uniform Rules of Superior Court, but the form must be released for public comment before it can be presented to the Supreme Court for approval. The form would not be ready on January 1, 2008, she said, but she hoped it would be ready within a few months of the new year.

[Attachment 3]

Next Meeting

Judge Iannazzone set the date for the next Commission meeting on January 31, 2008, at State Bar headquarters.

The meeting was adjourned.

The Commission went into Executive Session.

Attachments:

1. Letter from State Bar Foundation, copy of check
2. Sixth Judicial Administrative District ADR Rules
3. HB 369, Sec. 19-9.1.1

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