

MINUTES: NOVEMBER 20, 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 E. Auslander III, Jeffrey Bramlett, Esq., Sen. William Cowsert, Esq., Alan Granath, Dale Hetzler, Esq., Martha Kitchens, Edie Primm, Esq., and Judge Cynthia Wright.

Judge Louisa Abbot, Robert S. Glenn, Esq., and Judge David Irwin 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 Elmira Barrow, Coweta Circuit/Carroll County ADR Program; Deborah Blanton, DeKalb County ADR Program; Valerie Lyle, Ninth District ADR Program; Gretta May, Ninth District ADR Program; Debra Nesbit, AOC; Nancy Parkhouse, Clayton County ADR Program; Bonnie Powell, Fulton County Landlord/Tenant Mediation Program; Brenda Sutton, Houston and Macon Circuits ADR Program; and Jerry Wood, Fulton County ADR Program.

2. Minutes:

The minutes from the September 18, 2008, meeting were approved without amendment.

[Attachment 1]

3. Neutral Registration Fees:

Judge Iannazzone noted that prior to the meeting Commission members engaged in a productive e-mail discussion and vote on the issue of raising neutral registration fees, but were unable to achieve consensus. So the fees remain as they were, he said.

Mr. Morokuma reported that he testified at a task force created by the lieutenant governor, which met concurrently with the Judiciary Subcommittee of the Senate Appropriations Committee. The committees sent a clear message that the state is running low on money, and the budget process in the spring would be difficult, he said. It has become imperative that agencies such as GODR that collect fees increase their income from fees and reduce their dependence on state funds. Mr. Morokuma said he did not expect the news to be any different in the upcoming meeting of the Public Safety Subcommittee of the House Appropriations Committee.

Mr. Morokuma said there was much discussion of the fee increase at the September Commission meeting and online, but a decision needs to be made because the registration renewal season is about to start, and the office needs to be able to charge the new fees to renewing neutrals. Renewal season is when most of the registration fees for the year come into the office, he said, and the office could not afford to go through another renewal season under the current fee structure.

Mr. Morokuma alerted the Commission that any change to the current formula for calculating renewal fees would require rewriting of the software for the new online registration system, which would delay its implementation after more than a year of development. The new online registration system is an important way for the office to provide faster service and to do more with the few staff members it has, he said.

The simplest change to the fee structure is to change the numbers – the fees themselves – while leaving alone the two-tiered system based on income, Mr. Morokuma said. He asked that the Commission consider doubling the fees to \$50 every two years and \$250 every two years, while keeping the neutral's income criterion at \$2,500 earned providing ADR services in the past two years. Mr. Morokuma said keeping the income level the same might help to capture some of those renewing neutrals who are suspected of underreporting their income when they should be paying the higher fee. He asked that the proposed new fees be implemented for the upcoming renewal season, starting December 1, 2008, and that they be implemented for new registrants starting January 1, 2009, to accommodate any trainers who have advertised trainings based on the current fees.

Judge Abbot made a motion to adopt Mr. Morokuma's recommendation; Judge Irwin seconded. Ms. Primm said she understood the political reality that the fees need to be increased, but she asked if GODR had estimated how many registrants it would lose if the fees were raised. Mr. Morokuma said he did not know what the effect of the fee increase would be on renewals. For some neutrals, the new fees will be too much, and they will drop out. Because of dropouts, he said he was not optimistic that doubling the fees would result in doubling the \$60,000 average that GODR collects in registration fees each year.

The office has received some complaints about the fee increase. However, as Mr. Granath pointed out at the last meeting, a mere \$25 every two years for what is essentially a Supreme Court license to practice ADR in the courts, is almost insultingly cheap, Mr. Morokuma said. The registration fees have been the same since 1992, and it was time to raise them, he said. Judge Iannazzone said he could not imagine that anyone practicing ADR in the courts would consider \$50 every two years to be too much, nor would a neutral truly earning money at it consider \$250 every two years too much.

Judge Auslander asked how many of the registered neutrals paid the lower fee. Ms. Davenport said 70 percent of registered neutrals paid the \$25 volunteer fee, while 30 percent paid the \$125 fee. She said the numbers indicate that unless 50 percent of neutrals drop out of registration, GODR can only earn more money from a fee increase. Judge Auslander said there was concern at the last meeting that some of the smaller local court programs that depend on volunteer mediators would be jeopardized by a fee increase because those programs often pay the registration fees for their volunteers. Ms. Davenport said some of the court programs pay the registration fees for their volunteers, but others do not. So some volunteers do not get any

compensation from the court program and also have to pay registration fees on their own. She said she did not know exactly how many of the court programs paid the registration fees of volunteers. Mr. Morokuma said the Mediation Center in Savannah does pay the fees for its volunteers.

Judge Auslander said that rather than double the current fees to \$250 and \$50, he preferred a flat fee of \$125 for all neutrals because that scheme would bring the 70 percent of neutrals who pay \$25 up to \$125. He said he also did not want neutrals who are already paying \$125 to have an option to pay \$50 instead of \$250. Judge Wright said that was her concern as well since the office does not have a way to verify the income of neutrals. If the 30 percent paying \$125 now becomes the 5 percent who pay \$250, then the office hasn't gained any income, she said. Mr. Morokuma said he understands that there is some suspicion that neutrals who should be paying the \$125 fee have been paying the \$25 fee instead, and a flat fee would address that concern. Ms. Primm said she would agree to a flat \$100 for all neutrals. Another arrangement could be made for those neutrals who truly serve the courts without any other compensation, she said.

Ms. Davenport said she feared that raising the fee to a flat \$100 or \$125 would not generate very much more income for the office because many neutrals would choose to drop their registrations. Ms. Parkhouse said she was most concerned about the viability of the juvenile court programs if the fee was increased significantly because juvenile courts depend so heavily on volunteer mediators. Ms. Barrow said she was concerned that an increased fee would cause her to lose her volunteer magistrate court mediators, most of whom are local, retired professionals who are mediating as a public service.

Mr. Morokuma said determining who qualifies for a reduced volunteers' fee might be difficult, as neutrals who volunteer for court programs may nonetheless be making good money as neutrals in the private sector. Neither GODR nor the court programs have the resources to investigate the ADR income of neutrals for the purpose of determining what their fee should be. Judge Iannazzone said assessing on a case-by-case basis who might qualify for a fee reduction or waiver probably is not practical. Mr. Morokuma said a handful of waiver requests would be not overwhelming, but any more than that would slow down the registration and renewal process dramatically.

Judge Abbot asked if it was possible to retain the income criteria as they are now, but simply raise both fees as a way to acknowledge that some neutrals do not earn income from their work, in other words, reduce the difference in the two fees and reduce the incentive for applicants to underreport their income. Mr. Morokuma said that change would be easily accommodated by the programming of the online registration system. Judge Abbot said she attended one of the Senate budget hearings with Mr. Morokuma, and she impressed upon the Commission how urgent was the need to increase the registration fee income so the office and Commission could continue to exist. She said she did not expect the legislature to continue to provide any significant financial support to the office.

Judge Iannazzone asked if the fee criteria could be easily changed to one based solely on the length of time a neutral had been registered, with newer registrants paying a lower initial rate, which switches to a higher flat rate later. Judge Wright said the State Bar of Georgia determines its fees in that way. Mr. Morokuma responded that changing the fee criteria text on the online registration/renewal forms would not be an issue, but the software for the online system would

have to be rewritten to allow the system to compare the renewal date with each neutral's original registration date. Therefore, for the upcoming 2008 renewal season, such verifications would have to be done by the GODR staff by hand, which would slow the renewal process down significantly.

Judge Wright noted that the fee discussion has not advanced from the last Commission meeting. She said she felt that a flat fee of \$125 was just not very much for neutrals to pay every two years. Ms. Primm said she sympathized with the difficulties of the smaller court programs. But, she said, the reality nationwide is that there more mediators looking for work than there are cases being sent by the courts. Although it is difficult to lose good people because of the increased filing fee, there are many more who would gladly pay the fee and take their places, she said.

Mr. Morokuma noted that prior discussions had touched on the fairness of charging a flat fee when there are some lawyers who command hourly rates that are many times the proposed \$125 fee. Mr. Bramlett said he saw some merit to a progressive fee structure that charged more for neutrals who earned more. He acknowledged, however, that there was no time to implement such a structure before the renewal season began.

Judge Wright moved to amend the current motion by charging a flat rate of \$125 for registration and renewal. Judge Abbot accepted the amendment. Judge Irwin seconded the amended motion. Ms. Sutton asked if there could be some provision where the program directors could recommend certain neutrals on their rosters to receive a fee reduction or waiver. Ms. Blanton said she would be more comfortable with simply doubling the current fees. She said there seems to be some misperception that mediators are earning more money than they are. A flat rate would burden mediators, but also the court programs, which pay the registration fees for their staff members who are registered, she said. None of the smaller, rural court programs are represented at the meeting, she added, but most of them do not have a large pool of mediators to choose from. Ms. Parkhouse reiterated that a flat fee of \$125 could cause smaller programs and juvenile court programs to discontinue services.

Ms. Powell asked what original registrants pay. Mr. Morokuma said most first-time registrants pay \$25, but some pay \$125 because they have been mediating privately and earning more than \$2,500 in the past two years. Another idea is to charge neutrals a one-time fee when they add a registration category, since adding registration does require work by the office. Charging a fee for adding a registration category would not affect the software programming for the online system immediately, he added.

Mr. Granath said the flat \$125 rate appears to be more punitive toward the neutrals who would have paid or were paying the lower fee. Judge Auslander said part of the effort is to make the fees uniform and fair going forward. He also said the current two-tiered fee system does not appear to work well. The Commission may have to be punitive to some to level the playing field, he said. That playing field is pretty low, Judge Wright said. \$62.50 a year is not much to pay, she said. Moreover, it is difficult to predict the impact of this fee increase at this point. She agreed that it seems unfair that mediators in urban areas earning hundreds of dollars an hour would pay the same fee as those in rural areas trying to eke out a living. However, something new must be tried now, and a flat rate is a better step than maintaining the current two-tiered system, she said.

Ms. Nesbit expressed concern that raising the fees to a flat \$125 for all neutrals might cause some issues with the legislative budget offices, which would wonder why the fees weren't raised more on those neutrals who made more money and were paying the higher fee earlier. Judge Wright said she still would be surprised if a significant number of neutrals dropped out simply because their fees were raised \$100 every two years. Ms. Johnson said her concern as a program director is not so much individual neutrals dropping out as entire court programs closing down for lack of neutrals. Ms. Parkhouse worried about backlash from juvenile court and magistrate court judges if a flat fee were implemented. Ms. Powell suggested that program directors could use the state fee increase to argue for higher pay for their neutrals.

Mr. Morokuma said the two-tiered fee system was created fairly soon after the state court-connected ADR system was created in 1993. At the time, there were very few court programs and very few mediators, and the Commission set the fees as a way to encourage registration. Ms. Primm noted that for the first 10-15 years of the Justice Center's existence, it was one of the few programs that paid mediators, mainly because the center had some federal funds. So most court programs had neutrals working for years for no pay. So the fee structure was designed so as not to discourage the growth of the ADR system in the courts, she said.

Judge Auslander said he was in favor of finding a way to reduce the fees for neutrals who would sign affidavits attesting that they made less than, say, \$750 a year. But he would like to stick as much as possible to a flat \$125 fee for everyone. Judge Wright said such an affidavit should be a separate document from the registration or renewal applications that neutrals signed.

Mr. Hetzler said he calculated that the current fee structure generates an average of \$55 per neutral. He asked if that covered GODR's costs to register neutrals. Mr. Morokuma said it does not. Mr. Hetzler said the fee really should cover the true cost of registration. Mr. Morokuma said he has submitted reports to the legislative budget committees that estimate that 50 percent of the office's resources now go toward registering neutrals because the ranks of registered neutrals has increased dramatically over the years. The new online registration and renewal system will eliminate much of the inefficiency of the current paper application system, he said. Mr. Hetzler said he expected that the legislature is going to demand that GODR's registration process be self-sustaining, just as in any other professions. Sen. Cowser agreed. Ms. Primm said that was an ideal goal, but that the registered neutral population – unlike lawyers or accountants – likely cannot afford to pay the full and true costs for the office to maintain their registrations. She said the Justice Center has registered 200-400 people a year, most of whom live and work out of state. Those people have Georgia registration on their resumes, but they are unlikely to renew their registrations if the fee is too high, thus losing the office 200-400 renewals and their fee income every year.

Ms. Nesbit said the Board of Court Reporting and the Commission on Interpreters are both exploring how much it costs them to provide their services and how to set their fees to cover those costs. The Board of Court Reporting has been able to do that, and she saw the Commission as similar to that board. Ms. Primm said court reporters or court interpreters can make more money in one hour than mediators serving in some of the smaller court programs. It is not unusual for a mediator to be paid \$40 for a four-hour case, and most court programs do not pay by the hour, in order to control their costs. The high flat fee is going to penalize those neutrals who are least able to pay it, she said.

Judge Abbot said the reality is that the Commission must be prepared for a significant loss of funding from the legislature. She said if the Commission is agreed that registration of neutrals is an important responsibility, then the Commission must find ways to subsidize the costs of registration. There may be a negative impact of a fee increase, which would be regrettable, she said. But the Commission's choice is between trying some new way to increase income or doing nothing and having insufficient resources for the job.

The question was called, and the Commission voted on the motion to raise the registration and renewal fees to a flat rate of \$125 for every two-year registration cycle. The motion carried by a vote of 7 to 3.

4. Possible Filing Fee Bill:

Mr. Morokuma said that several senators in the budget meeting in October asked whether GODR could become self-supporting through registration fees. He said he told the legislators that unlike the State Bar is able to do, GODR cannot support itself on registration fees alone because mediators do not earn enough money for GODR to charge enough in fees. Sen. Seth Harp asked if GODR could support itself through registration fees supplemented by a filing fee. Mr. Morokuma said he told Sen. Harp that GODR could do so and eliminate the need for state funds, except by law none of the filing fees collected under the Court-Connected ADR Act goes to the state. Sen. Harp then proposed increasing the current statutory cap on the ADR filing fee and then allowing some portion of that increase to go directly to support GODR. That way, money would not be taken away from the local court programs that need it, the increase would allow those programs that are already charging the maximum to charge more if they feel the need, while allowing GODR some revenue for operations. GODR is in the early stages of exploring that idea, Mr. Morokuma said.

Judge Abbot, who was at the October budget meeting, met Sen. Harp at the Child Support Commission meeting last week. Sen. Harp indicated then that he would gladly carry a bill that would accomplish what he proposed, once we could provide appropriate language for the bill. She said it was best to act carefully, but also quickly, while GODR had Sen. Harp's support. It was important to craft the bill so that no money is taken away from the court programs, she said. But it was also important to see if court programs, even those that are not charging the statutory maximum, are willing to charge more than they are charging now. She also said she had some questions about how much money the legislation would generate for GODR. Judge Abbot said the legislature is generally not in favor of additional filing fees, but the budget crisis may make legislators see such fees more positively.

Ms. Nesbit cautioned that it was important to consider the mechanism by which the fees would be shared with GODR. The fee right now is reportable to the Superior Court Clerks' Cooperative Authority (CCA), and any increase and remittance likely would have to go through the authority, which serves as the legislature's accountability mechanism, she said. Therefore, any change in the filing fee statute would also require a change to the statute that determines the fees CCA collects and remits, Ms. Nesbit said. Collecting and remitting fees on behalf of GODR would mean additional work for the CCA. So the CCA must also be convinced to support the idea of an ADR filing fee increase. She also said that based on the current caseloads, an increase of 15 to 25 cents per case might be adequate to support GODR.

Judge Iannazzone asked what cases the filing fee would be charged to. Ms. Nesbit said it would be charged on all civil filings in jurisdictions that already had an ADR program and collected fees under the ADR filing fee statute. Ms. Lyle asked if the proposed statute would increase the current cap on the ADR filing fee, because her program already charges the maximum allowed. Ms. Nesbit said the idea was to increase the filing fee cap enough so local programs charging the maximum fee could collect more and GODR could collect enough to support itself. Mr. Morokuma clarified that the ADR filing can be charged on all civil filings that the local ADR board decides are appropriate, not just on cases that are referred to ADR.

Ms. Primm asked if a program did not want to increase its filing fee, could it opt not to allow any of its fees to be remitted to GODR. Ms. Nesbit felt that in order for the law to fulfill its function, local court ADR programs would have to be required to support GODR through the additional filing fee. Judge Auslander asked if it was correct that CCA currently collects \$4 million to \$5 million in ADR fees annually. Ms. Nesbit said that was correct, so 25 cents to GODR really should be sufficient. But, she added, the CCA may not be happy about all of the extra work it would have to do to remit just 25 cents per dollar of ADR filing fees it collects. Ms. Nesbit also clarified that the legislature likely will not consider creating a new fee, but rather would prefer to increase a current fee. She said another remittance option was to ask the local boards to remit funds directly to GODR rather than have the CCA do it.

Mr. Bramlett said that within the State Bar one is likely to find resistance to anything that increases the cost of accessing the courts. He also said his experience is that when the legislature creates a fee and money starts coming into the state budget, legislators start referring to that money not as fee money as “taxpayer funds.” He suggested approaching some of the larger private for-profit ADR firms with some sort of fee in exchange for a firm-wide credential. Ms. Blanton said most of the mediators working for those private firms do not seek GODR registration because they get plenty of work without it. Ms. Primm pointed out that there are only a handful of such firms anyway, and most of them would decline to register their neutrals altogether if they were assessed such a fee. Judge Iannazzone said that proposal was akin to charging dues to law firms as well as their individual lawyers, and there is no precedent for that.

Judge Iannazzone suggested that a strategic planning committee could look at the important issue of exploring options for raising revenue for GODR operations while reducing its need for state funds. Judge Wright suggested that such a committee include not just Commission members but program directors as well. Judge Auslander said the next meeting of the Commission is not scheduled until January, when the legislature is already in session, so it is important to draft any bill quickly. Ms. Nesbit agreed, and she said would prefer first to receive the approval of the Judicial Council before submitting the bill to the legislature. This coming year will be the first of a two-year session, so the bill may not pass the first year. She cautioned that legislation can take on a life of its own and can become something that the drafters didn’t intend for it to be.

Judge Auslander moved that the Commission ask Ms. Nesbit to begin drafting an appropriate funding bill for submission to the Senate. Judge Wright seconded. Judge Auslander said he liked the idea of having the local court programs remit funds to GODR. Ms. Parkhouse cautioned that such a process could be cumbersome, as some local programs have relatively inactive boards of trustees. Ms. Nesbit added that it may make sense to propose raising the filing fee cap much higher, so court programs have room to increase their fees over several years, if

necessary, without having to try to amend the statute again. The Commission voted unanimously to ask Ms. Nesbit to begin drafting an appropriate bill that amends the ADR Act to increase the ADR filing fee enough to allow GODR to be self-supporting and to permit court programs to raise their local fees, if necessary.

[Attachment 2]

5. Director's Report: Shinji Morokuma

a. Senior Judges' ADR training

Three judicial administrative districts – the Seventh, the Ninth and the Tenth – have begun training their senior judges in mediation with funding from the Administrative Office of the Courts, Mr. Morokuma said. The Institute for Continuing Judicial Education has scheduled a senior judges' training next year in conjunction with the superior court judges training conference in Athens. ICJE will pay the senior judges' travel expenses to the conference. The trainers will be from the National Judicial College. GODR is going to try to write some ethical standards for the judges, who will be conducting judicially hosted settlement conferences. Judge Philip Etheridge, senior judge in Fulton County, has agreed to help GODR with the drafting of those standards.

b. GODR-Sponsored Trainings

Mr. Morokuma listed recent trainings that GODR has sponsored statewide, including trainings on the new child support guidelines, a juvenile court skills update in Warner Robins, and a general civil mediation training in Athens. Upcoming is a mediator skills seminar in Atlanta, a Specialized Domestic Violence Mediation training in Macon, and a General Civil Mediation training in Gainesville.

c. Child Support Seminar on Web

Mr. Morokuma said Jill Radwin and Elaine Johnson of Child Support Commission have at GODR's request been traveling around the state holding seminars on the revised child support guidelines. However, Ms. Radwin is being treated for cancer, so she is no longer available to travel. To disseminate the child support information to mediators across the state, GODR has just posted an online version of Ms. Radwin's seminar on the GODR homepage. Ms. Radwin and Ms. Johnson and Jorge Basto of the Administrative Office of the Courts produced the seminar, which consists of Ms. Radwin narrating over her PowerPoint presentation. Anyone with web access can view the seminar for free, and it earns registered neutrals a half-hour of CE credit.

d. ADR Institute

Mr. Morokuma said the 15th Annual ADR Institute and 2008 Neutrals' Conference in October enjoyed a record attendance of 250 registrants, by far the largest single day

ADR Institute and possibly the largest single-day event for the Institute for Continuing Legal Education. Of the 250 registrants, about 150 were attorneys. The evaluations were favorable. He thanked Ms. Primm, Mr. Hetzler and Ms. Powell for their help on the planning committee. The planners made a particular effort to solicit speakers who not only had something important to say, but who could say it well to an audience. Planning is already underway for next year's ADR Institute, which will be held October 16, 2009, at the State Bar Conference Center in Atlanta.

e. Registration Renewal

Registration renewal will begin December 1, and the increased fee the Commission just voted on will be applied, Mr. Morokuma said. Because the season is starting two months late, the renewal deadline has been extended to January 31, 2009.

f. Annual Reports

Work has resumed on the pending ADR annual reports, Mr. Morokuma said. Work had stopped when GODR's budget crisis hit in early 2007. The FY06 annual report is at the printer, and FY07 and FY08 reports are in progress. Commission members will receive printed copies, and the reports will be posted on the GODR website. Judge Wright suggested that instead of printing reports, GODR should consider producing only electronic versions of reports to save money.

6. Committee Reports

Committee on Training and Credentials: Bobby Glenn

Mr. Glenn reported that the committee met in the morning to discuss the Commission's recent decision to drop the requirement of a letter of recommendation for mediators seeking registration in Specialized Domestic Violence Mediation. The committee felt it had good reasons for recommending that the requirement be dropped, but there have been some complaints about the decision. To learn more the committee met with Vicky Kimbrell of Georgia Legal Services, who explained why it was so important for the Commission to require that mediators who handle domestic violence cases be vetted for proper training, adequate experience, high skills, and sensitivity to the issues involved. Ms. Kimbrell had reported to the committee that in 2008 there were 100 reported fatalities from domestic violence in Georgia. Certainly, it would be unfortunate if any fatality occurred through a mediation, Mr. Glenn said. The committee wanted to take some time to explore if there is a better way, other than a letter of recommendation, to assure all interested parties that mediators handling domestic violence cases are qualified to handle those cases. Mr. Glenn made a motion on behalf of the committee to permit GODR to suspend further registration of neutrals in the category of Specialized Domestic Violence Mediation until March 2009, when it hopes to make a proposal to the Commission about how to ensure the quality of mediators handling domestic violence cases. The Commission voted unanimously to adopt the motion.

Committee on Ethics: Judge Auslander

Judge Auslander reported for Judge Wright, who was unable to attend the committee meeting. He said the committee took up eight neutral registration applications. Six were approved, one was denied, and one was held for more information.

Judge Auslander said the committee also considered an ethics complaint against a mediator. Although a memo on the complaint had been prepared, the committee decided that it could not yet address the complaint until a final jurisdictional issue was resolved.

Committee on Rules: Judge Auslander

Judge Auslander said the committee met for a second time with program directors. The result of that meeting is that the majority of the suggested changes to the Model Rules are going to be adopted. The program directors also asked that the Model Rules contain a provision that permits them to opt cases out of the court-connected ADR system where the parties ask to opt out or the parties choose a neutral who is not appropriately registered. Judge Auslander hoped to write and circulate language to amend the Model Rules before the next Commission meeting.

7. New Business

a. Decision Management training issue: Because a quorum was no longer available, Judge Iannazzone suggested that the training issues raised by Decision Management Associates be tabled until the next meeting.

b. Next meeting date: The next meeting of the Commission was scheduled for March 26, 2009.

The meeting was adjourned.

Attachments:

1. September 18, 2008, minutes
2. O.C.G.A. § 15-23-7 of the Georgia Court-Connected ADR Act

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