MINUTES: NOVEMBER 4, 2015, MEETING
GEORGIA COMMISSION ON DISPUTE RESOLUTION

Chair Judge Charles E. Auslander III called the meeting to order. In addition to Judge Auslander, Commission members present were:

Emily S. Bair, Esq.; Raymond G. Chadwick, Jr., Esq.; Mary Donovan, Esq.; Chief Judge Sara L. Doyle; Judge C. Andrew Fuller; Timothy Hedeen, Ph.D.; Melissa C. Heard, M.S.S.W.; and Judge J. Carlisle Overstreet. Judge Gregory A. Adams; Stefani R. Lacour, Esq.; and Vjollca Young participated by phone.

AOC staff members present were: Cynthia Clanton, Esq., Director; Ashley Garner, Chief Budget Officer; Christopher Hansard, Assistant Director of Research and Regulatory; Zan Patorgis, Esq., Legal Compliance Officer; Kimberly Miller, Research and Statistical Analyst; Shinji Morokuma, Esq., Director, Office of Dispute Resolution; and Linda Smith, Education Certification Officer.

1. Call to Order:

Judge Auslander called the meeting to order; members and guests introduced themselves. Judge Auslander congratulated Ms. Clanton on her recent selection as AOC Director.

2. Minutes:

The minutes of the August 12, 2015, Commission meeting were approved prior to the meeting via e-mail vote.

3. Committee Reports:

Budget Committee: Judge C. Andrew Fuller

Judge Fuller provided copies of the FY 2016 budget, noting that the Commission has remained within its FY 2016 budget so far. There were no questions or comments.

Ethics Committee: Zan Patorgis, Esq. (for Hubert J. Bell, Jr. Esq.)

Mr. Patorgis reported that since the Commission's last meeting the Committee has reviewed only one application for registration, which it rejected because the applicant is on probation until 2020.

Mr. Patorgis reported that the Committee has received three complaints since the Commission's last meeting. One complaint was dismissed for lack of jurisdiction because it was lodged against an unregistered neutral; the other two have reached the investigation stage. The first of these complaints was filed against a registered neutral for actions taken while serving as counsel to a party in mediation, not while mediating a dispute herself. The current rules apply primarily to neutrals acting as neutrals, so it is unclear at this time whether the rules apply to this particular dispute. Mr. Patorgis

suggested that when the rules are next rewritten, the Commission could consider expanding the rules to cover neutrals acting in other capacities.

The Commission discussed concerns that the unregistered neutral had flouted the rules and voted to ask the Committee to re-open the investigation of that individual, if possible.

Training Committee: Melissa C. Heard, M.S.S.W.

Ms. Heard reminded the Commission that at its August meeting it voted to reject two rule changes proposed by a mediator regarding continuing education – that neutrals over age 70 be exempted from continuing education requirements and that neutrals be permitted to roll over excess continuing education hours from one year to the next. As requested by Judge Auslander, Ms. Heard provided written responses to those proposals that can be posted on the GODR website.

Liaison Committee: Raymond G. Chadwick, Jr., Esq.

Mr. Chadwick reported that, as requested, he has been drafting written answers to three questions he has received from neutrals and program directors:

1) Must one be a registered neutral to perform mediation of any case that is filed in court? There is some confusion regarding the "court-annexed or court-referred" language in Appendix A, Rule 5.

   Mr. Chadwick said he would like more time to answer this question, as the current rules are not clear and can lead to several defensible interpretations. Commission members discussed how the rule might be rewritten to clarify it. The Committee will work on possible changes, Mr. Chadwick said.

2) How may program directors respond if registered neutrals refuse to fulfill the *pro bono* requirement prescribed by Appendix C of the Rules?

   Mr. Chadwick suggested that the court programs set their own guidelines to address this issue. Options include removal of those neutrals from the program roster and exclusion of those neutrals from court referrals, he said.

3) What is the Commission doing to develop ADR programs where they do not already exist?

   Mr. Chadwick said he will respond by notifying interested parties that there is a strategic plan in place to expand ADR programs.

Mr. Chadwick reported that he and Mr. Morokuma will attend the Southeastern ADR Conference in Nashville later this month, where they will give a presentation on continuing education of mediators.

Task Force on Evaluative Mediation: Timothy Hedeen, Ph.D.

Dr. Hedeen provided the Commission members with written conclusions of the Task Force regarding issues around the recognition and use of evaluative mediation in court-connected ADR programs. The Commission was asked to review the conclusions and bring any questions or comments to the next Commission meeting. In addition, the Commission will publish the report for public review and comment, Judge Auslander said.

Strategic Plan Research Sub-Committee: Dr. Hedeen

Dr. Hedeen reported that the sub-committee is studying how local court programs collect and use their data and how the Commission could help them to report their data more efficiently.

4. Director's Report: Shinji Morokuma, Esq.

Mr. Morokuma and Mr. Patorgis reported that the AOC has been working to craft a uniform set of disciplinary procedures for the Commission on Dispute Resolution, Board of Court Reporting, and Commission on Interpreters. They plan to present a draft of these unified rules to the Commission at the February meeting.

Mr. Morokuma reported that GODR's two planned domestic violence screening trainings for court program staff have been completed.

Mr. Morokuma reported that the registration renewal period recently began and will end on December 31. Very few neutrals have renewed at this time, he said, but he expects most to renew closer to the end of the year. No technical problems with the renewal process have been reported.

5. Chairman's Report: Judge Charles E. Auslander III

Judge Auslander reported that the Commission has reached out to the Georgia Commission on Domestic Violence and former Commission member Raye Rawls of the University of Georgia to assist in updating the guidelines for screening and mediating domestic violence cases.

Judge Auslander reported that neutrals will be asked to complete a customer service survey on the Georgia Courts Registrar system upon renewal this year.

7. Adjournment

The meeting was adjourned at approximately 3:25 pm.

Georgia Commission on Dispute Resolution

Report of the Task Force on Evaluative Mediation

Questions

1. **How is "evaluative mediation" defined? How is it distinguished from other forms of mediation, including "facilitative?" For what types of cases or parties is evaluative mediation most appropriate?**

Evaluative mediation is distinguished by the mediators' expression of their thoughts, opinions, and predictions about the strengths, weaknesses, or likely outcomes of cases. By contrast, facilitative mediation requires that mediators refrain from expressing personal opinions or assessments and focus instead on providing a process through which the parties themselves can craft resolutions that meets their mutual needs and interests. Evaluative mediation may be employed in most any type of case, but it is primarily seen in civil (non-family) matters, where both parties are represented by attorneys. Evaluative mediation is most appropriate where the represented parties are sophisticated and they expect mediators to take a more active role in providing information that may help them reach a resolution.

2. **Have other state offices or jurisdictions considered or included evaluative mediation among court-approved ADR processes? What insights might they offer the Commission?**

Many states expressly forbid mediators from offering evaluations. In at least one state, it is *illegal* for mediators to offer evaluation. Some other jurisdictions provide that mediators may offer their evaluations when asked by the parties to do so, or in only those cases in which the mediator holds specific expertise. Overall, most state offices do not favor or endorse evaluative mediation.

It should be noted that evaluative mediators, just like arbitrators, should receive all necessary and relevant information for their consideration. Yet mediation communications very seldom provide mediators with sufficient information upon which to base sound assessments. Further, unlike arbitrators or case evaluators, evaluative mediators are not obliged to explain or justify their opinions, predictions, or other evaluations, nor are they accountable for them.

3. **What is Georgia's experience with evaluative mediation? Which mediation providers and participants have used this approach? What do the stakeholders of Georgia's ADR community think about evaluative mediation?**

The task force and Commission liaison recognize that many mediators provide evaluative mediation in private (non-court-connected) mediations. Some mediators – in cases in which all parties are represented by counsel and one or more parties have requested the mediators' thoughts on a case or a proposal – report offering their assessments, often in the form of reality-testing questions.

4. **Would evaluative mediation fall within the Commission's jurisdiction? Would it be recognized as an approved ADR process, and if so, should it represent another registration category?**

The Commission's jurisdiction is defined in ADR Rule II(A)5. The rules require mediator neutrality and do not authorize evaluative mediation in court-connected cases. The task force concludes that evaluative mediation is a valid ADR process that exists on a continuum that can range from transformative (focus on relationships), to facilitative (focus on relationships and resolution), to evaluative mediation (focus on resolution). Mediators in private settings should know—and offer a clear explanation of—where on this continuum they practice, so that parties and counsel can choose the best process to achieve what they want from mediation.

Critical to the success and continued growth of court-connected mediation is the participants' belief that the mediation process is just and fair to all. Evaluative mediation endangers that belief by increasing the risk that the participants may perceive the mediators' opinions, predictions, and evaluations as evidence of the mediators' bias and efforts to undermine their self-determination. For these reasons, the task force concludes that for court-connected cases, evaluative mediation is not recommended and that a separate registration category should not be created for evaluative mediation.