

Georgia Commission on Dispute Resolution
MEETING AGENDA
Thursday, January 12, 2012, 11 AM-12:30 PM
State Bar of Georgia

I. Call to Order

II. Congratulate Judge Auslander on state court appointment

III. Minutes from November 10, 2011, meeting approved via e-mail vote

IV. Committee Reports

-- Budget and Personnel Committee: Larry Christensen

-- Ethics Committee: Judge Charles Auslander

-- Training and Credentials Committee: Melissa Heard
Juvenile Mediation Rules

-- ADR Court Program Liaison Committee: Alan Granath

V. Director's Report: Shinji Morokuma

-- Renewal season update

-- ADR Institute wrapup

-- Immigration law requirements

VI. New Business

-- Next Meeting Dates: March 8, May 10, September 27, November 15, 2012

VII. Adjournment

Executive Session

MINUTES: JANUARY 12, 2012, MEETING
GEORGIA COMMISSION ON DISPUTE RESOLUTION

Chair Edith B. Primm, Esq., called the meeting to order. In addition to Ms. Primm, Commission members present were: Justice Hugh P. Thompson; Judge Gregory A. Adams; Judge Charles E. Auslander III; Hubert J. Bell, Jr. Esq.; Judge Edward E. Carrere, Jr.; Laurence L. Christensen, Esq.; Judge Sara Doyle; Alan Granath; Dale Hetzler, Esq.; Martha Kitchens; and Judge J. Carlisle Overstreet. Melissa C. Heard and Kenneth L. Shigley, Esq., participated by phone.

GODR staff members present were: Shinji Morokuma, Esq., Director

1. Visitors:

Ms. Primm welcomed the visitors: Kingsley, Buhl, Esq., mediator; Cynthia Clanton, Esq., Administrative Office of the Courts; Amber Gallman, Esq., DeKalb County ADR Program; Lynn Goldman, Esq., Fulton County Juvenile Court Deprivation Mediation Program; Sheryl Hicks, Coweta Judicial Circuit ADR Program; Tracy Johnson, Sixth District ADR Program; Jennifer Keaton, Esq., mediator; Pam McClure, mediator; Nancy Parkhouse, Clayton County ADR Program; Molly Perry, Administrative Office of the Courts; and Jerry Wood, Esq., Fulton County ADR Program. Pam Godfrey, Seventh Judicial District ADR Program, participated by phone.

2. Judge Auslander Appointment to State Court:

Ms. Primm congratulated Judge Auslander, who was recently sworn in as a state court judge in Clarke County in December. Judge Auslander thanked Judge Doyle, Ms. Primm, Mr. Morokuma, and Ms. Clanton for attending his swearing in ceremony at the Capitol.

3. Dale Hetzler Leaving Commission:

Ms. Primm announced that Mr. Hetzler was leaving Commission. He was appointed to the Commission in January 2008, when he was chief legal officer at Children's Healthcare of Atlanta. He is now working at Erlanger Medical Center in Chattanooga, and is planning on moving there. Mr. Hetzler served on the Ethics, Training and Credentials, and Rules committees, and has been a registered mediator since 1999. Ms. Primm thanked him for his service and for encouraging many healthcare professionals to get mediation training so that they could prevent disputes from escalating to litigation.

4. Minutes:

The minutes of the November 10, 2011, Commission meeting were approved prior to the meeting via e-mail vote.

5. Committee Reports:

Budget and Personnel Committee: Mr. Christensen

Mr. Christensen reported that GODR ended FY11 with a \$7,000 surplus. It had budgeted \$278,000 for FY12, has spent \$166,000 to date, and is on track to finish FY12 with a \$72,000 surplus.

[Attachment 1]

Committee on Ethics: Judge Auslander

Judge Auslander asked the Commission to review textual changes to Appendix C, Chapter 2, that reflect the Commission's vote in November to allow GODR to conduct background checks on a random sample of renewing neutrals, rather than all renewing neutrals, every year.

Judge Overstreet asked if GODR received information from other agencies that would alert GODR to any criminal or professional problems that neutrals had. Mr. Morokuma said neutrals are ethically obligated to self-report any such issues to GODR at any time, but a neutral's renewal application is usually the first place GODR receives any notice. Ms. Clanton clarified that if staff or Commission members saw, for example, a news article on a neutral's criminal or professional conduct, she felt that would constitute cause to run a background check on that neutral.

Judge Doyle asked that the last sentence of the proposed amendment be changed in order to make clear that the rule applied to renewing applicants.

Mr. Morokuma explained that the rule that mentions refunds of the application fees is being eliminated. He said refunds have not been issued in years, as it takes the office considerable effort to determine if an applicant is ineligible for registration. All applications state clearly that the application fee is nonrefundable, he said.

Judge Auslander suggested that the proposed language be amended slightly to state clearly that GODR may run background checks on registered neutrals or renewing applicants for cause, so issues may be investigated outside the application process. He moved that the Commission accept the proposed language as amended. The motion was seconded, and the motion passed unanimously.

Judge Auslander said the Ethics Committee is drafting amendments to the rules that permit someone other than the GODR Director – a designee appointed by the Commission – to conduct investigations into ethics complaints against neutrals, court programs, or trainers. The amendments also will create timeframes for completion of various stages of the investigation. Ms. Clanton, who has made a comprehensive review of the current ADR Rules, was drafting those amendments, and they would be presented to the Commission for its review and approval at the March meeting, he said.

Ms. Primm discussed the ethics appeal hearing, which had been set in conjunction with the January Commission meeting, but had to be rescheduled at the last moment to coincide with the March Commission meeting. She said she and Judge Doyle, the hearing chair, have determined that the Commission would rule on the appeal in March whether the hearing occurs or not. Ms. Primm thanked the Commission members for setting aside the day to attend the hearing.

[Attachment 2]

Committee on Training and Credentials: Ms. Heard

Ms. Heard presented the new juvenile mediation rules for the Commission's review. The new rules included new Model Rules for Juvenile Court Mediation; registration requirements for two new registration categories, delinquency mediation and deprivation mediation; grandfathering provisions for registered neutrals who are already handling juvenile matters; and the topics to be covered in trainings for those categories. The registration requirements and grandfathering provisions were presented as amendments to ADR Rules Appendix B. The rules were drafted by a subcommittee of the Training and Credentials Committee, then reviewed and approved by the full committee, Ms. Heard said.

Judge Overstreet asked if there was a standard to determine if a party was "mentally incapacitated" as noted in the Model Rules. Ms. Heard referred the question to Ms. Goldman, who was a member of the subcommittee that drafted the rules. She replied that there is no bright line or diagnosis for mental incapacity, but a party's capacity is a judgment to be made the mediator. Mr. Granath explained that the mediator's role under the Model Juvenile Mediation Rules would appear to be the same as those for mediators in non-juvenile cases. The Georgia Supreme Court's Wilson v. Wilson case, he said, required mediators to include in their guidelines a provision where parties attest that they are able to negotiate in good faith and they have authority to make decisions for themselves, including the decision to end the mediation. If mediators determine that the parties lack capacity, they would be obligated to stop the mediation.

Ms. Kitchens moved that the Commission approve the Model Rules and the training topics. The motion was seconded, and the motion passed unanimously.

Ms. Heard next proposed that the registration rules and grandfathering rules take effect May 1, 2012. That would give GODR time to set up its registration systems, give trainers time to modify their trainings, and give neutrals notice of the grandfathering provisions. Ms. Primm said the per-participant training fee would apply to the delinquency and deprivation mediation trainings, but there would be no additional registration fee.

Judge Adams asked if the rules should take effect on July 1 to give neutrals more time to grandfather in. Ms. Heard said neutrals have had plenty of notice about the rules, as they were posted for public comment for several weeks' review period. Ms. Primm asked the

program directors in attendance if it mattered whether the effective date of the rules was May 1 or July 1. Ms. Goldman replied that the draft rules were posted for comment to all of the available electronic discussion boards and listservs for the various stakeholders in the juvenile courts, so most program directors should be aware that the new rules were pending. Mr. Shigley asked if the Council of Juvenile Court Judges had vetted the rules. Mr. Morokuma responded that it had, and the council president and several other juvenile court judges were members of the subcommittee that drafted the rules. Ms. Primm noted that 18 months should be plenty of time for neutrals already handling juvenile cases to decide whether to apply for grandfathering into one or both of the new juvenile categories, there was little need to wait until July 1 to have them take effect.

Ms. Parkhouse asked how juvenile court programs were expected to comply with the provision in the Model Rules that program coordinators be trained in domestic violence mediation. Ms. Heard explained that the Model Rules are not binding but merely suggested rules that courts can use as a model when drafting their local rules. The proposed local rules would then be approved by the Commission. Ms. Goldman said the training of program coordinators referred to training on how to screen cases of domestic violence. That provision was copied from the existing Model Rules and is not new, she said. Moreover, the qualifications for juvenile program coordinators in the proposed Model Rules for Juvenile Court Mediation mirror those being proposed by the National Council of Juvenile Court Judges and the Association of Family and Conciliation Courts.

Judge Overstreet asked if the ADR Rules contained other grandfathering provisions. Ms. Primm explained that grandfathering was offered when the rules were first adopted in 1993, so that neutrals who had been handling cases in the courts prior to 1993 could register. She confirmed for Judge Overstreet that the grandfathering provisions had a termination date, as would the proposed grandfathering provision for juvenile mediation categories.

Ms. Heard moved that the Commission approve the changes to Appendix B, including the new registration categories and the grandfathering provisions, with an effective date of May 1, 2012. The motion was seconded, and it passed unanimously.

[Attachments 3, 4, 5, 6]

ADR Court Program Liaison Committee: Mr. Granath

Mr. Granath reported that GODR helped to organize another ADR Institute in December. The office is now negotiating with the Institute for Continuing Legal Education for permission to post a video from the Institute on the GODR website. Neutrals would be able to view the video for continuing education credit. He hoped the video would be posted by the March Commission meeting.

He next reported that the project to update the GODR websites continues with help from law students from Ms. Powell's court mediation program. Last semester, the students updated links to court, private, academic, and other ADR organizations. This semester the students are adding links that may lead to employment and other opportunities for

neutrals outside the court system. He said he hoped to have the links updated by the March Commission meeting.

6. Director's Report: Mr. Morokuma

2011 ADR Institute: Mr. Morokuma said the 2011 Institute attracted more than 200 attendees and informal feedback led him to conclude that it was one of the more popular ones of the last few years. He thanked the Institute planning committee, comprising the executive committee of the State Bar's Dispute Resolution Section and members of the Commission. The Daily Report also sent a reporter, who covered the panel discussion on the 9/11 Victim Compensation Fund. The Daily Report article was passed out to members. Mr. Morokuma said he hoped to post the video from the 9-11 panel on the GODR website as soon as permission could be secured and the video could be edited and converted for web viewing. It would join two other videos from past ADR Institutes that are available for viewing by neutrals free as CE. According to the renewal applications, the videos have been very popular with neutrals, who appreciate the ability to earn CE without incurring the expense of traveling to or paying for conferences or seminars. Ms. Primm urged GODR to continue to post such videos as encouragement for people to register and to renew their registrations.

Mr. Morokuma said another free CE opportunity to be posted on the GODR website would be based on the agreement-writing seminar he and attorney Mary Ellen Cates conducted at the ADR Institute. The seminar would be posted as a PowerPoint presentation with narration by Mr. Morokuma and Ms. Cates. The topic has wide appeal, he said, because many neutrals and attorneys struggle with writing mediation agreements that are clear, complete and concise.

[Attachment 7]

Registration Renewal Season: Mr. Morokuma said the nearly 1,300 neutrals renewed their registrations during the on-time renewal period, November 1 – December 31, 2011. Of those applications, about 1,100 have been approved, and GODR is waiting on the remaining applications for missing components. Applications that GODR received well before the December 31 deadline were generally processed within three days, a fraction of the time it took previously. Mr. Morokuma said the increased processing speed can be credited to requiring neutrals to submit their renewal applications online and allowing them to pay their renewal fees online via PayPal. Applications submitted right at the renewal deadline have taken about 8 days to process because so many were submitted at once. Mr. Morokuma said he nonetheless expected that GODR would be able to meet its deadline of finish processing of all completing on-time renewal applications by the end of December.

New Immigration Law: Mr. Morokuma said a new Georgia law took effect on January 1, 2012, which requires that all people seeking a "public benefit" such as neutral registration must prove that they are in the United States legally. To do so, they must submit an affidavit attesting to their lawful presence and a copy of a supporting ID approved by the

Georgia Attorney General. Anyone who applied before January 1, 2012, were not affected by the law, but all those applying for registration, renewal or reinstatement in the new year would have to provide the new required documentation. Mr. Morokuma said all trainers have been notified, and neutrals have been notified via posting on the GODR website.

Ms. Primm expressed frustration that the new law would increase GODR's paperwork just after the office had reduced paperwork by using online renewal and a long-term authorization form for criminal background checks. She encouraged the office to find ways to manage the paper, perhaps by asking neutrals to submit documents well before the 2012 renewal season begins.

Judge Auslander asked if the law would allow an applicant's citizenship to be confirmed just once – if supporting documents were retained – without GODR having to do it each year. Ms. Clanton replied that the law is unclear on that issue. She has been consulting regularly with the Attorney General's Office, she said, and she hoped to receive some guidance on the question soon from the Attorney General or the legislature. The law affects several other offices of the judiciary, such as the Board of Court Reporting and the Commission on Interpreters, as well as the Secretary of State's office. Ms. Primm said it was the consensus of Commission to ask Ms. Clanton to continue to help the Commission understand the requirements of the new law.

Mr. Bell asked to clarify language in the affidavit that seemed to require that applicants send official documents, not copies of them. Mr. Morokuma explained copies, not originals, were to be sent, that the affidavit's language was provided by the Attorney General's office, and that the form had been modified only to add GODR information. Ms. Clanton added that if there were any problems with applicants or their documents, she has been designated by the Administrative Office of the Courts to consult with the U.S. Department of Homeland Security. She estimated that the new law could affect perhaps 100 GODR applicants in a year. She said she would continue to monitor the new law closely.

[Attachment 8]

Expense Reimbursement: Ms. Primm reminded the Commission that it had asked Mr. Morokuma in November to send flowers to Michele Gibson, who had a bad accident at home and was beginning a long recuperation after surgery. Ms. Gibson produces the GODR e-newsletter for free. Mr. Morokuma sent the flowers at his own expense. Ms. Primm moved for the Commission to approve Mr. Morokuma's reimbursement for the cost of the flowers. The motion was seconded, and it passed unanimously.

7. New Business:

Late Renewal Fees: Mr. Morokuma reported on a letter that GODR received from an attorney mediator who complained about the late renewal fee. He argued that the late fee – double the on-time fee – was punitive. Moreover, he argued, there was no rational basis for charging domestic mediators more to register and renew. Mr. Morokuma explained that the late fee was not meant to be a penalty, but an incentive for neutrals to

renew on time. 1,300 neutrals managed to renew by the deadline this season, he pointed out. The doubling of the on-time renewal fee as the late fee has been in the rules since registration was created, he said. The late fee should be nothing new to neutrals who, like the attorney who wrote the letter, have been registered and renewed for many years.

Judge Doyle asked if GODR made exceptions for the late fee. Mr. Morokuma responded that the office tries to be as lenient as possible. For example, if the online system failed, or if an applicant could prove some sort of hardship, military deployment or other legitimate issue, the office waives the late fee. For example, an applicant received a waiver of the late fee because he had been diagnosed with cancer at the beginning of the renewal season and was recovering from surgery. Mr. Morokuma said the online renewal system did not malfunction at the end of the on-time season, so there was no issue there for late applicants.

Ms. Keaton asked if the office had sought any legal opinion about whether GODR's late fee can be considered a "penalty." Mr. Morokuma said it had not, but agreed to seek one.

Judge Auslander said the late renewal fees likely total a significant amount of money and asked if GODR was depending on a level of late penalty income for its budget. Mr. Morokuma said he has never tried to determine how much of GODR's total fee income came through late fees, and he has never planned the office budget with an expectation of any late fee income. He said he would prefer that everyone renewed on time and no one paid a late fee. Ms. Primm noted that in 2009, when discussing how the office could survive on fee income alone without state funding, late fees were not considered at all in the income projections.

Justice Thompson said it is important for GODR to get through the renewal season efficiently so it can focus its efforts on others of its core mandates. GODR's gatekeeping function is very important, and the office has made good progress in making the renewal process simple and quick. However, he said, the office needs to be looking forward, not back, and it is reasonable for the office to expect people to do what they should do when they should do it.

Judge Adams asked what the basis was for charging domestic relations mediators an additional fee to register and renew. Ms. Primm said the additional \$25 a year that domestic mediator pays recognizes the mediator's potential to make more money handling domestic cases. Hourly rates for domestic cases can be several times that of non-domestic cases, she said, and \$25 a year is a small price to pay for the opportunity to earn significantly more money handling domestic cases.

[Attachment 9]

Next Meeting Dates: Next Meeting Dates: March 8, May 10, September 27, November 15, 2012. Ms. Primm reminded members that the March 8 meeting would begin at 11 am due to the ethics appeal hearing that afternoon. She thanked the Commission members for willingness to open their schedules to attend the meetings.

The meeting was adjourned.

The Commission went into Executive Session.

Attachments:

1. GODR budget summary
2. Ethics rules changes
3. Model Juvenile Court Mediation Rules
4. Training topics for delinquency and deprivation mediation training
5. Grandfathering clause for delinquency and deprivation registration
6. Appendix B with juvenile mediation amendments
7. Daily Report article on ADR Institute
8. New Immigration Law
9. Letter for attorney

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