

MINUTES: SEPTEMBER 9, 2010, 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: Judge Charles Auslander; Laurence L. Christensen, Esq.; Judge C. Andrew Fuller; Melissa C. Heard; Dale Hetzler, Esq.; Martha Kitchens; S. Lester Tate III, Esq.; Justice Hugh Thompson

GODR staff members present were: Shinji Morokuma, Esq., Director; Nathelia Davenport, Deputy Director; and Tynesha Manuel, Administrative Coordinator

1. Visitors:

Ms. Primm welcomed the visitors: Elmira Barrow, Coweta Judicial Circuit ADR Program; Deborah Boddie, Administrative Office of the Courts; Kingsley Buhl, Esq., mediator; Cynthia Clanton, Esq., Administrative Office of the Courts; Mary Cockrell, mediator; Pete Desrochers, mediator; Amber Gallman, Esq., DeKalb County ADR Program; Linda Gernay, Eastern Judicial Circuit ADR Program; Craig Henderson, State Board of Workers Compensation; Tracy Johnson, Sixth Judicial District ADR Program; David Kay, Esq., State Board of Workers Compensation; Eleanor Lanier, Esq., UGA School of Law; Valerie Lyle, Ninth Judicial District ADR Program; Linda McClain, Cobb County Superior Court ADR Program; Anna McDuffie, mediator, sign language interpreter; Raye Rawls, Esq., UGA Fanning Institute; Alex Scherr, Esq., UGA School of Law; Brenda Sutton, Macon and Houston Judicial Circuits ADR Program; Michael Opitz, mediator and arbitrator; Jerry Wood, Esq., Fulton County ADR Program. Pam Godfrey and Ellen Lahtinen, Seventh Judicial District ADR Program, participated by phone.

2. Swearing in of S. Lester Tate, Esq.

Justice Thompson swore in Mr. Tate as a member of the Commission. Mr. Tate is 2010-2011 president of the State Bar of Georgia.

3. Tribute to Judge Debra Bernes:

Ms. Primm took a moment to recognize the contributions of Commission Member Judge Debra Bernes of the Georgia Court of Appeals, who passed away on July 20. Judge Bernes served on the Commission since 2006, working on the Training and Credentials Committee and the Strategic Planning Group. Ms. Primm noted that Judge Bernes' memorial service was attended by about 1200 people, including herself and Mr. Morokuma. The large attendance, Ms. Primm said, was a testament to the contributions Judge Bernes made to the legal community, and she will be missed.

4. Minutes:

The minutes of the June 10, 2010, Commission meeting were approved prior to the September 9 meeting via e-mail vote.

5. Committee Reports:

Budget and Personnel Committee: Mr. Christensen

Mr. Christensen reported that the Commission and GODR have survived a tumultuous budgetary period, including legislative budget cuts and restructuring of the fee system. Current savings plus projected income during the 2010 renewal season will keep GODR solvent through this fiscal year, he said, and the Commission's goal remains for GODR to be financially independent from the legislature.

[Attachment 1]

Committee on Ethics: Judge Auslander

Judge Auslander reported that the committee met twice since the last Commission meeting. In June, the committee approved five of five registration applications that were up for review. This week, the committee approved three applications and held two for more information.

Committee on Training and Credentials: Ms. Heard

Ms. Heard reported that the committee has recently determined the length of service for committee advisors, and it held a hearing and reached a decision on a neutral registration issue. The committee plans meetings with the Rules Committee to work on defining the terms "court-connected," "court-ordered," and "court-referred" as used in the ADR Rules. It also plans to continue to amend the out-of-state registration requirements and to continue to work on creating juvenile mediation registration categories, she said.

ADR Court Program Liaison Committee: Ms. Johnson for Alan Granath

Ms. Johnson reported that the committee met earlier in the day and discussed a number of matters. Mr. Morokuma said GODR's integration with the Administrative Office of the Courts has given GODR access to the full array of support services the AOC provides, and it has allowed GODR to share resources and cooperate with other judicial regulatory agencies that reside in the AOC. At the request of committee chair Alan Granath, GODR will put out a press release on that integration and how it might affect service to registered neutrals.

Mr. Morokuma said interest in GODR's new e-newsletter has been very high, based on the newsletter's "open rate" of about 30 percent. He said he hopes to continue to keep the newsletter content relevant to neutrals. He thanked registered neutral Michele Gibson, who has offered to do most of the production and distribution work on the newsletter.

Mr. Morokuma reported that 13 neutrals so far have signed up for professional liability insurance through GODR's program with Complete Equity Markets, and he expected that number to continue to rise as neutrals' policies expire. BPC Financial has received 53 quote requests and sold two policies through the neutrals' insurance and retirement program, he said. The disparity between the numbers is a reflection of how much time it takes to determine the eligibility of applicants for various products. Those numbers will continue to increase, he said.

Ms. Johnson said progress is being made on an updated database program for ADR court programs. Committee advisor Mr. Desrochers presented the committee with a draft of a survey he had composed that will poll registered neutrals on what they want and need from GODR, she said. Committee members offered suggestions that will be used to revise the survey, which would be sent out during the upcoming renewal season. Ms. Primm thanked Mr. Desrochers for his hard work in drafting the survey.

5. Director's Report: Mr. Morokuma

-- Brunswick Circuit: Mr. Morokuma reported the reimbursement of all civil filing fees collected by the Brunswick Circuit prior to the ADR program's approval by the Commission. Chief Judge Amanda Williams wrote GODR a letter affirming that all prematurely collected fees were returned to plaintiffs.

[Attachment 2]

-- Savannah Subpoenas: Mr. Morokuma reminded Commission members that a mediator and a staff member with the Mediation Center in Savannah had been subpoenaed earlier this year to testify about confidential information from a divorce mediation. The mediation agreement was being contested by one of the parties. GODR strategized with the Mediation Center on how to handle the subpoenas. Motions to quash the subpoenas were heard on June 14 before Judge James F. Bass, Jr. Attorney Carl Pedigo represented the mediator and the staff member. Judge Bass quashed the subpoenas and enforced the mediated agreement. Mr. Morokuma said it was gratifying to see that Judge Bass recognized the critical role of confidentiality in mediation. He thanked the Mediation Center for alerting GODR to the subpoenas and the friends of the center who helped them with their legal response.

Ms. Gernay said she expected more such mediator subpoenas would be issued in the future, and she urged program directors and neutrals to be prepared and to contact GODR if called to testify.

6. New Business:

-- Michael Opitz: Mr. Opitz expressed to the Commission his frustration with court ADR programs that limit access to certain types of cases to mediators who are also attorneys. He said he understood the need for programs to maintain high standards for their local mediators. But he also pointed out that the Supreme Court ADR Rules state that mediators should be drawn from a variety of disciplines. And since mediators are not permitted to offer legal advice in mediation, it should not be necessary for mediators to be attorneys, he said. Moreover, attorney mediators do not necessarily have the expertise that a non-lawyer mediator may have in given area, he noted, after describing his professional qualifications and varied experience. Nonetheless, attorney-mediators are being given an advantage by local programs in competing for mediation work in the courts, he said. Mr. Opitz suggested that statewide uniform standards would allow non-attorney mediators to compete for all cases with attorney mediators, and that such a system would result in better service to Georgia citizens.

-- Alex Scherr: Scherr, associate professor and director of civil clinics at UGA law school, addressed the Commission as representative of all four Georgia law schools that offer mediation training to students (UGA, Emory, Georgia State, John Marshall). He based his remarks on prior correspondence between the Commission and the dean of UGA's law school regarding the Commission's charging a \$25 per-participant fee to trainers, including academic institutions, for all approved trainings. Professor Scherr covered three points:

1) The law schools do not and will not pay a fee to any other organization – for example the ABA, the Georgia Supreme Court, or the Patent Bar – for the right to offer any course to their students. Law schools must zealously protect their freedom to design their curricula as they see fit, he said.

2) The law schools help the Commission's efforts to develop mediation practice by each year producing a total of about 140 new mediators, of whom 70 percent or more register with GODR. Those new registrations contribute \$12,250 in fees to help the Commission meet its financial and membership goals. UGA law school turns away five times more students than it can take each year in its mediation training program. The Commission also benefits from having more new lawyers who are supporters of mediation and familiar with GODR. Meanwhile, the mediation trainings offer no profit to the law schools and in fact require considerable financial investment by the schools. Those efforts in effect subsidize the collateral benefits the Commission enjoys.

3) The law schools understand the Commission's need to charge the \$25 fee to trainees. However, the law schools cannot pay such a fee to the Commission and will not charge it to their students. The law schools propose instead that the \$25 per participant fee be charged to law students if and when they apply for registration, not when they take an approved mediation training through their schools. Professor Scherr said the proposal helps the Commission reach its goals while preserving its partnership with the law schools.

Professor Scherr passed out copies of a draft change to the ADR Rules that would support the law schools' proposal.

Asked if any other schools besides these law schools and Kennesaw State University offer approved mediation training as part of a degree program, Mr. Morokuma replied that he knew of none. He noted that while KSU's official stance seems to be against the per-participant fee, at least one teacher there has had students to write individual checks to GODR for the \$25 fee.

Judge Auslander stated that the Athens-Clarke County Magistrate Court where he serves has available student mediators trained by the UGA law school. The mediators resolve a significant portion of the disputes in magistrate court at no cost to the city or county. The benefit is immeasurable, and the court would be hard pressed to do without the mediators, he said. He moved for the Commission to approve the proposal submitted by Professor Scherr. Mr. Tate seconded the motion.

Discussion followed on how GODR would track law students who were registration eligible; the popularity of the mediation training at UGA law school; the reasons for its popularity; and the reason why some students register while others do not. Justice Thompson summarized that law students obviously feel that taking mediation or registering as mediators enhances their professional legal credentials, even if they do not intend to work as mediators. Mr. Tate asked why students could not pay the \$25 themselves, since it is not an excessive fee for a substantial credential that enhances their employability. Professor Scherr said the law schools are following a state bar model, that is, one pays when one applies for the bar, not before. So law students should pay the \$25 when they apply for GODR registration, not before. Ms. Primm pointed out that private trainers are responsible for paying the per-participant fee even if their students have no intention of registering. Those students receive a benefit by taking a GODR-approved training, and by paying the trainer paying the fee retain the ability to register for one of the few Supreme Court-sanctioned mediation credentials in the country. Ms. Primm and Ms. Heard confirmed that as private trainers they have chosen to pay the per-participant fee and not pass the cost on to their students. Judge Auslander said when the Commission was discussing the fee in November 2009, there seemed to be an assumption that the trainers were for-profit trainers, which would distinguish them from academic institutions. Ms. Primm noted that some of the trainers are nonprofit institutions. She also said GODR-approved trainings are recognized by many other states as fulfilling their local requirements for mediation, so the benefit to students is not just in Georgia.

Ms. Primm called for a vote on Judge Auslander's motion to approve Professor Scherr's proposal. The vote was 1 yes, 7 no, 1 abstention. The motion failed.

[Attachment 3]

-- Anna McDuffie: Ms. McDuffie, a certified sign language interpreter and recent mediation trainee, called the Commission's attention to the problem of hearing-impaired parties' access to interpreters in court-ordered mediation. Although federal and Georgia laws explicitly protect the right of deaf litigants to court-provided interpreters, deaf litigants are often told that they are responsible for providing an interpreter, she said.

That is a violation of the Americans with Disabilities Act. Ms. McDuffie pointed out that deaf people have a right to a sign language interpreter provided by the courts for any court-related service, including mediation. Another problem she has encountered is that deaf people are often told that they do not need to go to mediation, which she interprets as the courts' way of avoiding providing an interpreter. Such segregation of litigants by disability is forbidden by law, she noted. She cited several references, including a new bench card to help judges work with hearing-impaired litigants.

-- Mary Cockrell: Ms. Cockrell, a mediator, asked the Commission's help in finding out whom to talk to about her being removed from the mediator roster at Fulton County Juvenile Court. She was referred to Mr. Wood, director of the Fulton County ADR Program.

-- Next Meeting Dates: November 18, 2010; January 6, 2011; March 3; May 26; September 1; November 10.

The meeting was adjourned.

The Commission went into Executive Session.

Attachments:

1. GODR budget reports
2. Letter from Judge Amanda Williams
3. Professor Alex Scherr's proposal on per-participant fee

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