

MINUTES: MARCH 20, 2008, MEETING
(at Justice Center of Atlanta)
GEORGIA COMMISSION ON DISPUTE RESOLUTION

Judge Joseph Iannazzone called the meeting to order. In addition to Judge Iannazzone, Commission members present were: Judge Charles Auslander III; Judge Debra Bernes; Alan Granath; Dale Hetzler, Esq.; Judge David Irwin; Marti Kitchens; Elizabeth Manley; Edith Primm, Esq.; Justice Hugh Thompson; and Judge Cynthia Wright. Judge Louisa Abbot and Bobby Glenn, Esq., 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: Patti Anderson, Cobb County ADR Program; Elmira Barrow, Coweta Circuit/Carroll County ADR Program; Melissa Heard, 7th District ADR Program; Jennifer Matte, Vermont Law School; Cheryl Kelly, mediator, Macon; Nancy Parkhouse, Clayton County ADR Program; Laura Lynn Swafford, Gwinnett County ADR Program.; and Jerry Wood, Fulton County ADR Program.

2. Minutes:

The minutes from the January 31, 2008, meeting were approved without amendment.

3. Director's Report: Shinji Morokuma

a. Legislative Update

Mr. Morokuma reported that the Georgia House voted not to return to GODR in FY09 any of the \$250,000 that was cut from the office's FY08 budget. The House did fund annualizers and other cost increases in healthcare premiums and other personnel expenses, but only based on the \$144,000 FY08 allocation. With the annualizers and other increases, the FY09 budget recommendation from the House was about \$150,000 instead of the \$400,000 that was GODR's normal operating budget. Mr. Morokuma said the AOC's Debra Nesbit has already met with Commission Member Sen. Bill Cowsert about the House's recommendation, and said that he and Ms. Nesbit expect to work with Sen. Cowsert to try to get some of the \$250,000 back from the Senate in the Judiciary Subcommittee of the Appropriations Committee. While the House was crafting its budget recommendation, all state offices were told to cut 2.5 percent from their budgets, which GODR did.

b. Budget Update

Mr. Morokuma said GODR has submitted its first report to the Georgia Bar Foundation to outline its spending of the first \$83,300 check from the foundation through the end of the calendar year. A copy of the letter was handed out to Commission members.

[Attachment 1]

c. Parenting Plan Form

Mr. Morokuma said the new proposed uniform Parenting Plan Form written by the Council of Superior Court Judges has not yet been reviewed by the Georgia Supreme Court. When it is and approved, he said he will make it available to neutrals and court programs, who are anxious to begin using it.

Commission Member Marti Kitchens has generously offered to conduct training sessions on the new parenting plan form, when it is approved, for neutrals and court programs throughout the state, including those in South Georgia. She is on the agenda for the Program Directors' Retreat in May to help bring them up to date on the form.

d. Registration Renewal

Mr. Morokuma said registration renewal is going very well, though it is being done on paper as before. The online registration system is still being tested.

e. Program Directors' Retreat

Mr. Morokuma reported that the Program Directors' Retreat has been scheduled for May 12 and 13 in Savannah. Program Directors Linda Gernay and Wendy Williamson are putting together an agenda that addresses the program directors' needs. Mr. Morokuma said that local members of the bench and the legislature will be invited to the luncheon on Monday.

Ms. Primm asked if the Commission members should contact any House members they know to seek their support for GODR's budget. Mr. Morokuma said it would be more productive for Commission members to call or write to Senate members who represent their districts or whom they know personally. Ms. Manley asked if GODR could send out an e-mail solicitation where the reader would only have to click a few times to send a letter to their legislators. Mr. Morokuma said the State Bar used such a system for its lobbying efforts, and he agreed that a similar system would be ideal for asking registered neutrals to contact their legislators. He said he would check with the State Bar to see how their system works.

4. Cordele Circuit Rules

Judge Iannazzone asked Commission members to review the revised Cordele Circuit ADR Rules, which were handed out at the meeting. Mr. Morokuma said the Cordele Circuit has had an ADR program for a number of years, but recently the program underwent a leadership change. The interim program director and the new program director found that the local rules had not been updated in about 10 years and so wrote and submitted revised rules for the Commission's approval. Commission members had in hand the main body of the revised rules, but Mr. Morokuma said the Cordele rules also included verbatim the Commission's guidelines on mediating cases involving domestic violence and Appendix C to the ADR Rules. He said he reviewed the revised rules with the new program director, Amy Bryant, and they agreed to change the period a *pro se* party is given to have a mediated agreement reviewed by an attorney and to disavow that agreement from three calendar days to three days excluding holidays and weekends. That was the only change Mr. Morokuma said he thought was necessary, and because no one from the Cordele Circuit was able to request the Commission's approval in person, he asked on behalf of the circuit for the Commission to approve the rules.

Judge Wright asked why *pro se* domestic cases and child custody cases were excluded from cases that could be referred to mediation. Mr. Morokuma said most ADR programs want *pro se* domestic cases to be sent to mediation more than any other type of cases. But the Cordele Circuit program chose to have those cases dealt with in court instead.

Upon a motion and second, the Commission voted unanimously to approve the Cordele Circuit ADR Rules.

[Attachment 2]

5. Testimony by mediator Cheryl Kelley

Judge Iannazzone introduced Ms. Kelley, a registered mediator from Macon who was recently required to testify in court regarding a mediation she conducted. She happened to be in Atlanta and she offered to speak to the Commission about her experience as the Commission considers its response to the Supreme Court case of Wilson v. Wilson. Commission members were given a copy of her motion to quash the subpoena in her case.

Ms. Kelley, who always co-mediate domestic cases with her attorney husband, said this last subpoena was actually the fifth one that they have received, and they had successfully moved to quash the previous four. This time, however, they were ordered to testify. The difference, she believed, was the Wilson case. The case in question was a court-ordered domestic case from Bibb County that the Kelley's co-mediated twice at the parties' request. The parties reached a full agreement at the end of the second session, the Kelleys wrote up an extensive memorandum of agreement, which everyone signed. Just before GODR sent out an e-mail notice to neutrals alerting them to the Wilson case, the Kelleys received the latest subpoena. It called for the Kelleys to testify about the wife's competency during the mediation. The court hearing on the issue was held three

weeks ago; the Kelleys submitted a motion to quash. The wife's attorney from mediation had withdrawn, and the wife appeared at the hearing with new counsel. The wife's first attorney testified for about 45 minutes. Ms. Kelley said the judge never let the Kelleys be heard on their motion to quash and called them to testify. The judge did limit their testimony just to the issue of the wife's involvement in the mediation and did not allow testimony on specifics of the mediation. Ms. Kelley noted that the judge was a senior judge who was asked to preside because one of the parties in the cases was a retired local attorney. Ms. Kelley said she wanted the Commission to know that after Wilson, at least in Bibb County it seems that mediators will be expected to testify about some aspects of their mediations that had previously been considered confidential.

Ms. Primm asked if Ms. Kelley knew why the judge did not allow the Kelleys to argue their motion to quash and specifically whether the judge cited the Wilson case in calling them to testify. Ms. Kelley said the judge met with counsel in chambers and the Kelleys were not included, so she did not know his reasoning for making them testify. Mr. Granath asked if the Kelleys were cross-examined, and she said they were. Ms. Primm asked if the mediated agreement was ultimately upheld. Ms. Kelley said both parties were to submit briefs to the judge this week, but she heard from both attorneys that the judge was probably going to uphold the agreement, and his questioning of the Kelleys indicated that he was likely to do so.

Ms. Primm asked if it was the wife's new counsel who was arguing her client's incapacity during the mediation. Ms. Kelley said it was, and it was the husband's attorney who wanted the Kelleys to testify. Ms. Manley asked if the Kelleys were asked to testify only about was the wife's capacity to mediate. Ms. Kelley answered that their testimony was about the wife's capacity and about her general demeanor during the mediation. Ms. Primm asked if the Kelleys were represented by counsel. Ms. Kelley said her husband represented them. Chairman Iannazzone asked to confirm that the person who asked for the Kelleys' testimony was not the purported incapacitated person but the the other side, who wanted them to say that the party was competent; Ms. Kelley answered yes. Ms. Primm asked how long the Kelleys testified. Ms. Kelley said she and her husband each testified for about five minutes. She added that after the wife's first attorney testified for 45 minutes, and then a psychiatrist testified for 45 minutes, so the Kelleys thought that their testimony would not be required.

Ms. Primm said her understanding of the holding in the Wilson case is that a mediator can be required to testify about capacity only as a last resort, only if there is no other reliable source of information for the court. The judge's actions in this case were disturbing, Ms. Primm said, because the wife's attorney, who was at both mediation sessions, testified at length about her former client's capacity, and yet the Kelleys were still called to testify. Mr. Morokuma asked how much time the Kelleys spent on trying to quash the subpoena. Ms. Kelley said it didn't take them long because they have the motion in a form now. Ms. Manley asked if the Kelleys in their testimony cited Wilson and questioned the court's need for their testimony after the attorney and psychiatrist testified. Ms. Kelley said her husband, who testified before she did, probably discussed Wilson, but she herself did not have a chance to. Judge Wright confirmed with Ms. Kelley that the Kelleys never got an opportunity to argue their motion to quash.

Mr. Morokuma said he and Ms. Kelley had talked briefly about whether GODR should make available to mediators a generic motion to quash and other necessary forms that they could fill out when they receive a subpoena. Ms. Kelley said mediators, particularly non-attorneys, need all the resources they can get, especially if this trend continues. When Mr. Morokuma asked if the Kelleys called their local ADR office when they got the subpoena, Ms. Kelley said the local office had just lost its director and a successor had not been hired, so there was no one to talk to. She also said there was very little communication between mediators and the local office, but she believed a new director was about to be hired, and she hoped that communication would improve.

Ms. Primm said she could understand how the testimony of the psychiatrist, who was not at the mediation, would not be enough information for the court. But she said she was appalled that the Kelleys were forced to testify even after the wife's attorney, who was at the mediation, had already testified as to the wife's competence. The Georgia Supreme Court in Wilson made it clear that a mediator should be called to testify only if there no other reliable source of information on a party's competency, she said. Judge Irwin offered that the judge in this case may have trying to perfect the record by soliciting as much testimony as possible on the issue in the event the case is appealed.

[Attachment 3]

6. Committee Reports

Committee on Rules: Judge Auslander

Judge Auslander reported that the Rules Committee had two conference calls and a meeting just before the Commission meeting to discuss changes to the rules in the wake of the Wilson decision. The Rules Committee has decided that no changes need to be made to the ADR Rules or Appendices A or B. As to Appendix C, the Rules Committee asked the Ethics Committee, chaired by Judge Wright, to handle the matter. Judge Auslander said Mr. Granath prepared a report outlining the potential impact of the Wilson decision on trainers, mediators, judges, attorneys and parties, and the committee is studying the report, and will issue some recommendations to the Commission. He said he expected that the Ethics Committee might make some recommendations as well.

The committee also has compiled suggested changes to the Model Court Mediation Rules, which it will post on the GODR website and send out to program directors and mediators for comment. The Model Rules are offered to court programs as a guide in writing their local ADR rules, Judge Auslander noted. Four changes were proposed:

1. Rule 4 should be amended so that parties ordered to mediation who choose a registered mediator outside the local roster must notify the local program director of their choice, if the parties do not opt out of the mediation program;
2. Rule 7 should be split into two rules so the organization and numbering of the Model Rules matches that of Appendix A, the Uniform Rules for Dispute Resolution Programs;

3. Rule 12 (before renumbering) should be amended to allow an unrepresented party to object to a mediated agreement within three business days, excluding Saturdays, Sundays and legal holidays; and
4. Rule 12 (before renumbering) should be amended to require that a party's objection to a mediated agreement must be filed with the ADR program director, with the clerk of court with jurisdiction over the case, and with the opposing party or opposing counsel if the party is represented.

The committee will report back to the Commission at the May meeting with the feedback it receives on these proposed changes, Judge Auslander said.

Judge Auslander noted that many court programs, including his own in Athens-Clarke County, allow unrepresented parties 10 days to object to a mediated agreement rather than the three days currently allowed in the Model Rules. He asked the program directors to comment on whether the Model Rules should be amended to allow 10 days. Comments will be solicited via an e-mail from GODR, he said.

Ms. Parkhouse said her program in Clayton County uses the 10-day rule. Every year, the number of *pro se* cases increases, she said, and the problem is exacerbated by the profusion of do-it-yourself legal kits available to the public. She feels that to allow these parties fewer than 10 days to object to an agreement would be too little time. Sometimes they need 10 days just to get together enough money to go talk to an attorney, she said. Judge Auslander emphasized that the Model Rules are not binding on the court programs but are purely suggestions that the programs could adopt or not, based on local need.

Judge Auslander reported also that the committee has begun to study the problem of the Commission's jurisdiction over neutral conduct in court-connected cases. The problem lies in the lack of definitions in the ADR rules for terms such as court-annexed, court-referred, court-connected, and court-ordered, which are used throughout the rules. He said the terms seem to be used interchangeably in the rules even though their meanings differ. He said the committee would try to come up with uniform terms and definitions so the rules are consistent and the Commission's jurisdiction is made clear. He said Mr. Morokuma has started the process by compiling definitions of the above terms from Doug Yarn's Dictionary of Conflict Resolution and accounting for where and how often the various terms are used in the rules. The work will take some time, Judge Auslander said, and, as Chairman Iannazzone suggested, might require a public hearing.

[Attachments 4 and 5]

Committee on Ethics: Judge Wright

Judge Wright reported first that the committee reviewed 11 neutral applications, of which eight were approved, one was denied, and two were held for additional information.

The committee then discussed the ethics implications of the Wilson decision. There were many opinions on what the implications of the case were for the mediation community.

Judge Wright thanked Mr. Granath for his report and his input, which helped to focus the committee's deliberations.

Judge Wright said the committee voted to recommend to the Commission that Appendix C, Chapter 1, Section A, Ethical Standards for Mediators, be amended as follows: Subsection 1, Self-Determination/Voluntariness, Paragraph A, should add a 10th requirement for a mediator's explanation of the process:

“An explanation that the parties, by their participation, affirm that they have the capacity to conduct good-faith negotiations and to make decisions for themselves, including a decision to terminate the mediation if necessary.”

Judge Wright said the new requirement puts the parties on notice that their capacity could be an issue and alerts them to their responsibility to communicate to the mediator if they feel unable to continue with the mediation.

Judge Irwin asked if there was not a presumption that people have the capacity to engage in all sorts of normal activity, including participating in a mediation, and he therefore questioned the need for the rule change. Ms. Manley said the committee felt that the issue of capacity cannot be raised often enough because parties often are not paying attention to what the mediator says to them. The rule change would put the issue of capacity in writing in the agreement and guidelines to mediate that parties must read and sign before a mediation can begin. It would also remind the mediator to emphasize the issue when explaining mediation to the parties. Judge Irwin restated that he felt capacity was implicit. Chairman Iannazzone said the mediator is responsible for determining throughout the mediation whether a party is capable of continuing and for terminating the mediation if a party becomes incapable in the mediator's opinion. That being the case, if there is a mediated agreement, one would assume that the mediator never thought the parties were incapacitated. However, the mediator may later have to testify to that, and the rule change would alert the parties to that possibility, he said.

The Ethics Committee made a motion for the Commission to adopt the recommended amendment to Appendix C. No second was required. Upon a vote, the Commission voted to adopt the Ethics Committee's recommendation. Judge Irwin voted against the recommendation; Justice Thompson and Judge Bernes abstained.

Judge Wright said the committee also explored whether the Wilson case required changes to the mediator's opening statement regarding exceptions to confidentiality. The change may help mediators to avoid being sued by former parties who were not advised that their mediator could be required to testify if they put their capacity at issue later. She said the committee also discussed the potential need for the committee to issue an advisory opinion on ethical mediator conduct after the Wilson decision.

7. New Business

Judge Iannazzone noted that Ms. Parkhouse's daughter was a member of the Jonesboro High School mock trial team that just won the state high school mock trial championship. The team will go on to defend the national title it won in 2007.

The meeting was adjourned.

The Commission went into Executive Session.

Attachments:

1. Grant report to Georgia Bar Foundation
2. Proposed Cordele Judicial Circuit ADR Rules
3. Cheryl Kelley's Motion to Quash Subpoena
4. Alan Granath's report on implications of Wilson decision
5. List of definitions and tally of terms in rules

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