



Be Neutral

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A Publication of the Georgia Office of Dispute Resolution

From the Director: How To Get Sued For Malpractice



It's happened again. A mediator has been sued. (Not in Georgia, phew !) This time for \$15 million. That's right, \$15 million. Here's a short version of the story:

A mediator tried to help finalize an "ugly" divorce (is there ever a "pretty" divorce ?) in Tennessee. A few days after mediation, the husband e-mailed the mediator to complain that the wife was harassing him with phone calls and e-mails. The mediator e-mailed the husband back and advised that he:

- Keep all correspondence from the wife to use as evidence later
- Forward the correspondence to someone in her family in order to embarrass the wife; and
- Seek a restraining order against the wife.

Acting on the mediator's advice, the husband took out a restraining order against the wife, without her knowledge. He also swore out a criminal warrant against her, without her knowledge. The wife was arrested at her home months later. She claims now that the "false" arrest caused her to lose her job. The mediator now finds herself the defendant in a lawsuit filed by the wife, seeking damages of \$5 million each for malpractice, intentional infliction of emotional distress, and breach of contract. The Tennessee ADR Commission sanctioned the mediator for violating her neutrality and for giving legal advice to the husband. The full newspaper account can be found [here](#).

"Oh I'd never do something that unprofessional," you say ? Your response to the husband's e-mail would have been more like, "I'm sorry, I cannot correspond with you about this matter. If you like, we can schedule another mediation session. Otherwise, it is unethical for me to involve myself further in your dispute." Right ? Good for you. Nonetheless, this Tennessee tale offers important lessons for Georgia mediators.

Lesson 1: Scrupulously maintain the appearance of your neutrality. Mediator bias is the Number 1 complaint we receive here. Remember, as a mediator you usually won't know the parties, and they won't know you. They're testing you the moment they see you. "Does the mediator know what she's doing ?" "Is she treating him better than she treats me ?" "Can I trust her to keep her promises ?" The parties' "fairness radar" is on high sensitivity. And they may see bias in the most innocuous details. Like whether the mediator sat a few inches closer to one party than the other. Or whether the mediator gave everyone except one party a chair with arms. Or whether the mediator looked at one party longer than the other. People have a keen sense - sometimes overly keen - of when they're being treated unfairly by a person or a process. Don't give them the chance to conclude that you're biased.

Lesson 2: Don't give personal advice. Mediation is about the parties and what they choose to do with their dispute and their future. To think that as a mediator you know what these strangers should do with their lives is presumptuous. To voice that presumptuous opinion is malpractice.

Lesson 2(b): Don't give legal advice, especially if you're not a Georgia-licensed lawyer. The unauthorized practice of law is not only a violation of State Bar of Georgia Rules of Professional Conduct (5.5), it is also a violation of the law (O.C.G.A. § 15-19-51), Breaking the law, generally not productive. What can you do if someone complains about you ? What protection do you have as a Georgia-registered mediator ? Well for one, the Supreme Court's ADR Rules, specifically Section VII(C).

No neutral in a court-annexed or court-referred program shall be held liable for civil damages for any statement, action, omission or decision made in the course of any

ADR process unless that statement, action, omission or decision is 1) grossly negligent and made with malice or 2) is in willful disregard of the safety or property of any party to the ADR process.

That helps a lot. Those are pretty tough standards to find civil liability. But the rule doesn't prevent someone from suing you for malpractice. Even if a lawsuit is frivolous, you still may have to hire an attorney and spend valuable time, money, and energy defending yourself. Whether you're sued for \$15 million or 15 cents, a lawsuit is a lawsuit.

To protect yourself further, you might consider getting some professional liability insurance. We have arranged for Georgia-registered neutrals to be able to purchase malpractice policies at low group rates from [Complete Equity Markets, Inc.](#) As a Georgia-registered neutral, you will also receive Unauthorized Practice of Law coverage at no cost. [Betsy Thomas](#) is our account representative. For more on mediator liability take a look at these three articles:

[Read](#) "Ten Ways to Get Sued: A Guide for Mediators" by Michael Moffit, Esq.

[Read](#) "Mediator Liability: A Snapshot" by Robert A. Badgley, Esq.

[Read](#) "Mediator Liability: A Survey" by Robert A. Badgley, Esq.

Whether you get GODR insurance for registered neutrals via our source or not, our advice: Don't practice without mediator liability coverage from some insurance source.

As for the Tennessee case, I plan to follow it. Things are looking ironically grim already; the mediator's attorney told the newspaper that he and his client will "try our case in the courtroom." Oh, well. I guess mediation is off the table.

Shinji Morokuma, Director GODR

gaodr@godr.org

[Archive](#)



Free Video CEs Available

You want free CE ? You got free CE. We have recently posted two videos on our website that registered neutrals can watch for free to earn CE credit. Each video is one-hour long. Neutrals are free to watch the videos as many times as they wish, but we can only award 1 CE hour credit for each video once per renewal season. Please note the date you finished viewing each video so you can report it on your renewal form. Remember, registered neutrals are required to take at least 3 hours of CE each year in order to renew their registrations. Look for the link, "[Continuing Education Videos](#)," in the main menu of our website. For more information on what qualifies for CE, please see the "[Help! I Need CE!](#)" link on our website.

Quick Question and Answer



Q. What does the Georgia Commission on Dispute Resolution do ?

A. The Commission is charged with helping the Georgia Supreme Court fulfill its Constitutional mandate to "provide for the speedy, efficient, and inexpensive resolution of disputes and prosecutions" in the judiciary. The Commission does that by promulgating the rules, policies and procedures under which the state court-connected ADR system, its registered neutrals, its court programs, and its approved trainers operate. In your practice, you probably don't hear about the Commission or come in contact with it because it oversees system-wide functions and doesn't manage day-to-day operations. That's left to the local court ADR programs. The Commission comprises 16 volunteer members - judges, lawyers, non-lawyer ADR professionals - appointed by the Supreme Court to serve five-year terms. The latest information about the Commission is always available at the "[About the Commission](#)" link on our website.

Proposed Juvenile Court Mediation Rules Posted



The Commission on Dispute Resolution has focused recently on encouraging the use of mediation in juvenile court cases. An expert subcommittee of the Commission's Training and Credentials Committee has been working for the past year on new proposed rules that will:

- Create two new registration categories - Delinquency Mediation and Deprivation Mediation
- Grandfather current juvenile court mediators into the new categories
- Specify the topics that must be covered in approved delinquency and deprivation mediation trainings
- Provide Model Rules to help juvenile court mediation programs operate

Drafts of these proposed rules are being distributed to key stakeholders in juvenile court mediation, including judges, attorneys, trainers, mediators, CASAs, SAAGs, Guardians ad Litem, and others. The drafts have also been posted on the GODR website for comment by registered neutrals, trainers, and others interested in juvenile court mediation.

Please feel free to review the drafts and send your comments to Lynn Goldman, Esq., Deprivation Mediation Coordinator at Fulton County Juvenile Court, Lynn.Goldman@fultoncountyga.gov by July 1, 2011. We look forward to hearing from you.



Case Watch for Mediators: Real Estate Distribution in Divorce

Before mediators can help divorcing parties to divide their assets, they must clarify who owns the property. This is particularly important when dealing with real property - marital homes, vacation homes, rental property, etc. But determining ownership of real estate is not as simple as seeing whose name is or is not on the title, explains Mary Ellen Cates, divorce attorney and registered mediator, in this month's Case Watch for Mediators.

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Theory to Practice: Some Ways to Handle Violence in Mediation

Though some folks scoff at the idea, it's a fact that violence - domestic and other types - can crop up in most any mediation. After all, mediators are dealing with people in crisis. And we know that some folks cope with crisis through anger and violence. In this month's Theory to Practice column, Susan Raines, Ph.D., director of the master's program in conflict management at Kennesaw State University and herself a veteran mediator and trainer, offers up some tips for handling domestic violence in mediation, based on sound research and her own extensive experience.

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Marketing Tip: Mobile Media 101

Those powerful little smartphones and tablet computer are changing the way we work and play every day. But they can also dramatically change the way you market your ADR business. Our marketing maven and registered mediator Michele Gibson how to sell smart in the post-computer age in this month's Marketing Tip column.

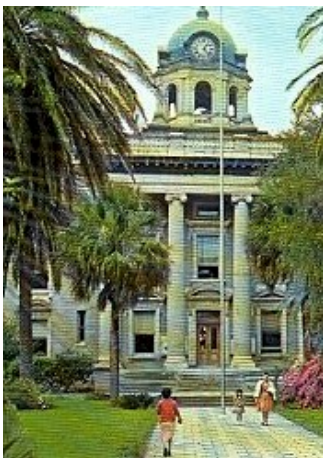
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Practice Tip: Balancing Power is the Key to Party Self-Determination

It is axiomatic that the best mediated agreements are the ones that the parties have crafted together through careful consideration of all critical information. It is also axiomatic that most mediators struggle to achieve that ideal level of party participation, informed consent and self-determination. In this Practice Tip column, Rachel Elovitz, Esq., family law attorney and registered mediator, shows you how knowledge of the law, awareness of power issues, and expertise with the process can greatly increase the likelihood that your next mediation will fulfill its potential for a meaningful and productive meeting of minds

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Brunswick Circuit ADR Program Launched

The Brunswick Judicial Circuit ADR Program has launched a new mediation program. The program, which serves Appling, Camden, Glynn, Jeff Davis, and Wayne counties, began referring cases to mediation on June 1, 2011. For more information contact:

Hon. James Tuten, Program Coordinator
Historic Glynn County Courthouse
701 G Street, Room 135
Brunswick, GA 31520
912-554-7415
jtuten@glynncounty-ga.gov

Up-to-date contact information for local court ADR programs is always available at the "Find Local Court ADR Program" link on our [website](#) .

GODR Budget Remake Discussed at Caribbean ADR Conference



GODR Deputy Director Nathelia Davenport delivered an invited speech on GODR's recent budget crisis at an international dispute resolution conference in April. The *5th Caribbean Conference on Dispute Resolution: Encouraging a Culture of Justice and Peace Through Dispute Resolution: Strengthen Your Role !* was held April 28-30 in Kingston, Jamaica, and drew a large attendance including Supreme Court justices, judges, ADR professionals, lawyers and law professors from countries throughout the Caribbean and Africa. *Donna A.M. Parchment Brown, CD, JP, CI Arb*, Chief Executive Office of the [Dispute Resolution Foundation](#), was the conference organizer and gracious host.

Ms. Davenport reported that interest was high in her talk, "Restorative Circle/Responding to a Funding Crisis: A Supreme Court Office Remakes Itself in Anticipation of State Budget Elimination," because other countries are looking for ways to sustain their ADR programs after the worldwide economic downturn. Several judges also expressed interest in visiting Georgia to learn more about how our state ADR system operates, she said. Ms. Davenport said she also saw the international influence of Georgia's ADR system when she met presentation attendee Dr. Walter Leavell, the C.E.O. of the Clarendon Peace & Justice Centre which is an affiliate of the Dispute Resolution Foundation. Dr. Leavell shared that he had been trained in mediation by our current Commission Member Melissa Heard and by the late Betty Manley, who also served on our Commission.

Benefits: Exclusive Insurance Products for Registered Neutrals



Georgia-registered neutrals are entitled to participate in several insurance and retirement programs that have been designed specifically for them. If you need insurance, are planning for retirement, talk to the experts at [BPC Financial](#). They manage our new exclusive insurance and retirement program, and they can advise you on your insurance needs and help you find good deals on major medical insurance, healthcare savings accounts, dental and vision insurance, term life insurance and more. Registered neutrals receive the benefits of underwriting concessions, enhanced benefits, or reduced premiums and fees compared to shopping for similar products on the open market. Check out the [GODR Registered Neutrals Insurance and Retirement Programs website](#).

We've also arranged for special benefits on professional liability insurance for registered mediators and arbitrators with [Complete Equity Markets](#). See our [website](#) for more information or contact [Betsy Thomas](#), 800-324-6234, ext. 472, and tell her you're a Georgia registered neutral!



Save the Date: 2011 ADR Institute

The 18th Annual ADR Institute and 2011 Neutrals' Conference will be held Friday, December 9, 2011, at the State Bar of Georgia Conference Center, 104 Marietta St. NW, Atlanta. We set an attendance record last year, and based on the speakers we are lining up, we think this year's conference will be even more popular. At least 6 hours of neutral continuing education and 6 hours of CLE (including 1 Ethics Hour) will be available. More details and conference registration will be available through www.iclea.org in November. Stay tuned !



Publicly Available Resources for Georgia ADR Professionals

We encourage you to visit the [blog](#) created by Georgia State University law professor Doug Yarn and GSU law student Alex Salzillo to inform and encourage discussion. Please add it to your reading list, send the link to your colleagues, and visit often. The address: <http://georgiaadr.wordpress.com/>



Also, don't forget the [Georgia Mediators Network](#), a great Facebook resource for the latest mediation news and articles from around the world. This page have been visited tens of thousands of times in just the few short months it's been around and it was the resource that discovered the Tennessee case referenced at the top of this newsletter. Use the information there to expand your own professional web pages and your expertise. The Georgia Mediators Network is the brainchild of registered mediator Michele Gibson, our marketing columnist and newsletter producer.



Upcoming CE and Training Offerings

Don't wait until the 2012 renewal season to get your CEs. Check frequently at our [website](#) for the latest CE and training offerings. Remember, any training you take counts as CE as long as you took it since your last renewal or your initial registration, whichever comes later. Lawyers, any CLE you took during that same time period counts as CE. Likewise, judges and CJE. Accountants and other professionals with CE requirements, same thing.

Be Neutral Back Issues Available Online

Be Neutral is sent monthly to all registered neutrals, generally at the beginning of the month. If you missed an issue, our back issues are posted at the bottom right of our website, under ["Newsletter Archive."](#) Please take a look. If you know people who want Be Neutral, please direct



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