



# The Dispute Resolution Advocate

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## Upcoming Events

May 2, 2008

*Winning at Mediation*  
State Bar of Georgia

October 17, 2008

*15th Annual ADR/Neutral's Conference*  
State Bar of Georgia



## From the Chair

By Dale C. Hetzler

Children's Healthcare of Atlanta, Inc.

**G**reetings. This is the second of our periodic newsletters sent electronically to each of you, highlighting upcoming events, reporting on the Section's activities and focusing on developments in state, local and national dispute resolution. My predecessor, Phil Armstrong, sent the first and it is our hope that with your suggestions, comments and ideas, this newsletter and our section will be both informative and entertaining.

My year as chair, which ends June 30, has been a true pleasure. The Section was co-sponsor of the 14th Annual ADR Institute and Neutral's Conference held last October at the State Bar of Georgia headquarters. Shinji Morokuma, director of the Georgia Office of Dispute Resolution, and I co-chaired the conference. We are now planning for the 15th Annual ADR Institute this fall. We would love to have your thoughts on speakers and program ideas. More information on that will follow. On May 2 our Section will sponsor ICLE's Winning at Mediation seminar, chaired by one of the originators of the first Winning at Mediation program, Bill Goodman. It is a highlight of the ICLE calendar for Georgia advocates in mediation, and I invite you all to attend and learn from this wonderful program.

As I look back at the year I note what has changed as much as what has remained the same. The reassuring constant is that people of great commitment and talent are invested in this field. The DR Advocate today is as passionate and creative as always. The programs and activities available to us are vibrant and relevant. The cases remain compelling and the parties truly appreciate the efforts we make to try and bring them to resolution in the midst of what often is the single biggest conflict they have experienced in their lifetime. Among our peers we find true friends and colleagues who care about the future of the profession and about the reputation of DR practitioners in general.

The changes I see are at the same time challenging and reassuring. There are more qualified neutrals, and competition for cases is brisk. That means many more attorneys and others are embracing the many forms of DR that comprise this rapidly growing profession. It stretches the definition of DR to new limits every time someone makes the investment in time and training to become a qualified conflict coach, mediator, arbitrator, facilitator or ombudsperson. All are part of a field that by this time next year will no doubt include terms we have yet to learn describing another form, style or method of bringing adversaries to peaceful resolution.

Thank you for your participation in this extraordinary section of the State Bar of Georgia. Please let us know if there is anything we can do to enrich the profession. We welcome your comments. ❖

# Recent Developments in Georgia ADR Law

By Ellen Malow  
Malow Mediation & Arbitration

## Divorce Arbitration

The Georgia Legislature enacted a new statute on Jan. 1, 2008, allowing for parties to a custody dispute to submit their case by agreement to binding arbitration. The new statute O.C.G.A. Section 19-9-1.1 provides:

In all proceedings under this article, it shall be expressly permissible for the parties of a child to agree to binding arbitration on the issue of child custody and matters relative to visitation, parenting time, and a parenting plan. The parents may select their arbiter and decide which issues will be resolved in binding arbitration. The arbiter's decisions shall be incorporated into a final decree awarding child custody unless the judge makes specific written factual findings that under the circumstances of the parents and the child the arbiter's award would not be in the best interests of the child. In its judgment, the judge may supplement the arbiter's decision on issues not covered by the binding arbitration.

At this time, Court-annexed ADR programs contemplate non-binding arbitration so any request for binding arbitration would require the parties to select private arbitrators. Some counties may have adopted different program requirements so it is best to check with the specific county's ADR office.

## Compelling Mediator to Testify

The Supreme Court of Georgia recently ruled in *Wilson v. Wilson*, 653 S.E.2d 702 (2007) that the mediator's testimony as to husband's competency was admissible. The case involved a divorce action in which the parties were referred by the trial judge to mediation. Although it was court-ordered, the parties selected a mediator not on the court mediation center's roster and did not have the mediation scheduled through the county's ADR office. The parties participated in the mediation without their attorneys present. The parties entered into an Agreement to Mediate. The case was settled at the mediation and the parties executed a settlement agreement acknowledging they "had adequate time to consult with their respective attorneys before freely and voluntarily executing this agreement." After the agreement was executed, the husband's attorney sent a letter to wife's counsel stating the settlement agreement was set aside on various grounds, including the husband's lack of competency to enter into the agreement. Husband's attorney also stated that the county's ADR rules provided time to object to the agreement if the parties were not represented at the mediation. The wife filed a motion to enforce the settlement agreement. The trial court entered

an order enforcing the settlement agreement. The husband appealed the trial court's order.

The main issue is whether compelling a mediator to testify violates the confidentiality of the mediation process. The Supreme Court of Georgia held that the blanket rule prohibiting a mediator from testifying might deprive the court of the evidence needed to rule on the plaintiff's contentions. This could result in denying the motion to enforce the settlement agreement.

The mediator was the only witness to the husband's competency during the nine-hour mediation process. The husband and wife were separated almost the entire time in caucuses. The mediator was not required to testify about any confidential statements made during the mediation process. As such, the Court concluded that the limited nature of the mediator's testimony was permissible and necessary to a just determination of the issue on competency. It is significant to note the mediator did not object to testifying.

The Court did state that the better practice would be for a court to conduct a hearing in camera in order to address the need to call a mediator as a witness. The Court acknowledged the significance of the confidentiality of the mediation process and the strong policy considerations that support it, and urged trial courts to exercise caution in calling mediators to testify. *Id.* at 6.

### Call to Action

If you are subpoenaed to testify as a mediator GODR recommends that you

1. file a motion to quash
2. notify the GODR

*Note: GODR has a form for the motion to quash that is available from their office.*

## Ethical Issue on Self-Determination

The Commission on Dispute Resolution has made a change to the 10th element of the mediator's explanation process as follows:

Appendix C, Chapter 1, Section A, Part 1A

In order for parties to exercise self-determination they must understand the mediation process and be willing to participate in the process. A principal duty of the mediator is to fully explain the mediation process. This explanation should include:

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# Does Intractability Mean Impossibility in Mediation?

By Amy Griffith Dever

James, Bates, Pope & Spivey, LLP

Her back was straight against the chair. She refused to make eye contact. Her arms were crossed tightly against her chest. Her lips were thin and tight over a clenched jaw. She wasn't going to say or do anything that could be construed as a sign of weakness. Even though she allowed herself to smile during the introductory remarks, it was clear she wasn't the least bit interested in mediation. Her intractability was as obvious as if she had a neon sign flashing over her head spelling out the word.

You probably dealt with similar characters whether you've served as the neutral or represented them. If you're the mediator and you realize that one, if not both, of the parties has come to the table with their "intractability flag" borne high, what do you do? Is it possible to mediate with an intractable person?

In Webster's "intractable" describes one who is not easily governed, managed, or directed—an obstinate person. It's not usually a compliment. The intractable person may be a bully or terrified of what they perceive as loss of control. Whatever the source, intractability is often a death knell to the mediator's efforts, an ominous portent that nothing productive will be accomplished. But, as dire as the situation may seem, a neutral may still be effective in guiding the parties to a satisfactory outcome.

First, as simplistic as it sounds, it is critical for the neutral to demonstrate a positive attitude towards the mediation process and participants. Unfortunately, "truTV" has yet to delve into mediation so many are uninformed about the process or its potential. Being confined to a small room with your arch enemy while some hired gun supervises is likely perceived as uncharted and dangerous territory. Educating the parties about the role of the neutral, the process of mediation, and the importance of their participation is always important, but this is particularly true with the intractable. Georgia's ADR Ethical Standards require specific explanations to the parties at the onset of the mediation.<sup>1</sup> Don't fall victim to routine and simply regurgitate the explanation without conveying your conviction to their significance or to the process. A formulaic recitation may mistakenly convey lack of interest. The parties are heavily invested in the dispute; you need to identify with them at the onset by conveying your commitment. Developing a sense of security and trust in you will serve as a counterpoint to their fears and reservations. The intractable person always looks for negativity. Contrast that with a positive and engaging outlook to bring them into the fold.

After general introductions, you'll have an idea if you've made headway in dealing with your intractable party. Don't be discouraged if the arms are still folded and the lips are still thin. Be prepared to give the process time. Typically, after introductory remarks, the parties present their cases, but consider whether or not a full blown hashing out of the details, in front of each other, is wise. If the parties are already demonstrating high antagonism, don't assume airing out their anger in front of each other will be a positive thing. It may be better less contentious to ask for only basic details of the claim and procedural status. Individual caucusing right away may be a better route.

When you speak individually with the intractable party, let them speak freely. Listen with an open mind. Note their emotional trigger issues. Read between the lines. One of my favorite resources is a book by Herb Cohen, *You Can Negotiate Anything*.<sup>2</sup> Cohen recommends a quiet, consistent probe; "don't come on like a grand inquisitor." Determining a person's feelings, motivations, and real needs requires hearing what is said and understanding what is omitted. Look for cues in unintentional words and behavior. Look at intonation, emphasis, and body language. While you listen, make sure you maintain neutrality. Don't make moral judgments, even privately. You may think you are keeping a perfect poker face, but the same subtle cues you look for will be used to evaluate you. Even if you manage to choke back exclamations about outlandish positions, realize your shocked silence may also demonstrate condemnation. No matter how bizarre or outrageous the statement, don't just ignore it. Ask for additional explanation; find out how they reached their position. Be persistent. You need to understand where a person really comes from in order to help them negotiate effectively.

Interaction during the information gathering brings the party into the process and creates a collaborative environment that may help you deal with the intractable party. Most disputes have layers of complexities and emotions that the parties are unaware of or deny. Your goal is to cull away misinformation and emotions that distract the intractable person from participating in a successfully negotiated resolution. When intractable parties reject mediation, they miss the opportunity to reach a rational and efficient resolution of their dispute by mistakenly wielding a temporary sense of power over a long term and much more satisfying result. It is critical to help them recognize how detrimental such posturing is to their ability to bargain

effectively. "Control of the outcome by the parties is the source of the power of the mediation process...it is the characteristic which may lead to an outcome superior to an adjudicated outcome."<sup>3</sup>

In conclusion, be prepared to accept that there will be situations where you won't be able to help and you will ultimately need to terminate the mediation. Don't compromise your neutrality by trying to coerce a completely intractable person to change, but don't give up too quickly either. Recognizing that sometimes, intractable people are simply angry or scared may help you work through the dilemma of intractability and help that party take advantage of mediation to work through personal issues which cloud their judgment. ❖

#### Endnotes

1. The Georgia Office of Dispute Resolution's web site has a complete listing of the rules, ethics and statutes for ADR issues, see: <http://www.godr.org/odr.html>.
2. Cohen, Herb. *You Can Negotiate Anything*. New York: Bantam Books, 1982.
3. Commentary, Standard I, Ethical Standards for Neutrals, Chapter 1 of Appendix C, ADR Rules.

#### Recent Developments

*Continued from page 2*

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10. 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.

According to the Office of Dispute Resolution, this change addresses the issue of capacity that was raised by the Court in the *Wilson* decision. The Ethics Committee of the Commission is considering other possible rule changes after the *Wilson* decision, including whether mediators have an ethical obligation to fight a subpoena. ❖

## Mediator's Tip: The Good Old-Fashioned Way

By Ellen Malow  
Malow Mediation & Arbitration

**R**emember back in the days before text messaging and e-mails, when we talked face-to-face or over the phone? Times have certainly changed.

While modern technology speeds up the communication process, it may also result in us losing the message. Written words have no inflection, tone or pitch. When we send a pre-mediation statement to a mediator, it may present a great overview of our cases.

Another effective approach to pre-mediation preparation is to use the old-fashioned way and have a telephone call with the mediator. Some mediators will conduct a confidential separate call with each side. There is also the option of a joint call between the mediator and all parties. Often more may be discerned in a 10 minute telephone call than reading a stack of documents for hours. Many times a simple call can provide tremendous insight into the obstacles that have blocked a settlement from being reached. For example, a lawyer may be able to share over the phone that his client has unrealistic expectations of the case value. In that instance, the mediator is armed with knowledge that strong reality testing will need to be utilized. This sharing of information eliminates the attorney having to discuss this type of concern at the mediation when the client may feel like his attorney is saying something behind his back to the mediator.

Given that all conversations with the mediator are protected by confidentiality, do not hesitate to pick up the phone and informally share information about your case. The call may be a strong way to initiate an effective mediation. ❖

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