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BY JACK P. ETHERIDGE*

Although a Neighborhood Justice Center was established in Georgia in 1977, and has enjoyed great success since that time, little else of great significance had occurred in Georgia in the field of alternative dispute resolution. The Atlanta Judicial Circuit had established, with the aid and support of the Justice Center, a court-annexed arbitration program which had attracted some attention, but brought mixed reviews from the bench and bar. There were fitful efforts at institutionalizing settlement weeks in various state courts, but the general feeling seemed to be that the effort committed to these enterprises could not be sustained year after year. With the leadership of one or two Superior Court judges in an urban county adjoining Atlanta, a program had been successfully put in place whereby all family cases in which children were involved were referred to the Neighborhood Justice Center for mediation. A justice center was established in two or three counties outside the Atlanta area, but with little support of the bench and bar. Georgia was, like many other states, ready for leadership in developing a viable plan for the use of Alternative Dispute Resolution ("ADR") within its judicial system.

This article will portray the work of an Alternative Dispute Resolution Commission formed in 1991. It will briefly recount the concept which lead to its success in creating a statewide acceptance of the idea of ADR and its possibilities for enhancing the delivery of a system of justice in the state.

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In Georgia, as in other states,[1] "adjudication and mediation were generally portrayed in idealistic terms as polar types representing formalism and informalism, adversarial due process and cooperative compromise." The lack of congruence with this common notion, and with the constitution of the state, was increasingly difficult to defend as the literature of the law, and more important, the way law was being "practiced," were at odds. Georgia's constitution of 1983 mandates that the judicial branch of government provide "speedy, efficient, and inexpensive resolution of disputes and prosecutions." To many in Georgia, including its new Chief Justice Harold Clarke, the judicial branch was not responding to that mandate in a meaningful way.[2]

It has not been the tradition in Georgia for its chief justice to take an active role in espousing new directions in judicial and administrative procedures. The State Bar Association typically expects such leadership to come from its various Committees and from its aspiring leaders. But the public and professional call for a more effective delivery of justice and the constant call for a better way to administer it was heard by the Chief Justice Harold Clarke and his colleagues on the Georgia Supreme Court.[3] Lawyers throughout the state had encouraged him to speak on the subject and he did. Somewhat tentatively, and always judiciously, he introduced the subject of alternative dispute resolution at local bar association meetings, and then in 1990 at an annual address to the State Bar Association. The response was encouraging and he undertook to make ADR a major theme of his tenure as chief justice.

Presently there is perhaps no subject more compelling in the area of judicial administration nationally than the search for alternatives to the courts. It is not unusual for judicial leaders to be surprised at the depth of feeling residing in the business community about this. This is being increasingly observed, for instance, in the work of the American Bar Association, whose Alternative Dispute Resolution Standing Committee was recently elevated to a section of that association. Indeed, virtually

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[1] Timothy O. Lenx, *Politics, Rights, and Undue Process of Law*, 14 LEGAL STUDIES FORUM 393, 393 (1990).

[2] We can help [our jury trial system] by looking toward effectiveness. Effectiveness differs from efficiency. Efficiency is doing a thing better. Effectiveness is doing a better thing. We need to look for some things in the court system .... Not every case needs a full blown trial. Some need more effective resolutions.

Chief Justice Harold G. Clarke, State of the Judiciary Address to the Georgia State Legislature 6 (June 14, 1991).

[3] One writer correctly stated that Chief Justice Clarke "has shown progressive leadership in modernizing Georgia's justice system." *The Search for Fair and Equal Justice*, ATLANTA JOURNAL-CONSTITUTION, Feb. 2, 1993, at A8.

every division of the American Bar Association contains Committees or Sub-committees which interest themselves in ADR.

It is with this background that the chief justice invited the president of the Georgia State Bar Association to join him in the creation of a Joint Commission on Alternative Dispute Resolution. On September 26, 1990, by an order of the Georgia Supreme Court the Commission was charged as follows:

> The Georgia Constitution of 1983 mandates that the judicial branch of government provide "speedy, efficient, and inexpensive resolution of disputes and prosecutions." As part of a continuing effort to carry out this constitutional mandate the Supreme Court of Georgia hereby establishes a Commission on Alternative Dispute Resolution under the joint leadership of the Chief Justice of the Georgia Supreme Court and the President of the State Bar of Georgia. The Commission shall be known as the Joint Commission on Alternative Dispute Resolution.
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> The Commission is charged to explore the feasibility of a comprehensive court-annexed alternative dispute resolution program to complement dispute resolution methods currently used in Georgia. The focus of this feasibility study will be upon mediation and arbitration as alternative methods of dispute resolution. The Commission is charged to gather information, implement experimental pilot programs, and to make recommendations for implementation of a comprehensive program.[4]

The order stated that the commission would be composed of fifteen members, selected jointly by the chief justice and the president of the State Bar Association. The commission was composed of: the chief justice; the State Bar president; a Georgia Court of Appeals judge; three Superior Court judges; two state legislators; six attorneys; and one lay person. The individuals chosen to fill these positions were not from a single mold. Some of the members had extensive experience in alternative dispute resolution, while others had little knowledge of the various processes available. But all were eager to explore the potential of alternatives to the courts, and to make real the mandate of the Georgia Constitution.

The chief justice also named a chairperson and a reporter for the Commission. In selecting a chairperson, Justice Clarke sought an attorney with the energy and enthusiasm to press the task of the Commission to

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[4] Order of the Supreme Court of Georgia, Sept. 26, 1990 (copy on file with the *Kentucky Law Journal*).

successful conclusion. He chose Jack Watson, a well-known Georgia trial lawyer. In choosing a reporter for the Commission, it was important to find someone who could not only gather and organize information, but someone with an understanding of the ADR field, who could gather *valuable* information. That person was Ansley Barton, an experienced attorney and trained mediator. The Reporter's office was set up in the offices of the chief justice, and the Commission was ready to begin.

The first meeting of the Commission was held on March 7, 1991. Aside from the usual organizational matters, the Commission established some timetables for its work, and decided to meet on a monthly basis. Committees were established so that particular aspects of the Commission's inquiries, such as funding,[5] legislation and pilot programs, could be promptly managed.

The charge of the Commission, as set forth by the supreme court, was three-fold: (1) gather information; (2) implement experimental pilot programs; and (3) make recommendations for implementation of a comprehensive program. Likewise, the work of the Commission was actually a three-part process.

I. EXPLORING THE POSSIBILITIES

The Commission's first several meetings were devoted to learning as much as possible about ADR and existing programs. The Commission discovered there are many laboratories in which experimentation is being conducted to find better ways to improve our system of justice. These range from modest dispute resolution centers, now being found throughout the country, to impressive foundations, well-supplied with funds and scholars bearing pretentious titles. Courts in both state and federal systems are establishing court-annexed programs, and law schools are tentatively introducing new courses into their curriculum. Federal agencies are receiving mandates to use ADR, and are designating "specialists" to inquire into new methodologies and establish rosters of trained neutrals. Literature in the field of alternative dispute resolution is growing rapidly.

The reporter served an indispensable role in sifting through the massive amount of information available and equipping the Commission with a rich library of materials. The Commission analyzed studies done

[5] To express their desire to pursue alternatives to the courts, the Georgia Bar Foundation, the State Bar of Georgia, the Georgia Civil Justice Foundation, and the National Institute for Dispute Resolution provided funding for the Commission. Because of these donations, no tax revenues were needed to support the work of the Commission.

by similar groups throughout the country, and spent a significant amount of time comparing the programs and legislation enacted in other states, such as Florida, California and Texas.

Leaders in the ADR field were introduced to the Commission.[6] Members of the Commission were instructed in the rudiments of mediation and the skills required of mediators and counsel. The effective uses of other devices such as court-annexed arbitration and mini-trials were the topic of multiple meetings. Through this educational process, a common base of information was constructed, from which the Commission explored both the possibilities of ADR and the practical limitations involved in offering a comprehensive program to the State. All the relevant interests had to be considered: the bar, the judiciary, the ADR providers, and, most importantly, the litigants. Any statewide comprehensive plan would have to take into account the varying needs throughout the state to create a system that would be workable.

The Commission was flexible and receptive to ideas. Meetings were open to the public, and information was welcome. The goal of the education process was to benefit as much as possible from the experiments that had already been done, and to create the best possible system for Georgia.

II. PILOT PROJECTS

Although ADR "experiments" were being conducted throughout the country, the Commission needed to find out how these programs might work in Georgia. Therefore, some pilot projects were developed.

In Lagrange, Georgia, a very successful attempt was launched to establish a "multi-door" courthouse. Mediators were trained, and cases were referred from state, municipal and juvenile courts. Because of the strong support of the judiciary and widespread local support, the program flourished and became a model for the State. The Commission also supported a pilot mediation project on the juvenile courts in seven counties, and initiated several "neutral evaluation" projects within the court system. Non-binding arbitration, which had already been established in the Fulton County Superior Court, was further tested. The success of these projects, combined with the positive public reaction to ADR, gave tangible evidence to the Commission that an alternative system could succeed.

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[6] Among those the Commission worked with were: Milinda Ostermeyer, Executive Director of the Multi-Door Dispute Resolution Division of the Superior Court of the District of Columbia, and Margaret Shaw, Director of the Institute of Judicial Administration, Inc.

III. RECOMMENDATIONS

With a year of study and experimentation under its belt, the Commission commenced the final stage of its mandate–the drafting of recommendations. In March 1992, the Commission began the writing process. Drafts were then sent to everyone who might conceivably have an interest in the outcome, and those drafts were generally well-received. The final product of this process were eight recommendations, which were presented to the Georgia Supreme Court in September of 1992.[7] Most important among these were the following:

(1) Authority. The Commission recommended that the Georgia Supreme Court exercise its rule-making power pursuant to Article 6, Section 9, Paragraph 1 of the Georgia Constitution of 1983 to implement a comprehensive statewide ADR system.

(2) Central Organization. The Commission recommended that the Georgia Supreme Court create a successor to the present Commission to provide permanent oversight for the development of court-annexed and/or court-referred ADR in Georgia. The Commission would have the chief administrative duties, as well as the power to certify court programs, promulgate rules for programs, establish criteria for training, and establish standards of conduct for neutrals. The Commission further proposed that a nonprofit corporation, the Georgia Commission for Dispute Resolution, Inc., be created to receive and disburse money from private donations and grants as a tax-exempt organization.

(3) Funding. Because funding of ADR programs is primarily a public responsibility, the Commission recommended that permanent funding be sought primarily through a filing fee surcharge, along with fees for mediator certification and recertification. The Commission determined that if a surcharge of five dollars were applied to each civil case filed in state court in 1990, $2,951,275 would have been provided for funding of ADR programs.[8]

(4) Education. In order to assure that members of the bar were aware of the benefits and the specifics of ADR, the Commission recommended that each member of the Georgia Bar be required to attend a three hour CLE seminar on ADR. Even more significantly, the Commission recommended that the ethics rules of the state be amended to add the duty of a lawyer to advise the client concerning all available forms of dispute resolution.

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[7] *See* JOINT COMMISSION ON ALTERNATIVE DISPUTE RESOLUTION: RECOMMENDATIONS TO THE GEORGIA SUPREME COURT (1992).

[8] *Id.* at 12.

IV. IMPLEMENTATION

On February 19, 1993, the Supreme Court of Georgia passed an Order amending Ethical Consideration 7-5 of the Rules and Regulations for the Organization of the Government and State Bar of Georgia to add the following:

> A lawyer as adviser has a duty to advise the client as to various forms of dispute resolution. When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution which might constitute reasonable alternatives to litigation.[9]

On February 25, 1993 the supreme court appointed members of the Georgia Commission on Dispute Resolution, and on that date Ms. Ansley Barton, who played a crucial role in the work of the Joint Commission during the months preceding this, was named Director of the Georgia Office of Dispute Resolution. On March 9, 1993 an amendment to the Commission Rules was adopted providing that the Council of Superior Court Judges could have certain oversight on some procedural aspects of the application of further uniform rules. On April 17, 1993 the Governor signed legislation permitting a surcharge of $5.00 to be paid for all civil matters in cases filed in the Superior, State, Probate and Magistrate courts where the appropriate authority in a county, such as the chief administrative judge, authorized the clerk of court to start collecting it. These funds will be spent only in the county which collects it, unless various jurisdictions choose to pool those funds.

In July 1993 there will be conducted a technical workshop for clerks and others interested on matters relating to the implementation of ADR programs, throughout the state.

CONCLUSION

Within two years from the creation of the Commission, proposals were formulated and adopted by the Supreme Court which will give birth to a state-wide comprehensive alternative dispute resolution program. This was done with little controversy, and with the blessing of both appellate courts and the State Bar of Georgia. Many who hardly knew the meaning of ADR had become proponents, and some who were skeptical now lead the way in encouraging the use of mediation.

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[9] Order of the Supreme Court of Georgia, February 19, 1993 (copy on file with the *Kentucky Law Journal*).

There are many reasons why public projects succeed or fail. The successful experience of this Commission can be ascribed to several key factors: the determination of the state supreme court and its chief justice to develop a program of alternative dispute resolution for the state; a reporter who knew the ADR field well and had an enlightened vision of the potential for the use of alternatives; a chairperson from the trial bar who was eager to learn about ADR and its possibilities for enhancing the delivery of justice; and a Commission membership receptive to instruction in the field and critically skeptical.