ADVISORY OPINION 6
COMMITTEE ON ETHICS
GEORGIA COMMISSSION ON DISPUTE RESOLUTION

Executive Summary

This Advisory Opinion provides a broad overview and interpretation of the rules concerning confidentiality of mediation as those provisions relate to communications from mediators to ADR program staff and the referring courts. In examining the application of ADR Rule VII and Appendix A, Rule 7, the opinion discusses the policy concerns underlying those provisions and states that mediators may not directly or indirectly share with courts any information, including impressions or observation of conduct, from a mediation session. As guidance for mediators, the opinion provides responses to "frequently asked questions" regarding communications with judges.

I. Introduction

In response to questions from mediators and court-connected ADR program directors about the parameters of mediation confidentiality, the Committee on Ethics has concluded that this important issue should be addressed in an advisory opinion that is accessible to the entire mediation community. Thus, this advisory opinion is intended to provide broad guidance regarding confidentiality in court-connected mediation, particularly as it applies to communications between mediators and the courts.

The first section of this advisory opinion discusses the Georgia mediation confidentiality rules while the second section of the opinion addresses some questions that are representative of inquiries on this issue in an FAQ format.

II. Confidentiality Rules and Policies

A. Overview

"Confidentiality is the attribute of the mediation process which promotes candor and full disclosure." Georgia Supreme Court Alternative Dispute Resolution Rules (hereinafter "ADR Rules") Appendix C, II. Confidentiality is a core value of mediation. This value is an expression of the belief that participants in mediation will be more candid and more creative in their problem solving if they believe that sensitive information, or particular approaches to settlement, will not be shared, particularly with individuals who might preside over their case should it proceed to trial. Confidentiality of the mediation process is a principle that is universal to every compendium of ethical standards for mediators. See e.g., Model Standards of Practice for Family and Divorce Mediation, Standard VII; Florida Rules for Certified and Court Appointed Mediators,

Rule 10.360; and Virginia Standards of Ethics and Professional Responsibility for Certified Mediators, I.

ADR Rule VII requires that a mediator hold any statement made in mediation confidential unless certain, very limited, exceptions apply. **See** also ADR Rules, Appendix A "Uniform Rules for Dispute Resolution Programs, Rule 7; ADR Rules, Appendix C, II. The word "statement" is intended in the broadest sense. Confidentiality extends to any oral communication made in mediation; tangible items generated for mediation or conduct that occurs in mediation. ADR Rule VII, A; Appendix C, IV, B. Confidentiality even extends to the mediator's impressions derived from the communications in mediation. See Ethics Advisory Opinion 3.

The essence of these rules and the ethical standards is that any **information** acquired by the mediator as part of the mediation process is confidential unless one of the very limited and very specific exceptions applies. These exceptions are contained in *ADR Rules, VII, B* and are as follows:

- Threats of imminent violence to self or others
- A written and executed agreement or memorandum of agreement
- Mediator believes that a child is abused
- Mediator believes that the safety of any party or 3rd person is in danger
- Issue of Appearance
- A statutory duty to report information
- Documents or communications relevant to a disciplinary complaint against a mediator or ADR program arising out of an ADR process

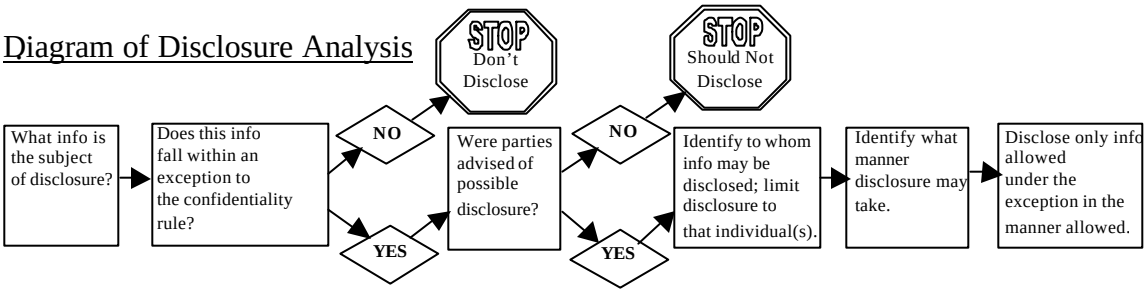
If the information acquired by the mediator in mediation does not fall clearly within one of these exceptions, the mediator cannot disclose the information without violating the ADR Rules and the ethical standards of conduct for mediators. See ADR Rules, Appendix C, Chapter 1, A. II.

If information falls within one of the specified exceptions, it may be revealed only to the extent necessary to prevent the harm or to meet the obligation to disclose imposed by statute or rule. For example, there is an exception to the confidentiality rule regarding appearance at mediation. In invoking this exception to confidentiality, a mediator may disclose that a party came to mediation but may not elaborate and communicate, for instance, the party's demeanor or cooperation.

If the mediator believes that an exception to confidentiality applies to information learned in the mediation, the mediator must engage in a five-part analysis to arrive at an ultimate conclusion about what information may be disclosed to whom. The questions that are the basis of this five part analysis are as follows:1) what information is the focus of the mediator disclosure? 2) does the information sought to be disclosed fall within an exception to ADR Rule VII, B? 3) have the parties been advised of the

exception to the confidentiality rule?[1] 4) to whom may the information be disclosed? 5) what form can the disclosure take and how much can be disclosed?

Diagram of Disclosure Analysis



B. Mediator Communications with the Court

The general rule is that the mediator is to have no communication about the case, either orally or in writing, with the court. This general rule applies regardless of which direction the communication is flowing- from the court to the mediator or from the mediator to the court, and also applies even if the information falls within one of the exceptions to confidentiality. There is a very narrow exception to this rule in ADR Rules, Appendix A, Rule 7, captioned **Communications Between Neutrals, The Program and The Court,** that provides as follows:

> *7.1 If any communication between the court and a neutral is necessary, the communication **shall** be in writing or through the program administrator. [Emphasis added.] Copies of any written communication with the court should be given to the parties and their attorneys.*

The word "shall" when used in rules is considered mandatory and not discretionary. The term "the court" includes any judge, judicial officer, or staff member who reports to the judge or judicial officer. The term judge includes judicial officers.

Thus, if a mediator wishes to communicate with the judge about a case, or the judge or judicial officer wishes to communicate with a mediator, there must first be a determination that the communication is necessary. If the communication is necessary, the mediator or judge has two options: he or she may communicate the necessary information in writing with copies furnished to the parties and their attorneys or may communicate with the program director.

ADR Rules, Appendix A, Rule 7.2, in turn, provides specific limitations on what information the program director may communicate to the court. Generally speaking, the

[1] While ADR Rule VII, B notes that the parties should be informed of limitations on confidentiality, the Ethical Standards for Mediators require that the mediator inform parties of confidentiality exceptions in the mediator's opening statement. Appendix C, Chapter 1(A)(I)(A)(3).

seven types of information that can be conveyed by an ADR program director to the court fall under the heading of procedural information.

7.2. Once an ADR process is underway in a given case, contact between the administrator of an ADR program and the court concerning that case should be limited to

- *a. Communicating with the court about the failure of a party to attend;*
- *b. Communicating with the court with the consent of the parties concerning procedural action on the part of the court which might facilitate the ADR process;*
- *c. Communicating to the court the neutral's assessment that the case is inappropriate for that process;*
- *d. Communicating any request for additional time to complete the mediation, non-binding arbitration, case evaluation or early neutral evaluation;*
- *e. Communicating information that the case has settled or has not settled and whether agreement has been reached as to any issues in the case;*
- *f. Communicating the contents of a written and executed agreement or memorandum of agreement unless the parties agree in writing that the agreement should not be disclosed;*
- *g. Communicating with the consent of the parties any discovery, pending motions or action of any party, which, if resolved or completed, would facilitate the possibility of settlement.*

It is important to note that Subparagraph 7.2(g) provides a basis for a **program director** to communicate to the court regarding **actions that the parties have initiated** prior to mediation that have yet not concluded but when concluded might help facilitate a settlement. Examples might be a motion for summary judgment or an appraisal of a home. It does not provide a basis for the mediator to decide for the parties what a good next step in the case might be and convey that information to the judge or judicial officer. For example, the mediator could not communicate her opinion that appointment of a *guardian ad litem* would be helpful to the case.

ADR Rules, Appendix A, Rule 7 is specifically designed to protect the objectivity of the court and the neutrality of the mediator. **See** Model Court Mediation Rules, Rule 11. The rule also supports the mediator's ethical responsibilities to hold information conveyed by the parties in confidence and to guard the integrity of the mediation process. This rule also lessens the opportunity for a culture to develop in which the lines become indistinct regarding the mediator's obligation to guard the integrity of the process. It also protects the mediator from external pressures. The rule protects the parties from the effects of disclosures they did not authorize and provides a reasonable basis for them to bring an ethics complaint against a mediator who promised confidentiality and did not keep that promise.

We are aware that it may be more expedient to provide information to the court orally. However, because of the dangers to the mediation process and the mediator's neutrality inherent in communications to the court, information learned in the mediation may not be shared with the court unless such information falls within an exception to confidentiality and both prongs of Rule 7.1 are met.

Mediators have commented that child abuse, domestic violence and good faith are three very troubling situations in which it may seem important to communicate information to the court. The Commission on Dispute Resolution has specifically considered each of these situations and concluded that this information is not to be conveyed to the court.

Both the Commission's Guidelines for Mediation in Cases Involving Issues of Domestic Violence and Guidelines for Reporting Child Abuse contain statements that the **judge is not to be advised of the suspicions of violence or abuse**. The **program director** [emphasis added] is simply to report that the case is inappropriate for mediation. The Guidelines on Child Abuse Reporting, Par. 6 go on to say "there is no need to report further to the court since the proper avenue for reporting is through the agency designated by the Department of Human Resources."

The mediation report/administrative documents that are provided by the mediator to the program director following the mediation should contain only a statement that the case is inappropriate for mediation. The mediator is not to convey information concerning the abuse, either orally or in writing, to the court. The mediation report should not contain any other information about the abuse because this report may be available to the court and, if placed in the court file, would be a public record.

Typically, the ADR program director is the first recipient of this form. Appendix A, Rule 7.2c provides that the program director is authorized to communicate to the court the "neutral's assessment that the case is inappropriate for" mediation. This rule does not permit the program director to elaborate on the reasons the case is not appropriate for mediation.

The Ethical Standards for Mediators also specifically address another frustrating "confidential" situation that arises in court-connected mediation--lack of "good faith" participation in mediation. See ADR Rules, Appendix C, VI. B. The mediator has a responsibility to maintain confidentiality regarding a party's good faith or lack thereof. The recommendation under this Ethical Standard IV is as follows:

> *When a mediator realizes that a party is not bargaining in good faith, he or she often experiences an understandable frustration and a desire to report the bad faith to the court.* ***The pledge of confidentiality extends to the question of conduct in the mediation, excepting of course threatened or actual violence. The possible damage to the process by reporting more than offsets the benefits in a given case. Further, if the lodestar of mediation is the principle of self-***

determination, the unwillingness of a party to bargain in good faith is consistent with the party's right to refuse the benefits of mediation. [Emphasis added.]

C. Information from the Court to the Mediator

There is an underlying tension between the court's desire for expeditious case management on the one hand, and the ethical boundaries for mediation practice. The ethical prohibition on mediators sharing of information from mediation sessions with the courts can become a serious point of tension between judges and mediators. If a case does not resolve in mediation, the judge may understandably want to know why. The judge may wish to sanction an uncooperative or intransigent party. Information about whom or what are the sticking points could assist the judge in conducting pre-trial settlement conferences. In the case of a partial agreement, information about which issues remain for trial could assist the court in scheduling logistics.

The confidentiality tension is more likely to manifest in the context of an "on-site" or calendar call mediation program in which mediators are present in or near the courtroom to receive referrals directly from the bench. Proximity, especially when there is a roster of mediators who are regularly present, can create familiarity. Familiarity can naturally lead to conversation; and conversation can lead to discussion that discloses confidential information. In an environment in which mediators and judges work in proximity, two types of ethical issues may emerge:

1. Mediators may lose their grasp on the very strict ethical boundaries concerning confidentiality and communications with the court; and

2. Judges may view mediators as an expeditious conduit for telling the parties how the judge will rule if the case does not resolve in mediation, and may seek mediators' assistance in preparing orders for *pro se* parties who reach an agreement.

Sections A and B of this discussion of mediation confidentiality have focused, in large part, on the problems that arise when a mediator conveys information obtained in mediation to the court. As noted in these sections, however, the rules restricting communications between mediators and the court apply in both directions.

In addition to the risk of violating confidentiality that is always present in communications between the court and mediators, a unique set of problems arises if a judge tells a mediator to direct the parties toward a specific outcome. From a judge's point of view, it may make perfect sense that if the parties know how the judge is likely to rule on some or all of the issues, this will assist settlement along those lines. And this assumption may well be correct. The problem, however, is that if the mediator serves as a conduit for messages that the judge wants to convey to the parties, the parties' self-determination is undermined. While it may be permissible for a mediator to offer general information about how a judge tends to view common issues, it is not

appropriate for the mediator to serve, in effect, as the judge's agent by telling the parties how the judge will rule in their case. It is not the role of the mediator to direct parties toward a particular outcome. To do so would undermine the core mediation values of self-determination and voluntariness.

If, on review of a mediation agreement, the judge determines that some terms should be amended or some issues have not been addressed, any matters determined by the judge should be entered as the court's order, not added to the mediation agreement. The written mediation agreement whether is called "Memorandum of Understanding" or "Mediated Settlement Agreement" is executed by the parties and is enforceable as any other agreement. Terms not agreed to by the parties in mediation cannot be added subsequently. *Moss v. Moss*, 265 Ga. 802 (1995); *DeGarmo v. DeGarmo*, 269 Ga.480 (1998)

Finally, the mediator cannot prepare a court order for the parties. The ethical standards for mediators provide that in a court-connected mediation, the mediator must advise the parties that he or she serves as a neutral person who facilitates discussion between the parties and will not give legal advice to the parties. Preparation of a court order is the practice of law. O.C.G.A. § 19-15-50. If a mediator who is not an attorney were to prepare an order for the court, this would constitute unauthorized practice of law. O.C.G.A. § 15-19-51. If a mediator who is an attorney were to prepare an order, this would be a violation of the ethical standard that prohibits mediators from providing legal advice. Appendix C, Chapter 1, A (I)(E). Furthermore, an attorney-mediator does not serve the parties in his or her attorney capacity when serving as a mediator. As a neutral, he or she serves the parties in a completely separate and distinct role. Drafting a court order for the parties, even at the request of a judge or judicial officer, puts the mediator in an impermissible dual role relationship with the parties.

The mediator's role ends when the parties sign a full or partial mediated memorandum of understanding or agreement in the privacy of the mediation session or when the mediation is terminated without an agreement. The mediator should not prepare any documents other than the mediated memorandum of understanding or agreement and administrative paperwork required by the ADR program. Nor should the mediator have any contact with the judge or judicial officer about the outcome of the case.

III. Confidentiality FAQs

Is it permissible for the mediator to tell the judge what the sticking point in settlement is so that the judge can address this issue in a settlement conference with the parties?

No. This would involve disclosing content discussed in the mediation and would be a clear violation of confidentiality. There is no exception to confidentiality or the rule governing communications with the court that would permit this.

In the case of partial agreement, can the mediator report to the judge, either verbally or on the mediator's report form, which issues remain for the judge to hear?

No. Again, such a communication would disclose information learned during the mediation and does not fall within any of the permitted communications by the program director. The program director is authorized by Appendix A, Rule 7.2 e to convey whether the case has settled or not and if a partial settlement was reached, what issues **were settled**. Neither the program director nor the mediator is permitted to disclose those issues that are unresolved.

The parties and the program director will have copies of the written and executed partial agreement. The court will have access to that document which contains the terms agreed to, and can ask the parties what issues remain when they appear for a pre-trial conference or trial.

The parties can choose to specify unresolved issues within their written and executed partial agreement. This is the party's choice and not a decision to be made by the mediator or the court. The benefit of listing the unresolved issues in the agreement is that it clarifies that the parties intend to enter a partial agreement, and, as the court can have access to the written agreement, it may assist the court in scheduling the appropriate next proceeding. The risk is that there may be issues that the parties did not think of at the time of mediation, especially if they are self-represented or their attorney does not attend the mediation Should the **parties choose** to identify within the written agreement those issues that they agree are not resolved they should not be precluded in the subsequent litigation from raising issues they may have failed to identify in the partial agreement.

In a case involving custody and/or visitation issues that are not resolved in mediation, can the mediator let the judge know that appointment of a guardian ad litem would be helpful?

No. Even if such a communication did not involve disclosure of specific information from the mediation, the communication would be based on the mediator having been privy to confidential information. In addition to violating confidentiality, such a communication would also violate the mediator's duty of neutrality. The appointment of a *guardian ad litem* could have significant adverse effects on one or both parties. The mediator should not have any role in what happens outside the mediation process.

Should the parties reach an agreement that includes the request for an appointment of a *guardian ad litem*, that provision, like any provision in a mediated agreement, can be set forth in the written and executed agreement.

If the judge asks the mediator about the parties' cooperation, what can the mediator say? For example, what if one of the attorneys slammed her files down on the table, shouted at opposing counsel and stormed out with her client early in the session?

The mediator must not report conduct to the court either verbally or in writing (including the mediation report form). Again, this is behavior that was observed in a confidential setting. When the court orders parties to participate in mediation, the court naturally has an interest in parties' compliance with the order. However, reporting any information that addressed the conduct of the parties or the attorneys would be inconsistent with the assurance of confidentiality. This information cannot be reported to the court or the mediation director even if the court's order includes language requiring the parties to participate in mediation in good faith. The Commission's policy is that while referral to mediation is often mandated by the court, participation in the process is voluntary. Voluntariness is a key element of self-determination, the foundation of mediation.

If the mediator hears threats of imminent violence to self or others or the mediator believes that the safety of a party or third person is in danger, can the mediator report this belief to the court?

No. The reason for these exceptions to confidentiality in the ADR Rules[2] (threats of imminent violence or the mediator's belief that safety of a person is in danger) is so that the mediator can take reasonable steps to prevent the threatened harm by reporting to law enforcement authorities, or to the ADR program administrator, or to other appropriate agencies or individuals. If the threat is imminent, such as a party assaulting someone in the mediation or threatening to use a weapon, it is law enforcement who can best intervene. If the danger is not imminent, the report should be made to the ADR program administrator who can then notify law enforcement or other appropriate agency/person in accordance with the program's procedures.

The decision regarding to whom to disclose information learned in mediation concerning an imminent threat of violence or danger to the safety of any person must be made on a case-by-case basis. The guiding principle is that the information should be conveyed to someone who can take appropriate action to prevent the threatened harm. The rules having to do with confidentiality and communications to the court make the court, in most instances, the least appropriate entity to whom to report the information. However, in an extremely rare emergency circumstance in which there is no option of contacting law enforcement authorities, the ADR program director or other appropriate individuals or agencies, the mediator should take reasonable actions to report the danger to the best available source of assistance to prevent violence.

[2] ADR Rule VII(B) provides that confidentiality does not extend to a situation in which (a) there are threats of imminent violence to self or others; or (b) the mediator believes that a child is abused or that the safety of any party or third person is in danger.

If the mediator forms a belief that child abuse has occurred, should the mediator report this belief to the court?

No. Mediators who are mandated reporters have a statutory obligation to make the report themselves to DFACS, law enforcement or the district attorney. O.C.G. A. 19-7-5 (d), (e). A mediator who is a mandated reporter cannot discharge her statutory responsibility to report by conveying the information to the ADR program director. However, it may be helpful to convey this information to the program director in addition to the one of the agencies required by law.

Mediators who are not mandated reporters may report this information to the program director and follow the program director's instructions about appropriate next steps. The mediator may not report that information to the judge. Information about suspicions of child abuse could be extremely prejudicial information. The judge should receive information regarding any child abuse allegations as evidence in legal proceedings. For this reason, the Commission's Guidelines for Reporting Child Abuse specifically provide that the judge is not to be advised of the suspicions of violence or abuse.

Once the mediator or the ADR program director has reported the matter to DFCS or law enforcement, it is the responsibility of those agencies to investigate any allegations or admissions and take any further legal actions that are appropriate.

Can a mediator and the program develop a "code" for conveying certain types of information, either orally or in writing, that could not otherwise be revealed? For instance, could a court or program administrator ask mediators to include a phrase in the mediation report such as "# 7" to indicate that, in the mediator's opinion a GAL should be appointed?

"Codes" for communicating certain information are still communications, albeit abbreviated ones, and are impermissible. A reviewing body might even consider a "code" a more egregious confidentiality violation because sharing information that cannot be ethically disclosed via a code evidences an intentional and surreptitious attempt to violate the confidentiality promised to the parties in the Supreme Court's rule.

IV. Conclusion

It is understandable that judges may want to know of information from mediation sessions that could assist them in resolving the case, and that they may want to send information to the parties in mediation that would urge them toward a settlement that the judge believes is appropriate. Indeed, this exchange of information could very well be helpful to resolving cases, and there is certainly no prohibition on the parties and the court communicating directly in a pre-trial conference either before or after the mediation session. Or, if the parties believe that information from the court would be helpful during the mediation process, the mediation could be adjourned to provide an opportunity for the

parties to seek that information directly from the court. But the mediator must not be involved in those communications.

Mediation is a confidential alternative dispute resolution process involving the parties and the third party neutral. While the parties may be ordered to mediation, any agreement is entirely voluntary and is to reflect how the parties want to resolve the case they are litigating. ADR Rules, I. In the absence of settlement, these parties lose none of their rights to trial. The confidentiality of these settlement discussions is a hallmark of the court-connected mediation process. It encourages resolution, protects the parties, the court and the neutral. The ADR Rules reflect a policy determination that confidentiality, in almost every instance, outweighs case management concerns. The mediation process would lose its benefit to parties and courts if parties could not rely on the confidentiality and voluntariness of the process.

It is also understandable that people who work in proximity to each other toward similar goals---resolution of disputes pending in courts--- will naturally tend toward a comfort level with each other that invites communication. Because this is a strong and natural pull, it requires heightened attention and conscientious choices on the part of all concerned.

Issued June 14, 2005, by the Committee on Ethics of the Georgia Commission On Dispute Resolution.