Georgia Commission on Dispute Resolution
Best Practices Manual for
Registered Neutrals

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Georgia Commission on Dispute Resolution
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Introduction

On behalf of the Georgia Commission on Dispute Resolution, it is our pleasure to present the ***Best Practices Manual for Registered Neutrals in Georgia***[1]. Within these pages, you'll discover a comprehensive guide to the commonly accepted practices and procedures prevalent in this state's dispute resolution community.

Crafted as a supplement to the Supreme Court of Georgia's ADR Rules, this manual is intended to serve as a compass for mediators, offering insights on effective mediation within the framework of these rules. Each section is designed to delve into the core values of the Rules, addressing common concerns and offering practical solutions based on past experiences of veteran neutrals.

As a dynamic document, our goal is for this manual to grow alongside our court system and the field of alternative dispute resolution. We welcome ongoing feedback from our esteemed neutrals, ensuring the manual's continual refinement to meet the evolving needs of our community.

Join us on this journey as we strive to enhance the quality and efficacy of dispute resolution in Georgia.

With gratitude,

Georgia Office of Dispute Resolution

[1] *As approved by the Georgia Commission on Dispute Resolution May 8, 2024*

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Ethical Standards for Neutrals

The following sections focus on the ethical standards for neutrals contained in Chapter 1 of Appendix C. The comments, examples, and recommendations previously included in Appendix C, have been relocated to this handbook to provide an in-depth analysis on real world scenarios that have called these rules to action. The advisory and ethics opinions are incorporated to further highlight the applicable ethical standards and are included as attachments.

Self Determination and Voluntariness

Where parties are ordered to participate in a dispute resolution process other than trial, the process must be non-binding and voluntary, so it does not interfere with the parties' constitutional right to trial. Additionally, for a party to exercise self-determination, they must understand the mediation process and be willing to participate[2]. *See Supreme Court ADR Rules, Appendix C, Chapter 1 (A)(I).*

> ***Control Over the Outcome:*** *The Georgia Commission on Dispute Resolution accepts the proposition that self-determination of the parties is the most critical principle underlying the mediation process. Control of the outcome by the parties is the source of the power of the mediation process. Further, it is the characteristic which may lead to an outcome superior to an adjudicated outcome.*
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> *Self-determination is a difficult goal in our society in which people seem often unwilling to assume responsibility for their own lives, anxious for someone else to make the decisions for them. Mediation is antithetical to this attitude.*

Explaining the Mediation Process to Parties

The principal duty of the mediator is to fully explain the mediation process to the parties. This allows them to exercise self-determination and participate willingly in the process. Mediators should take the time to fully explain these expectations and the process. Mediators must keep in mind that some participants may have difficulty understanding the implications of mediation and should set aside time to address the participants' questions and concerns about the process. A thorough list of what should be explained prior to mediation is outlined in the Supreme Court ADR Rules, Appendix C, Chapter 1(A).

See Ethics Opinion #1, which highlights several best practice methods that all mediators should use when conducting mediations and provides guidance for ADR program directors when crafting program guidelines and rules.

Capacity and Balance of Power

The mediator has an obligation to assure that every party has the capacity to participate in the mediation conference. Below are a few examples and recommendations for handling potential

[2] A court may order parties to attend mediation, however, any agreement reached at mediation must be voluntarily agreed to.

capacity and balance of power issues. *See Supreme Court ADR Rules, Appendix C, Chapter 1(I)(B).*

> ***Addressing the Issue of Subtle Incapacity:*** *Georgia mediators are confident of their ability to recognize serious incapacity. Situations in which there is a subtle incapacity are more troubling. Several mediators expressed concern about situations in which they questioned capacity to bargain but felt certain that the agreement in question would be in the best interest of the party and that going to court would be very traumatic. Should the mediation be terminated because of suspected incapacity if mediation is the gentler forum for a fragile person and the agreement which the other party is willing to make is favorable? Does the mediator's substituting his or her judgment for the judgment of the party destroy any possibility of self-determination? Is self- determination and the empowerment which it offers a rigid requirement in every mediation? Does it make a difference whether the suspected incapacity is temporary – i.e. a party is intoxicated – so the mediation could be rescheduled?*

Capacity and Balance of Power Examples and Recommendations:

Example #1: The husband, who is a doctor, is also an alcoholic. The mediator notes, "She could have said anything, and he would have said yes. He just wanted to get it over with. It was really hard keeping him here. I had to make two pots of coffee during each session to keep him going. He was just ready to get out and go get a drink or something." The wife is represented, but he is not represented. Both parties are concerned about preserving his assets, and they both agree that she should get a large portion of the assets. There seems to be danger that the assets will disappear because of his alcoholism. The mediator is concerned that the husband is agreeing too readily and is worried about the balance of power. The party is not presently incapacitated except to the extent that his desire to complete the mediation is interfering with his giving careful thought to the process. It may be that the level of self- determination which he is exhibiting is the highest level that is possible for him. Should this person be deprived of the benefits which he might derive from mediation because he is not able to bargain as effectively as the other party?

Example #2: During the mediation it becomes apparent to the mediator that one party is well-represented, and the other party is not being adequately represented. What, if anything, should the mediator do? If the mediator interferes in the attorney-client relationship a number of issues are raised. Would interference infringe upon the self-determination of the party who has retained the attorney? Is neutrality compromised? Is the mediator crossing a line and in effect giving legal advice? If the mediator is compensated, will the mediator's action or inaction be influenced by the desire to maintain good relationships with attorneys for business reasons.

Recommendations: Where a party is laboring under an incapacity which makes him or her incapable of effective bargaining, the mediator should terminate the

mediation. Mediation is not an appropriate forum for the protection of the rights of a person who cannot bargain for him or herself.

- If the incapacity is temporary – i.e. intoxication – the mediation should be rescheduled.
- If there is a serious imbalance of power between parties, the mediator should consider whether the presence of an attorney, family member, or friend would give the needed support.
- An obvious example of a power imbalance occurs when there is a history of domestic violence. Although the Commission has approved rules to guide court programs in identifying those cases which are not appropriate for mediation, information about a history of domestic violence may surface for the first time during the mediation. The questions the mediator faces are whether to terminate the mediation and, if so, how to safely terminate it. Factors which should be considered are whether the mediator is registered as a specialized domestic violence mediator and therefore qualified under the rules to handle a case involving domestic violence, whether there was more than one incident, when the incident or incidents occurred, whether the information surfaces during a joint session or during caucus, whether the alleged victim is intimidated. If the mediator has any concern that the safety of any person will be jeopardized by continuing the mediation, the mediation should be terminated.
- If one party is simply unable to bargain as effectively as another, it is probably inappropriate to deny those parties the benefits of the mediation process because of that factor.
- If the imbalance occurs because of disparity in the ability of the parties' attorneys, the principle of self-determination, in this case in relation to the selection of an attorney, again prevails.
- One mediator expressed his view this way: "I am reluctant to withdraw where there is an imbalance in power because I always try to look at the alternative. The alternative usually is that person is going to be no better off in litigation. I understand that there's a judge there that can look after the parties, but still my practical experience in litigation teaches me that most parties are not going to be much better off in litigation rather than mediation if lack of power is their problem."

Informed Consent

Informed consent to an agreement implies that the parties not only knowingly agree to every term of the agreement but that they also have sufficient information to bargain effectively in reaching an agreement. The commentary and examples below address the effectiveness of mediation when the parties have sufficient documentation and information to bargain effectively and make an informed decision. *See Supreme Court ADR Rules, Appendix C, Chapter 1(I)(C).*

The Effectiveness of Mediation when Parties are Fully Informed: *One mediator suggested that the parties who are operating without full information be asked to reconvene with attorneys present. This mediator said, "I have been more and more impressed with how effective a subsequent session can be with the attorneys present and everyone having prepared for it."*

Informed Consent Examples and Recommendations:

Example #1: One party says that there are assets which have been hidden and the other party denies the existence of the assets. The mediator faces the question of whether to push them forward on the facts that are established or give any credence to these alleged facts.

Recommendation: The question is resolved in favor of terminating or rescheduling the mediation if there has not been sufficient discovery or the party claiming that assets have been hidden feels that she or he cannot bargain effectively. The more specific question comes if there is unsubstantiated suspicion – i.e. "He must have made more than he reported on his income taxes in 1992, so where is it?"

Domestic relations mediators who work in court programs may not have the luxury of several sessions so that parties can be assigned "homework." As long as the information on assets and budgets is available, the actual preparation and affirmation/verification of lists of assets and liabilities and the preparation of budgets may provide an important opportunity for collaborative work by the parties.

Example #2: In a divorce mediation the wife is clearly dependent on the lawyer, as she had been on her husband while they were married. The lawyer is not cooperative in the mediation. At each session the lawyer comes in with a totally new agenda and without promised information. The mediator finds that she is spending an inordinate amount of time dealing with the lawyer. The mediator offers to meet with the parties alone, but the lawyers will not allow that.

Recommendation: The mediator may caucus with the lawyers alone and confront the lawyer who is obstructing the mediation. The mediator may also raise questions in caucus with the lawyer and the client which may alert the client to the need to control the lawyer. Beyond this, it is difficult to resolve this situation without compromising the self- determination of the client or compromising neutrality.

Issues that Parties have not Identified – The Mediator's Dilemma: *Yet another variation on the issue of missing information is the missing issue – should the mediator bring up issues which the parties have not identified? As one mediator expressed this: "What's our role when people say we want you to mediate this case? Are we to mediate the issues that they bring to us or are we to create issues for them to discuss and decide about? I guess that a lot of the conflict that we're talking about here is what do we as mediators have to initiate or inform people or*

educate people about: all the issues that can be and probably ought to be discussed in the context of a divorce mediation? You're potentially opening up all these cans of worms for people who don't necessarily want them opened." On the other hand, have the parties had an opportunity to mediate from a position of full information if they have not considered every relevant issue? Beyond this, will the agreement hold up if it is not made in the context of all issues in the dispute.

Coercion

The mediator must guard against any coercion of parties in obtaining a settlement. *See Supreme Court ADR Rules, Appendix C, Chapter 1(I)(D).*

> ***Coercion and Declaring Impasse:*** *Many mediators discussed the question of when to declare impasse. One mediator said that she loved the point of impasse because the parties have "gone through the conflict" to get to impasse. She felt that the moment of impasse is a moment of great opportunity. At some point, however, persistence becomes coercion. The question of when to terminate the mediation will be discussed further under the topic of fairness.*

Advice

It is improper for a mediator who has any professional expertise in another area to offer professional advice to a party. Below we explore the quandary where mediators believe that the party would benefit from their personal expertise but must reconcile this desire with the duty to remain neutral and allow the parties to exercise their right to self-determination. *See Supreme Court ADR Rules, Appendix C, Chapter 1(I)(E).*

See Advisory Opinion #7, which confirms that mediators may help parties use the software to make child support calculations and incorporate them into the draft memorandum of understanding or settlement agreement. However, mediators should be careful not to provide advice or direction that may constitute the unauthorized practice of law or undermine the ethical principles of self-determination and impartiality.

Advisory Opinion #9 focuses on a Georgia Court of Appeals case and the practice of negotiating past-due child support. Parties may not lower the child support amount owed, but they may negotiate a repayment schedule of the arrearage owed. Any child support arrearage that is unknown must be reserved for judicial determination.

> ***The Line Between Information and Advice:*** *Conversations with Georgia mediators who are trained as lawyers confirmed that this concept is extremely difficult for lawyer/mediators. Lawyers, having been trained to protect others, agonize over the perception that missing information, poor representation, ignorance of a defense, etc. may place a party in danger.*
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> Recommendation: The line between information and advice can seem very gray. However, failure to honor the maxim that a mediator never offers professional

advice can lead to an invasion of the parties' right to self-determination and a real or perceived breach of neutrality.

Confidentiality

The promise of confidentiality in a mediation session promotes candor and full disclosure. Without the protection of confidentiality, parties would be unwilling to communicate freely, and the discussions necessary to resolve disputes would be seriously curtailed. Below you will find examples of common confidentiality issues and how to handle them, recommendations on what to include in your mediation guidelines to conform to the confidentiality requirements, and information on the newly enacted Georgia Uniform Mediation Act which further expands upon the confidentiality requirements pursuant to the O.C.G.A. *See Supreme Court ADR Rules Appendix C, Chapter 1(II).*

***See Advisory Opinion #8**, which focuses on the ethical obligation of mediation confidentiality and the ethical conduct to which all mediators, attorneys and parties involved in mediation should aspire. This opinion serves as a guide to address what is considered confidential in a mediation, who is obligated by confidentiality, and when confidentiality applies following the mediation session. It is the mediator's responsibility to ensure that all mediation attendees understand the concept of, and the obligation embedded in mediation confidentiality. Two rules of thumb can help all attendees avoid problems: "What happens in mediation stays in mediation" and "Mediation confidentiality is forever."*

Confidentiality Examples and Recommendations:

Example #1: A party reveals to the mediator in caucus that he has cancer and that he does not want his ex-wife to know about it. He is not sure how long he will be working because of his illness. This information could be very important to the wife. She may need to make other plans for the time when that money is not coming in. Because of the confidentiality, the mediator feels that she cannot say anything.

Recommendation: This presents the classic dilemma of the collision between the promise of confidentiality and the need of the parties for complete information if they're to enter into an agreement voluntarily. The mediator is placed in the position of keeping the confidence of one party at the expense of the self-determination of the other party. If the mediation is terminated, there is no guarantee that the husband's condition would be revealed at trial, and the parties may lose the opportunity for a more creative agreement than the verdict imposed after a return to court.

The first tactic of the mediator is to encourage the person keeping the crucial secret to share it with the other party or allow the mediator to reveal the secret. If the secret is central to the creation of a solid agreement, and if the mediator cannot persuade the party with the crucial secret to share it, she may have no alternative but to terminate the mediation.

One mediator discussed the problem of information which, if made part of an agreement, might constitute a fraud upon the court. He felt that the ethical

requirement that a lawyer is always an officer of the court would require that the lawyer/mediator not draft an agreement if there were a secret which made the agreement a fraud on the parties or on the court. "In other words, if one party says as soon as we sign this custody agreement, I'm going to take my kids across the country, that would put me in an impossible conflict of interest. I would feel that I would be perpetrating a fraud on the other side if I allowed them to enter into an agreement."

Example #2: A deceptively simple example of this problem can occur in jurisdictions where a "warrant fee" must be paid even if the warrant is not served or is dropped. As the parties enter into the mediation of this sub-issue after the mediation of the dispute which resulted in the warrant is completed, both parties refuse to pay a penny, saying that it is the responsibility of the other party. In caucus, one party says, "I'll pay half of it but don't tell them that." Or someone will say, "I think I should only have to pay half of it, but I'd pay it all to be finished with this, but don't tell them." The mediator has been given a piece of information that would make a difference in the settlement of perhaps the entire case and instructed not to tell.

Recommendation: Absent fraud or mutual mistake, when the secret information is something that would foster settlement rather than something that would prevent settlement, the mediator is remiss if he or she does not push the parties toward revelation.

See Advisory Opinion #6, 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. This opinion examines the application of ADR Rule VII and Appendix A, Rule 7, and discusses the policy concerns underlying those provisions. The opinion states that mediators may not directly or indirectly share with the courts any information, including impressions or observations of conduct, from a mediation session. As guidance for mediators, the opinion provides responses to frequently asked questions regarding communications with judges.

Guardian ad Litems and Mediation

A common question and concern to all parties and especially a mediator's is, where does a Guardian ad Litem (hereinafter, "GAL") fit into mediation? A GAL is an attorney or other qualified individual who is appointed by the court, represents the court to assist with a recommendation to the court as to the best interests of a minor child(ren), or an incapacitated adult in a proceeding where the custody or welfare of a child is at issue, or where an alleged incapacitated adult's rights are called into question. GALs are interested parties in a mediation setting, however, not all issues discussed at a mediation will concern a Guardian ad Litem. The question then comes, how do you protect the confidentiality of the parties, and include the GAL in the mediation process. *See Supreme Court ADR Rules, Appendix C, Chapter 1(II).*

Guardian ad Litems and their Role in Mediation: *An interesting problem intersecting self-determination and confidentiality occurs because of the increasing use of guardian's ad litem to represent the best interest of the child and assist the court in reaching a decision regarding child custody, visitation, and child-related issues. If the guardian is present at the mediation, should he or she be privy to the entire mediation, including caucuses? The interests of the child are not necessarily synonymous with the positions of parties. One solution to the issue would be to caucus separately with each party and with the guardian. Another question is whether the guardian, who has an obligation to report to the court, can be bound by confidentiality.*

Recommendation: The mediator's opening statement should include an explanation that the guardian ad litem is a party to the mediation whose interests may be separate from those of the other parties. Parties should be informed of the limits on confidentiality presented by the guardian ad litem's presence, as what is revealed in the mediation may be used in the guardian ad litem's investigation. The parties should be informed that it is the party's choice to have the guardian ad litem present at mediation.

See Advisory Opinion #5*, which addresses whether disclosing a juvenile's participation in a mediation session violates the confidentiality provision of the Supreme Court ADR Rules. This opinion arises out of the difficulty of ADR Programs in scheduling mediation sessions for juvenile court cases. In this case, the program contacted a school to contact the juvenile. The Commission found that while these contacts may have negative consequences for the juvenile, they do not violate the confidentiality provision of the ADR rules because they do not disclose any confidential communications from mediation.*

Signing Mediation Guidelines

When scheduling mediation, it is important that all parties be contacted to confirm who will be in attendance, including any supportive individuals. This includes, but is not limited to, friends or family members, translators, interpreters, or individuals who are able to make decisions on behalf of a party. Participants should be provided the mediation guidelines in advance to confirm that all participants are aware of the rules of confidentiality, and their obligation throughout the process. If a court appointed guardian ad litem is attending the mediation, the parties should be informed of the limitations on confidentiality created by the guardian's presence, and the guardian should sign off on the mediation guidelines.

Translators and interpreters often have the most access to private and confidential information simply by the nature of their job. All information they obtain and communicate is necessary to facilitate a successful mediation session. Pursuant to the Supreme Court of Georgia Commission on Interpreters Rules and Regulations, interpreters shall protect the confidentiality of all privileged or confidential information pertaining to court cases. *See the Supreme Court of Georgia Commission on Interpreters Rules and Regulations, Appendix C, Rule 10*. While interpreters are

bound by their own professional code of conduct to keep the information of their cases confidential, interpreters should sign off on the mediation guidelines as well.

GUMA

The Georgia Uniform Mediation Act (GUMA), codified in O.C.G.A. §9-17-1, was enacted in 2021 to establish rules for all mediations, similarly to the Supreme Court's Alternative Dispute Resolution Rules. The GUMA does not replace the Supreme Court ADR Rules but contributes additional protections by codifying some of the principles of the Supreme Court ADR rules into the Georgia Code.

How the GUMA Relates to the Supreme Court ADR Rules

The GUMA has very similar provisions governing the privilege and the confidentiality of the mediation session. Below are the provisions that are applicable to the ADR Rules, and how some of the rules may differ from each other.

- O.C.G.A. §9-17-3, Privilege Against Disclosure: This section provides for the privilege against disclosure of mediation communications by any party, the mediator, or a non-party.
- O.C.G.A. §9-17-4, Waiver of Privilege: A privilege may be waived if expressly waived by all the parties, and in the case of the privilege of a mediator, it is expressly waived by the mediator, and in the case of the privilege of a non-party participant, it is expressly waived by that non-party participant.
- O.C.G.A. §9-17-5, Exception to Privilege: There are some exceptions to certain mediation communications, such as a threat of violence or bodily injury, where child or adult protective services is a party and the communication is sought to prove or disprove the neglect, or where a mediator or a professional must defend against a complaint of professional misconduct.
    - This section also expands on the extent of the disclosures where there is no privilege, and mediators shall disclose only the portion of the communication necessary.
- O.C.G.A. §9-17-6, No Mediator Reports: Mediators are prohibited from making any report, assessment, evaluation, or a finding about a mediation and submitting it to a court or agency that has authority to make a ruling on the dispute.
    - Mediator's **MAY** Disclose:
        - Whether a mediation occurred or has terminated, whether a settlement was reached, and attendance;
        - A mediation communication as permitted under O.C.G.A. §9-17-5; and
        - A mediation communication regarding abuse or neglect to an agency responsible for protecting individuals against such mistreatment.
- O.C.G.A. §9-17-8, Conflicts of Interest: As expressed in the impartiality section of the ADR Rules, mediators shall make a reasonable inquiry into whether there are any circumstances about the proposed mediation that a reasonable individual would consider likely to affect the impartiality of the mediator. Mediators must disclose any known fact to the parties prior to accepting a mediation.

- An individual who does not disclose a conflict of interest is precluded from asserting a privilege under O.C.G.A. §9-17-3.
- At the request of a mediation party, mediators shall disclose their qualification to mediate a dispute. It is recommended that mediators include a link to the Georgia Court's registrar to allow parties to view the mediator's qualifications and confirm registration with the GODR.
- Keep in mind, though O.C.G.A. §9-17-8(f) states this chapter shall not require that a mediator have a special qualification by background or profession, the ADR Rules have separate requirements for mediating domestic relations, and juvenile cases.

- O.C.G.A. §9-17-9, Participation: An attorney or other individual designated by a party may accompany the party to and participate in the mediation. Here, this individual may be attending for emotional support, or may be an expert that intends to offer advice (for example, a financial advisor to offer advice in divorce proceedings).
  - Every individual in attendance should sign the mediation guidelines so they are aware and agree to the guidelines for mediation.
  - Where a party elects to have another individual attend virtually or solicits their advice or support from over the phone, it is wise to also have that person sign the mediation guidelines.

Impartiality

A mediator must remain impartial throughout the mediation session. A mediator must be free from favoritism, bias, or prejudice against any party. Mediators must remember that their role is to remain neutral and guide parties toward the common ground of settlement, and mediators are cautioned against forming any opinions or relationships with the parties which would create an impartial atmosphere or the appearance of an impartial stance. Below are examples and recommendations as to how to guide parties to participating in mediation in a meaningful manner while still maintaining neutrality. *See Supreme Court ADR Rules, Appendix C, Chapter 1(III).*

Impartiality in Word and in Deed

A mediator must demonstrate impartiality in word and deed. A mediator must scrupulously avoid any appearance of partiality. *See Supreme Court ADR Rules, Appendix C, Chapter 1(III)(A).*

Impartiality Examples and Recommendations:

Example #1: As one mediator expressed this problem: "I had a big case once upon a time where I thought the plaintiffs, who were represented by three attorneys, had made a very poor presentation of their case and this was a case that went on for multiple sessions. I don't remember whether it was the opening presentation. I think it may not have been the opening presentation, but a subsequent presentation, and it may have been on just a few issues or something like that. I felt like they did not present their case in as strong a form as they could have. Maybe that they were holding back some evidence. In caucus I just did some coaching. I don't mean to be so presumptuous as to say that I knew how to do it better than they did but I pointed out some things to them that I think they agreed with. They went back and made a more forceful, more cogent presentation and I think were able to move things along better. Because by making a weak presentation of their case, they were not going to be able to get what they knew or believed they were entitled to. So, it was a matter of helping the other side see the strengths of the plaintiff's case that they had not been able to see through the original presentation."

Recommendation: Several mediators discussed the problem of dealing with a party who is unable to bargain effectively and puzzled over an ethical way to coach that party while retaining neutrality. Helping a party to present his or her needs and interests in a way that can be heard by the other side is not a breach of neutrality but is, rather, an important part of the mediator's role. When the mediator helps each side to communicate effectively, the mediator is assisting the parties in establishing the common ground upon which a solid agreement can be based.

Example #2: During a mediation the attorneys begin to fight with each other to the extent that it is difficult to control the mediation. It is also difficult for the mediator to keep an open mind about how to deal with it because, as he expressed his own emotion, his stomach is churning. The mediator is faced not only with controlling the situation but in dealing with his own reaction to it. The mediation did not result in an agreement although the matter was settled before trial. The mediator

wondered in hindsight if it might have been better if he had said "Look, because of the way I'm reacting to your fight, I can't be an effective mediator for you. You need a different personality to help you mediate."

Good Mediator's find Neutrality is Not an Issue: *Mediators give very few examples of situations in which they felt such antipathy for a party that they were unable to remain neutral. Many mediators discussed the fact that when they began to search for needs and interests of a party, they were able to reach a sufficient level of understanding that neutrality was not an issue.*

Compensation

Mediators may not accept anything of value from a party, or attorney, before, during, or after the mediation, other than the compensation agreed upon. However, it is not improper to receive referrals from parties or attorneys. *See Supreme Court ADR Rules, Appendix C, Chapter 1(III)(B).*

Conflict of Interest/Bias

Mediators shall avoid a conflict of interest before, during and after a mediation session. See Supreme Court ADR Rules, Appendix C, Chapter 1(III)(C), to use as a guide on how to assess whether there is a conflict of interest, and proper inquiries to decide whether mediation is appropriate for the neutral in question. *See Supreme Court ADR Rules, Appendix C, Chapter 1(III)(C).*

Conflict Check: *How a mediator conducts a conflicts check varies by practice context. For a complex case that comes to a mediator through his or her law firm, best practice consists of making a firm-wide conflicts check at the pre-mediation phase. By contrast, for a mediator of a matter outside the mediator or firm's areas of practice, making an inquiry of the parties and participants at the time of the mediation regarding potential conflicts of interest may be sufficient.*

In performing the mediator's role, an individual displays multiple analytical and interpersonal skills which may well lead a mediation participant to consider employing the mediator again. If a mediation participant, be it a party, party representative, witness or any other participant, wishes to employ the mediator in a subsequent mediation, or in another role (such as personal lawyer, therapist, or consultant), then the mediator must make certain that entering into such a new relationship does not cast doubt on the integrity of the mediation process.

Conflict of Interest Examples and Recommendations:

Example #1: A divorce mediation results in a full agreement. The parties do not want to take the agreement and spend the extra money on an attorney. And they ask the mediator to take the agreement to court and help them obtain an uncontested divorce. As the mediator described the problem, "I told them that technically I could but no I won't because I've been your mediator and must be neutral. I think it would be a conflict for me to go from mediator to attorney in the same case for the purpose of getting you your divorce and making it legal. They said that they really didn't

want to go pay anybody else and asked me to prepare the papers. So, I charged them an additional fee to prepare the papers, the decree and separation agreement, without my name on it and I told them to file it pro se. They were satisfied with that, and I could sleep with that decision."

Recommendation: The ethical problems that arise in the area of subsequent contact with parties have to do with neutrality and the perception that the mediator might capitalize upon the mediation experience to create a future business relationship with one or the other party. Here the mediator did legal work for both parties and the mediator tried to distance himself by refusing to represent the parties in court, acting more as a scribe than a representative. He acted with great reluctance and only because the parties requested that they not be placed in a position of incurring additional expense. This mediator said that specific rules in this area would be helpful. It is the Commission's recommendation that a lawyer/mediator never accept any legal work arising out of the mediation. In the context of the example above, this recommendation is more for the protection of the mediator than for the parties. Mediators should not accept legal work where the mediator will act as a representative to both parties, even if the request comes to assist in uncontested divorce matters. There reward of assisting pro se parties who otherwise would have to pay for legal services does not outweigh the risk of a neutrals impartiality and neutrality being compromised.

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*See **Advisory Opinion #3**, which raises the issue of neutrality when a mediator plays a dual role in a case. Mediators who also serve the parties as a case evaluator, GAL or in another professional capacity undermine key ethical standards including neutrality, confidentiality, and self-determination. The Ethics Committee recommends that courts never appoint a mediator who has served the parties in any other professional capacity.*

*See **Ethics Opinion #3**, where a mediator's actions resulted in the mediator's removal from the list of registered neutrals. The opinion emphasizes that a mediator's credibility is fragile, and a mediator should guard against the perception of impartiality and bias and cautions against handling cases in which the parties have engaged the mediator in another professional capacity. The Committee also recommends that mediators never voluntarily testify about their mediations other than when the situation is covered by the exceptions to confidentiality in the Supreme Court ADR Rules.*

Advisory Opinion #4, *which addresses the potential conflict-of-interest issues that arise when mediators accept business referrals following a mediation. This opinion also addresses the appearance of impropriety in accepting those referrals and cautions mediators to keep in mind factors such as the passage of time, and whether both parties have consented to said subsequent representation.*

Ethics Opinion #5 *found that a perceived or actual conflict of interest that raises questions about a mediator's impartiality, especially in the case of a dual relationship with a participant, should be avoided during and after mediation.*

Ethics Opinion #6 *addresses the importance that neutrals be transparent and forthcoming about relationships and be sensitive to the fact that future business dealings with parties or their attorneys may create the appearance of impropriety.*

Fairness

A mediator must assure that the conference is characterized by overall fairness and must protect the integrity of the process. *See Supreme Court ADR Rules, Appendix C, Chapter 1(IV).*

Parties to the Mediation

A mediator should not be a party to an agreement which is illegal or impossible to execute. Below you will find examples of some challenges mediators have faced when the fairness of a mediation session is called into question. *See Supreme Court ADR Rules, Appendix C, Chapter 1(IV)(A).*

> ***Mediator's Concern for the Fairness of an Agreement:*** *Georgia mediators expressed two concerns related to the fairness of a mediated agreement: How to handle the situation in which the parties agree to something which the mediator feels is unworkable; how to separate out the mediator's own bias that a party could have done better from the agreement which seems fundamentally unfair to the party.*

Fairness Examples and Recommendations:

Example #1: As one mediator expressed the tension, "You know, have you done this or that? Why don't we come back? 'No, I just want to get it over with.' God, you're paying such a price just to get it over with. But then, maybe they just really need to get it over with. I don't know how many times I've heard that, that I just want to get it over with. I don't care what it takes, I want it done, nobody's going to abide by this anyway. Whatever that whole bundle of things may be. That's my bugaboo. I don't know what advice to give other people about it. You can create some type of abstract standard [for mediators to handle this situation.]"

Example #2: In a juvenile court case the parties are working toward agreement and the mediator realizes that the child is agreeing to anything in order to get out of the room. The mediator also realizes that if the agreement is breached, the child will have to answer for the breach in court. The mediator's check testing is to no avail.

Example #3: The mediator is concerned about the tax consequences of a property transfer, and the parties are unwilling to consult an outside expert. As one mediator set forth the problem: "So they come in with a house to sell or a business as part of their marital assets and you're talking about transferring all this property and then what about the taxes. Have you thought about the tax implications? They say no, and you say well you ought to go see a CPA and get this information. And they don't want to because they don't want to spend any more money and all of a sudden, you're taking what appeared to be a simple situation and you're making it more complex and you're making it more expensive and where does it stop. That's our question."

Example #4: The parties have been married twenty-two years and have grown children. They come to mediation having settled everything but who is to get the Volvo, which is for them their most prestigious material possession. The husband

suggests the solution of just selling the car, a solution which would make it possible to finalize the divorce. The wife, who is not ready for finality begins to cry hysterically and then says, "Just write it up and I'll sign anything."

Recommendation: The mediator's tension may result from his or her concern that the agreement is not the best possible agreement. On the other end of the continuum, the mediator feels that the agreement is unconscionable. This is an area in which the mediator's sense of fairness may collide with the fundamental principle of self- determination of the parties. On the other end of the continuum, the mediator may feel that the agreement is unfair in that one party is not fully informed. In other words, the process by which agreement was reached was unfair because one party was not bargaining from a position of knowledge. An underlying question is whose yardstick should be used in measuring fairness.

The mediator has an obligation to test the parties' understanding of the agreement by making sure that they understand all that it involves and the ramifications of the agreement. The mediator has an obligation to make sure that the parties have considered the effect of the agreement upon third parties. If after testing the agreement the mediator is convinced that the agreement is so unfair that he or she cannot participate, the mediator should withdraw without drafting the agreement. Parties should be informed that they are, of course, free to enter into any agreement that they wish notwithstanding the withdrawal of the mediator.

Guardians of the Integrity of the Mediation

A mediator is the guardian of the integrity of the process. *See Supreme Court ADR Rules, Appendix C, Chapter 1(IV)(B).*

Good Faith Participation: *Georgia mediators expressed concern about confusion of parties and neutrals as to the difference between various ADR processes. This confusion may result in the parties not knowing what to expect of the mediation process. While there is room for variation in mediation style from the more directive to the more therapeutic, the mediator should recognize the line between mediation and a more evaluative process and be prepared to refer the party to another process if that would be more appropriate.*

Another concern mentioned by many Georgia mediators was how to recognize impasse and, perhaps more difficult, how to recognize when parties come to the table unwilling to bargain in good faith. Another variation on this theme is the attorney who has come to the table merely intending to benefit from free discovery or use mediation as a dilatory tactic. Yet another variation on this theme was the expectation of lawyers that the mediation could be completed in one session. These problems are experienced differently whether the mediator is being compensated on an hourly basis, per session, or is a volunteer. Many mediators and program directors struggle with the issue of good faith and the question of whether lack of good faith can ever be reported to the court.

Pledge of Confidentiality and Good Faith Participation Recommendation: *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 benefit 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 that party's right to refuse the benefits of mediation.*

See ***Ethics Opinion #2****, which stems from a complaint against a mediator, following a mediator's derogatory comments made during a mediation. When a party feels humiliated or insulted by the mediator, and where there is an objective reason for such feeling, there is a loss of mediation integrity and fairness. Mediator conduct that is insulting to a party can be perceived as intimidating, which may be coercive and undermine the party's self-determination.*

Also see ***Ethics Opinion #4****, which emphasizes that mediators must exercise caution when communicating with mediation participants and court staff about a mediation session. Additionally, mediators should remember that a mediator's ethical obligations to a case do not end at the conclusion of the mediation session but continue indefinitely.*

Ethics Opinions #7 *the Ethics Committee found that the ethics rules and standards continue to apply to neutrals when they are representing to the public that they are a mediator, and therefore all neutrals are encouraged to act in a way that does not erode the public's confidence in the judiciary.*

General Best Practices

The Mediation Process

Prior to Mediation

- Introduce yourself to the parties and send out the notice of mediation. See attachment ____.
- How will the mediation be conducted? Will it be conducted virtually or in person. Send out the guidelines for mediation according to how the mediation will be conducted. See attachments ____.
- If this is a domestic relations case, plan to complete the domestic violence screening before the mediation. If you are not registered in specialized domestic violence, avoid conducting the screening on the day of mediation in case issues of domestic violence are present. If domestic violence issues are present, and you are registered as a specialized domestic violence mediator, appropriate measures should be taken to ensure there is a secure location for the mediation to be conducted. If the case has not been screened for domestic violence, the mediation should be conducted in a secure location. For more information on secure locations to conduct mediation, please refer to the domestic violence guidelines below.
- Email all parties and their attorneys, if represented, with the agreement to mediate and the mediation guidelines in advance of the mediation. Your guidelines should include information about the cost breakdown, how payment will be accepted, and your cancellation policy. The email should also include a notice that all lawyers and attendees may not record the mediation – audio, video or otherwise, any portion of the mediation – as such behavior would compromise the confidentiality of the mediation. See attachment Family Law Mediation Checklist for an example of mediation guidelines.
- Determine who will be in attendance and their relation to the case. All mediation participants should sign off on the mediation guidelines. Set expectations ahead of time on how many people are allowed to attend the mediation.
- Mediators should inform the parties of any time restrictions and make arrangements to continue the mediation. It is not advisable to schedule mediations around prior commitments, as it decreases the chances of settlement, but if it cannot be avoided it is best to alert the parties up front.
- Send out the virtual meeting link to all participants if it is a virtual mediation. Please refer to the virtual mediation section below for protocols on conducting mediation virtually.
- Arrive ahead of time (at least 30 minutes), or long on to your computer early to prepare for the mediation and familiarize yourself with the location where the mediation will take place.
- If available, review the intake form to familiarize yourself with the parties and the issues in the case.
- It may be beneficial to request pleadings, or a summary of the issues in the case. Keep in mind that this information should be viewed at face value as it is still your duty to remain neutral and unbiased.

- Some parties may wish to provide their proposed settlement agreement as a starting point for settlement negotiations. Mediators may find this helpful when beginning discussions and it may assist in document preparation for any mediated agreement.
- Participants:
    - Who should be present?
        - The parties and any other decision maker to the case;
        - Counsel for the parties;
        - A support individual may be present for either party. O.C.G.A. §9-17-9 allows parties to designate an individual to accompany them to the mediation. Mediators should understand who is attending, what their role is, and require the accompanying individual to sign off on the mediation guidelines;
        - An interpreter or translator;
        - Domestic Violence Advocate;
        - Guardian ad Litem; and
        - Financial experts.
    - The mediator is the facilitator of the mediation session, and part of your role as the mediator is to provide an environment that is conducive to the parties reaching an agreement. Be wary of supporting individuals that will heighten the litigious atmosphere of the mediation. The number of attendees permitted should be clearly communicated to the parties ahead of time.

During Mediation

- Explain the mediation process in your opening remarks:
    - Introduce yourself and provide your credentials.
    - Go through the guidelines to mediate and answer any questions the participants may have. Even if the parties have read and signed the agreement to mediate ahead of time, you must go through the guidelines to confirm they are aware of what is expected during mediation. Parties often do not read the guidelines and it is good practice to use this as a refresher.
    - Explain your role as a neutral and that you will facilitate the discussion, but you have no authority to force anyone to settle.
    - Outline the process, tell the parties what to expect, and how the parties will discuss the issues in the case. Explain the opening statement and which party will provide their statement first, explain what a caucus is, and explain that the parties may end the mediation at any time.
    - Describe the nature of mediation, this is not a courtroom, and the mediator is not the judge.
    - “What happens in mediation, stays in mediation.” Explain confidentiality and the exceptions to confidentiality.
    - Make sure the parties understand that mediation is the opportunity to resolve their disputes together, and they will forfeit that right if they elect not to settle and go to court. This should be stated during your opening remarks to avoid the statement

being misconstrued as a coercion to settle if it is presented in the middle of the mediation.

- Explaining the Guidelines
    - It is imperative to go through the guidelines in every mediation, regardless of the party's status as a self-represented litigant or whether they bring counsel to the table. While it may be the attorney's intention to jump in to discuss the issues of the case, keep in mind this process is likely new to the parties and to make informed decisions about their case, the guidelines must be explained. This applies to every mediation regardless of whether the parties have attended mediation before or not.
    - Failure to review the guidelines for mediation and explain the process to parties not only violates the Supreme Court ADR Rules, Appendix C, Chapter 1(A)(I), but runs the risk of a participant not understanding their rights during mediation. This has resulted in numerous complaints being filed against registered mediators.
    - Mediators shall, at the very least, go over the following guidelines before beginning any mediation session:
        - Explain that your role as a mediator is a neutral role to facilitate discussions between the parties, but you cannot control or coerce the outcome;
        - Explain the mediation procedure;
        - Explain the confidentiality of the mediation that binds you as the mediator, and any limitations on confidentiality;
            - Explain mediators cannot give any financial or legal advice and parties are expected to refer to outside experts;
            - Explain that the recording of the mediation, audio, video or otherwise, is strictly forbidden as such behavior would compromise the confidentiality of the mediation;
        - Explain that while mediation might be mandated, only their participation is required, and a settlement cannot be mandated;
        - Explain mediated can be terminated at any time by the mediator or the parties;
        - Explain that parties are expected to participate in good faith and full disclosure;
        - Explain that parties are free to consult legal counsel and are encouraged to have any agreement reviewed by counsel prior to signing;
        - Explain that once an agreement is signed, there will be an impact on the rights of the parties and the status of the case; and
        - Explain that by participating in mediation, they are affirming they have the capacity to conduct good faith negotiations and make decisions for their case.
- Opening Remarks
    - Encourage the parties to give their opening remarks and explain that it is your procedure to being with the Plaintiff as they filed the action.
    - Parties should give a summary of their case and the issues to be discussed.

- Encourage the parties to maintain respect for each other while they are giving their opening statements and if the parties become argumentative, attempt to diffuse the tension while maintaining the position of a neutral facilitator.
- If the parties are unable to give their opening remarks in the same room, break into caucus and allow them to give their opening remarks separately. Some parties may wish to only meet in caucus, and it is important to know the parties comfort level with each other prior to the start of mediation.

- Caucus
  - Explain what a caucus is to each party. This may be beneficial to encourage the parties to open up and explore their case without the other party being present.
  - Read the room, participants may be emotional throughout this process, and it is imperative to read their behavior and respond accordingly to their emotions to encourage an effective mediation moving forward.
  - Clarify what each party wants before leaving the room to present their offer to the other side. Be sure to clarify what may be shared and what information the party wishes to keep confidential.
  - Where a caucus is taking longer than anticipated, it is recommended that the mediator check in periodically with the other side to confirm that the mediation is still moving forward, and you will return as soon as you are permitted to communicate an offer.
- Mediator's Toolbox
  - **Reality Checking.** It is often useful and necessary when conducting mediation to reality test a participant when their position is not conducive to settlement or is contrary to the law. While mediators must remain impartial and not give any legal advice, it is permissive to question the participant about their opinion in a way that will make them think realistically, and if they have considered whether their stance will work out for them in the long run.
  - **Measure Twice, Hang Once.** Mediation can be confusing, particularly when there are many complex issues involved and many offers going back and forth. A stumbling block that impedes a smooth-running mediation is confusion over what a party wants. Often what they want and what they tell you might be two different things. If you are unsure about what the participant is seeking, restate what the participant has said back to them, and make sure what they have said and what they want are the same thing. Participants want to feel understood and having a clarifying conversation will allow participants to know that their mediator is actively listening to them.
  - **Read the Room.** Understand that parties will inevitably become emotional. It is your job as the mediator to remain calm, maintain your composure, and try to keep the parties moving forward in a positive direction.
  - **Maintain Neutrality.** Always maintain neutrality and be smart about your choice of words. Maintaining neutrality is crucial to a successful mediation and neither party should feel like one is favored over the other.

- **Make the parties comfortable.** If they are attending in person, provide the Wi-Fi password and make sure they have access to charging cables and a printer to sign off on any agreement reached. Make sure the room temperature is comfortable and they have proper tables and chairs to sit on during mediation. Provide water and snacks to each party and allow them the ability to order lunch or dinner if the mediation lasts past business hours. Treat each party equally and provide each party with the same accommodations.
- **What Would the Judge do?** Mediators are permitted to ask questions that will encourage the participants to think about what their judge would do in their case. It is important to phrase these questions in a way so as not to give the impression that you know what the judge would do. This tactic may help the parties and their attorneys play out what might happen if they go to court, and what the benefits are of settling in mediation.
- **Solutions.** The parties should be the driving force behind brainstorming solutions to their case. Mediators may offer support and creative alternatives, but the parties should not feel that the mediator's opinion is being forced upon them.
- **Creative Phrasing.** Mediators often find that some parties are not seeing the whole picture or considering all the consequences of their potential agreement. It is important that the parties maintain their right to self-determination, and that mediators do not give legal advice, and it is permissible to phrase questions that make the participants think further. Where mediator's think that a party's offer is counterproductive, communicate the offer with the party and explore how the other party may understand the offer before it is communicated.
  - "Have you considered…"
  - "Are there any other requirements…"
  - "Have you thought about…"
  - "Will [non-party] be impacted by this agreement?"
  - "Have you considered what the outcome of going to court will look like?"

- Reduce any agreement made in to writing. A mediated agreement has not been reached if the parties don't reduce the agreement to a signed written document.

After Mediation

- Establish which party will be responsible for filing the required paperwork with the court and the timeline for doing so. Set clear expectations surrounding the dismissal of the case.
- Make arrangements for who is responsible for paying the mediation fee.
- If there is an impasse, ask the parties if they would like to reschedule mediation for another day.
- File the results of mediation indicating whether a full or partial settlement was reached or if the mediation resulted in an impasse. See Notice of Completion of Mediation in attachments.

Domestic Violence Considerations

- In a case involving domestic violence, mediators must be registered with the GODR to mediate specialized domestic violence cases.

- When mediating domestic violence in person, it is important to have a game plan for the parties arriving at the mediation. Make sure to have the parties arrive separately to avoid the victim and their partner running into each other. Designate certain areas of the office that are separate where each party will be placed for the session.
- Where a case involving domestic violence is mediating in person, mediators should only conduct the mediation in a secure facility. A secure facility includes a building that has security present, easy access to exits, space for the parties to be continually separated, etc.
- If the parties are mediating virtually, be sure to place the parties in separate breakout rooms from the beginning and have a thorough understanding of how to operate your virtual platform to avoid placing the parties together on accident.
- During mediation, make sure to be the closest person to the door. While mediation is meant to be a safe environment, if the aggressor becomes angry you should have a quick way to remove yourself from the situation.
- Have security onsite and escort the parties to their cars.
- Understand that the victim may be looking for support, especially if they appear pro se. It is important to explain your role as a neutral, and that you are not the victim's advocate.

Advertising and Marketing

- To have a successful mediation practice, having a website or a known presence in your applicable court is imperative.
- It is important that when advertising mediation services, mediators should list themselves as a registered neutral with the Georgia Office of Dispute Resolution, and list the categories they are registered in. Mediators should not list themselves as certified, as the Georgia Office of Dispute Resolution does not issue certificates for its neutrals.
- Neutrals should only list the categories in which they are registered.
- Neutrals must not advertise that they guarantee a specific result. It is up to the parties to determine whether they will settle their case, and publishing success rates may cause the parties to feel forced to a certain resolution, which inhibits the parties right to self-determination.

Social Media Guidance

- Mediators are held to a higher standard of behavior whether they are in mediation or representing the alternative dispute resolution process in court.
- The Model Code of Professional Conduct for Court Professionals provides exceptional guidance on how the behaviors of courtroom professionals have an impact on the public trust in the judiciary. This includes what courtroom professionals post to social media. The Ethics Committee issued an opinion on the use of social media by neutrals and its impact on the public perception of the judiciary.
- Things to consider when posting to social media:
    - How will this be perceived by the public?
    - Does this promote confidence in the judiciary and the alternative dispute resolution process as a whole?
    - Will this post reveal courtroom personnel?

- Will this post reveal confidential communications that took place during mediation?
- Will this breach any of the ethical standards for neutrals?

Virtual Mediations

Virtual mediation has become the preferred way to resolve disputes between parties. Virtual mediation offers parties the same opportunity to participate in mediation from the comfort of their home. Common virtual platforms include Zoom, Skype, Google Meet, Microsoft Teams, and WebEx. With the use of online applications to conduct mediation, there is much to consider in terms of security awareness of each platform, and the mediator's ability to effectively conduct mediations virtually.

Technical Requirements

Neutrals should insure they are able to navigate and access the following technical requirements:

- Computer (laptop or desktop) with an updated camera and microphone.
- Fast, hi-speed, secure internet connection (no public wi-fi).
- Safe and accessible video-conferencing software with the following features:
    - Unlimited meeting with no time restrictions;
    - Break-out room capabilities;
    - Waiting room function;
    - Whiteboard function;
    - Screen sharing; and
    - Security features such as administrator controls, password protection, encryption, and authentication.
- Software:
    - Document sharing (e.g. Dropbox, Google docs, OneDrive);
    - Document Execution (e.g. DocuSign, Formstack, Adobe, printer/scanner). Mediators should explain the enforceability of electronic signatures to participants, and understand how to comply with any notary requirements; and
    - Up to date firewall and anti-virus installed.
- Preferred Payment method such as PayPal, Zelle, or Venmo.
- Create:
    - Technology Failure Protocols (whom and how to notify of internet, software, or hardware failure), and
    - Caucus protocols.

Preparing for the Mediation

Virtual Mediation Guidelines

Mediators should send their mediation guidelines to parties in advance of the mediation session to allow the parties to familiarize themselves with the virtual platform, and what is expected of them throughout the mediation session. It is the best practice to continue to go through the mediation guidelines at the start of mediation and to answer any questions or concerns the participants may have. Virtual mediation guidelines should include all guidelines that apply to in person mediations, with the addition of guidelines specific to virtual mediations.

Technology Assistance

Mediators should explain the software they are using and provide links to download said software and provide tutorials if possible. The experience with the mediator is just as important and will have just as much of an impact on the ability of the parties to settle. A little customer service often goes a long way, and not every participant is tech savvy and able to navigate the virtual platforms.

Confidentiality and Privacy

Mediators may need to limit and disable chat functions to protect the confidentiality of the mediation. Mediators should disable the recording function of the virtual platform to minimize the chances of a party recording the session. Mediators should also remind the parties that the recording of mediation in any form is strictly prohibited.

Mediation is a place where parties should feel safe to discuss some of the most intimate parts of their case. Often, this presents itself in domestic cases and particularly cases involving domestic violence. Mediators are encouraged to check in with each party to make sure they feel safe and are in a safe location where they will not be interrupted or overheard. Additionally, as stated above in general mediation guidelines, mediators should ensure that the parties are alone, or request that anyone else in attendance outside of the parties and their attorneys are notified of the confidentiality requirements. Everyone in attendance should be prepared to sign off on the mediation guidelines. Mediators who are registered to mediate domestic violence cases are instructed to review Appendix D of the Rules to ensure compliance with the domestic violence mediation requirements.

The Mediation Atmosphere

Mediators should log in to the virtual mediation session at least 15 minutes early to ensure the systems are functioning properly. Make sure all necessary devices are fully charged and a charging cable is readily available to avoid any disruption to the mediation environment.

Mediators should provide a quiet, professional environment in which to conduct the mediation. Mediators should take steps to prevent interruption and limit distractions that might interrupt the mediation.

- Turn off or silence all electronic devices;
- Silence any notifications through your email;
- Conduct the mediation in a space where any co-workers, pets, or family members will not cause a distraction; and
- Dress in a professional manner that is not distracting (i.e., no pajamas).

Preparing the Participants:

- Ask if the participants need a 10–15-minute review of the virtual platform;
- Exchange telephone numbers so the parties can connect with you if there are any technical issues;
- Make sure the participants name is clearly visible on their virtual screen;
- Let the participants how to contact you should they need to speak with you while you are in another room;

- Emphasize the importance of maintaining a mediation environment free from disruptions. Make sure the participants are not driving and they are in a space where they can safely focus on the mediation; and
- Ask participants to silence their electronic devices and notifications.

Competency

Mediators should understand their limits when conducting a virtual mediation. As virtual mediation becomes a preferred method to mediate cases in Georgia, mediators are expected to competently use their selected virtual platform, and problem solve when technical difficulties arise. Misuse can lead to serious consequences and potential breaches of the confidentiality of the mediation.

Mediators should be able to navigate their virtual platform on their own device, independently and without the assistance of any other individuals. Mediators should not use the devices of either of the parties or their attorneys, as this could lead to a potential conflict of interest or breach of confidentiality. Mediators should not elicit help from either of the parties when troubleshooting technical issues, as this is unprofessional and could also breach confidentiality.

Mediators who are unable to navigate the virtual platform are strongly encouraged to conduct mediations in person to avoid any potential violations of the Supreme Court ADR Rules. Virtual mediation is a luxury and a privilege, but where a mediator does not meet the competency standards to conduct mediation virtually while still complying with the Supreme Court ADR Rules, they should only conduct mediations in person.

Recording Mediations

Recording of mediation, whether virtual or in person, is strictly forbidden. The integrity of the mediation is compromised if any portion of the mediation is recorded. Mediators should keep in mind that the success of the mediation process lies in the party's willingness to trust the process and trust that their conversations with the mediator will remain confidential. Where recording is allowed in mediation, confidentiality is lost and there is nothing to prevent a party from using the recording in the future. For more information on recording in mediation, please see the memo attached on ___.

Additional Considerations

- Court Requirements: If mediating a court case, check to see if there are any additional requirements with the court and the ADR Program if conducting the mediation virtually.
- Domestic relations cases may require that the mediation is conducted entirely in caucus. Be aware of who the parties and their attorneys are to place them in the correct breakout rooms.
- Domestic relations cases must be screened for domestic violence. Mediators should familiarize themselves with the ADR program procedures to ensure that the case has been screened, and if not, plan to screen the case prior to the mediation.
- Have a Back-Up Plan!
    - Consider having another secure device to conduct the mediation if the main computer stops working.

    - Have a backup form of communication to continue the mediation (if feasible) if the virtual platform stops working.
    - Have an emergency plan for the appropriate procedures to follow should the mediation be interrupted unexpectedly.
    - Expect and prepare for technological difficulties, allow for extra time and be flexible.
- Practice before conducting a live virtual session. Seamless transitions and use of the virtual platform will make the session flow smoothly and promote confidence in the mediator's abilities.
- Be wary of your microphone. Assume your microphone is ALWAYS on and govern yourself accordingly.
- Respect your participants. As in any mediation session, be respectful of each participant and their technological abilities. Some participants may be unable to manage the virtual platform and it may be appropriate to move to an in-person session. It is important to discuss technological concerns prior to the mediation session to address any inability to participate.

Subpoena Recommendations

Confidentiality is the cornerstone of the mediation process that encourages parties to willingly participate and disclose aspects of their case that will encourage settlement. Mediation loses its luster when confidentiality is at risk of being lost. While there are many ways this can occur, one such way is when a party subpoenas the mediator to testify about the discussions that took place during mediation. Listed below are the applicable Supreme Court ADR Rules, and relevant statutes and case law to consider when responding to a subpoena to testify about a mediation.

Supreme Court Alternative Dispute Resolution Rules, VII. Confidentiality and Immunity:

Any statement made during a court-ordered mediation may not be disclosed by the neutral or program staff and may not be used as evidence in any subsequent administrative or judicial proceeding. The rules further state that neither the neutral nor any observer present with permission of the parties in a court ADR process may be subpoenaed or otherwise required to testify concerning a mediation in any subsequent administrative or judicial proceeding.

There are only a few exceptions to confidentiality, which should be explained to the participants at the beginning of the mediation. Confidentiality does not extend to the following situations:

- Attendance of the parties;
- Whether an agreement was reached;
- Threats of imminent violence to self to others; or
- Where the mediator believes that a child is abused or that the safety of any party or third person is in danger.

O.C.G.A. §24-4-408, Compromise and Offers to Compromise:

a) Except as provided in O.C.G.A. §9-11-68, evidence of:
   1) Furnishing, offering, or promising to furnish; or
   2) Accepting, offering, or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount shall not be admissible to prove liability for or invalidity of any claim or its amount.

b) **Evidence of conduct or statements made in compromise negotiations or mediation shall not be admissible**.

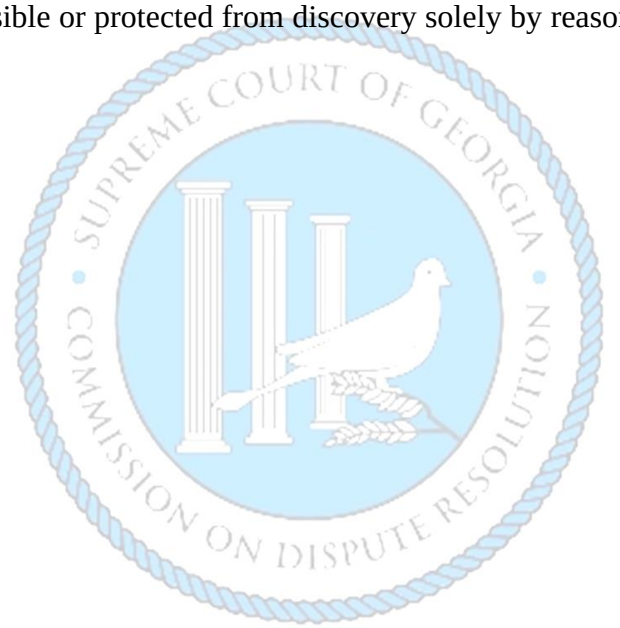
c) This Code section shall not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations and **mediation**. This Code section shall not require exclusion of evidence offered for another purpose, including, but not limited to, proving bias or prejudice of a witness, negating a contention of undue delay or abuse of process, or proving an effort to obstruct a criminal investigation or prosecution.

O.C.G.A. §9-17-3, Privilege Against Disclosure; Admissibility; Discovery:

a) Except as otherwise provided in O.C.G.A. §9-17-6, a mediation communication is privileged as provided in subsection (b) of this Code section and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by O.C.G.A. §9-17-4.

b) In a proceeding, the following privileges apply:
   1) A mediation party may refuse to disclose and may prevent any other person from disclosing a mediation communication;
   2) A mediator may refuse to disclose a mediation communication and may prevent any other person from disclosing a mediation communication of the mediator; and
   3) A nonparty participant may refuse to disclose and may prevent any other person from disclosing a mediation communication of the nonparty participant.

c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

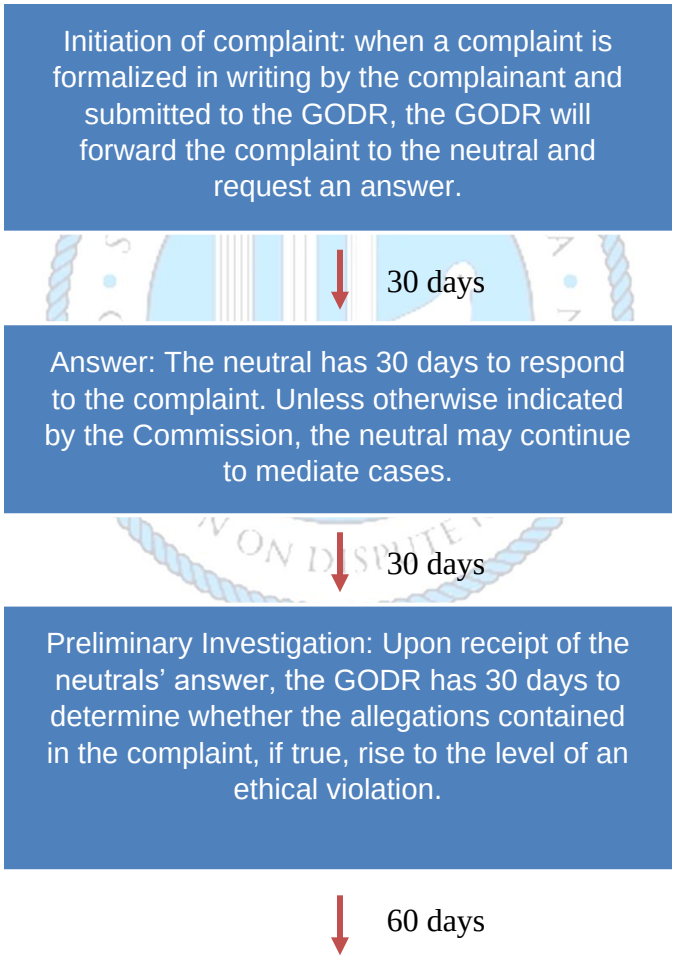


Ethical Review Process

The GODR is confident that its registered neutrals hold themselves to high professional and ethical standards. To hold neutrals accountable to this standard and to ensure the ADR Rules are being followed, there is an ethical review process to review complaints made against neutrals.

For mediators, their first thought when receiving a complaint is shock, and fear that their registration with the GODR will be affected. This is especially concerning for neutrals when they rely on mediation as their sole source of income, or where mediation is a large part of their practice.

While the procedure for processing complaints is addressed in Chapter 2 of Appendix C, below is a timeline to easily understand the timeline of the complaint process, and some tips on understanding what happens when a complaint is filed.



Investigation: The staff attorney has 60 days to investigate following the preliminary review period. A report will then be submitted to the Chair of the Ethics Committee.

Decision: The Ethics Committee shall make a decision on whether the Ethical Standards for Neutrals have been violated. The neutral will be notified in writing of the Committee decision.

Committee Options: The Committee will either dismiss the complaint, issue a private reprimand, issue a public reprimand, or recommend removal of the neutral's registration.

Frequently Asked Questions:

- **Do I need an attorney?** *While most mediators opt not to have an attorney present during the investigative process, mediators may have an attorney present if it makes them more comfortable.*
- **If mediation is confidential, what am I allowed to discuss to defend myself?** *The confidentiality of the mediation is waived to the extent necessary to allow the investigating attorney to explore the allegations of the complaint. The information provided during the investigation is confidential and will not be shared with anyone else outside of the investigating attorney, staff for the GODR, and the Ethics Committee. By filing the complaint, the complainant has opened the door to discussing anything that happened at mediation that is relevant to the allegations against the mediator.*
- **Can I still mediate if a complaint has been filed?** *Yes. Unless the Commission has determined that it is not in the best interest of the public for a mediator to continue mediating while the complaint is being investigated, a mediator may continue to mediate as if no complaint had been filed.*
- **Who will know if a complaint has been filed against me?** *During the early stages of a complaint investigation, only the GODR staff, the investigating attorney and the Chair of the Ethics Committee are aware of the complaint. Only if there is a public reprimand or a removal from registration will the public and the ADR programs know of the complaint.*

- **What does the investigation consist of?** *The staff attorney may speak to anyone who has knowledge of the subject matter of a complaint. The staff attorney generally speaks to the complaining party, the mediator, and the party's attorney if necessary.*
- **Do I need to submit any affidavits when a complaint is filed?** *Mediators are not required to submit anything other than their answer in response to the complaint. Mediators may submit affidavits or letters by the attorneys, if they are willing, to describe the mediation.*
- **Do I need to send a copy of my response to the complaining individual?** *No. Only send your answer to the staff attorney who contacted you.*
- **When can I expect to receive a decision back from the Committee?** *Neutrals may expect to receive a decision within 2-4 months following a complaint being filed. The Ethics Committee meets every two months, and if a complaint is filed too close to a committee meeting, the report may be presented at a later date to allow the complaint to be properly investigated.*

Attachments

Advisory Opinion 1

Advisory Opinion 2

Advisory Opinion 3

Advisory Opinion 4

Advisory Opinion 5

Advisory Opinion 6

Advisory Opinion 7

Advisory Opinion 8

Advisory Opinion 9

Ethics Opinion 1

Ethics Opinion 2

Ethics Opinion 3

Ethics Opinion 4

Ethics Opinion 5

Ethics Opinion 6

Ethics Opinion 7

Recording in Mediation Memo

Sample Mediation Guidelines

Sample Mediation Notice

Sample Virtual Mediation Guidelines

Sample Virtual Mediation Notice

Sample Subpoena Motion

Family Law Mediation Checklist

Sample Parenting Plan

DV Screening Packet

SDV Screening Packet

Sample Mediation Completion Form

Committee on Ethics of the Georgia Commission on Dispute Resolution

Advisory Opinion I

The Ethics Committee has been presented with a complaint concerning the assignment of cases by a program director or coordinator. Because the complainant has asked that the complaint not be forwarded to the director or coordinator in question, the Committee cannot process the complaint in the normal manner.

The question does not fall within the scope of the Ethical Guidelines found in Appendix C to the Georgia Supreme Court Alternative Dispute Resolution Rules. However, it is a question that has important implications for the health of Georgia ADR programs. For this reason, the Committee has determined that it would be appropriate to issue an advisory opinion as to the propriety of a program director or coordinator receiving cases from his or her own program for compensation.

The Committee issues the following opinion:

The assignment of cases by a program director or coordinator to himself or herself is fraught with problems. Although, it is perhaps unreasonable to expect that a program coordinator or director would never act as a neutral in a case in his or her own program or that he or she would not be compensated as other neutrals, the question of compensation should be approached very carefully.

1. A program director or coordinator should not be compensated for cases that are handled during time for which he or she is also compensated as director or coordinator of an ADR program.

2. Assignment of cases for which the neutral will be compensated should generally be made on a rotational basis so that the coordinator or director receives no more cases than other neutrals serving in the program.

5/28/96

Committee on Ethics of the Georgia Commission on Dispute Resolution

Advisory Opinion 2

Findings of Fact

1. In December 1995, Complainant applied to the magistrate court for a restraining order against the father of her child because of an incident occurring October 7, 1995. She was told that the magistrate court could not issue a restraining order and that she should apply for an arrest warrant and explain the situation to the magistrate judge at the warrant hearing.

2. At hearings January 8 and January 9, 1996, Complainant told the court that on October 7, 1995, the father of her child struck her when she had their 14 month old son in her arms. She told the court that the father of her child began abusing her when she became pregnant. In spite of the abusive behavior, she had allowed him visitation with the child until the October 7 incident. She said that after her refusal to let him visit the child he had harassed her with telephone calls and unwelcome visits. The court asked Complainant whether she wanted to have the father of her child arrested. She said that she did not wish to have him arrested but that she would not have come to court if she had not wanted some action taken. The magistrate court ordered that the parties attend a mediation session.

3. On January 19, 1996, Complainant spoke with the ADR program coordinator and voiced her concerns about mediation to the program coordinator. The program coordinator told her that the violence itself would not be mediated and that the only issue to be mediated was visitation for the father of her child. Complainant said that until the issue of violence was addressed, she was not willing to mediate the issue of visitation. The program coordinator asked Complainant a series of questions concerning whether Complainant was fearful of the father of her child. Complainant says that she answered truthfully that she was not intimidated by the father of her child but that she was concerned about the effect of his increasingly unpredictable behavior upon their son. She continued to raise this concern in a second conversation with the program coordinator on January 22.

4. In an order of February 1, 1996, the magistrate court judge rescinded his order of January 9 ordering the parties to mediation since "[t]he Court ... from its own observations of petitioner's representations and demeanor, finds petitioner . . . not amenable to the mediation process, and vociferously unwilling to consider or positively approach such process." He found that although there was probable cause to arrest and prosecute the father of her child for simple assault, simple battery, and harassing telephone calls and to require that he post bond for good behavior, Complainant had "unambiguously" told the court that she did not wish to have the father of her child arrested and prosecuted. The court admonished the father of her child about the seriousness of possible charges against him and "... admonished both parties regarding their respective

responsibilities as parents of the minor child ....”

5. Since the dismissal of the warrant application by the magistrate court judge, the matter was brought up again in the state court of the county. The father of her child pled guilty and was given probation on the condition that he go through a counseling program for batterers. Complainant is apparently pleased with this outcome and is willing to consider the question of visitation after he completes the counseling sessions.

6. An issue which underlies much of Complainant’s distress about this matter is a pending action for legitimation, custody, and name change brought by the father of her child. The action was originally filed in another county but was dismissed and refiled in the superior court in the county where Complainant lives with her son. Complainant continues to be very concerned that the actions of the magistrate court, and particularly language in the order of February 1, 1996, will adversely impact her position in the action for legitimation.

Conclusions

1. This complaint illustrates the complexity of handling cases which involve issues of domestic violence. The Georgia Commission on Dispute Resolution has spent two years studying the appropriateness of mediation in these cases. The general guidelines set out by the Commission in April 1995 state emphatically that mediation is not the appropriate forum to address the underlying criminal act of violence.

2. The Commission guidelines which indicate that the issue of violence is not appropriate for mediation should not be interpreted as precluding any discussion of the violence. To the contrary, other issues cannot be decided without a discussion of the important issue of safety for all parties.

3. In this case the magistrate judge ordered the victim to participate in mediation of issues of visitation which were not before the court. The victim, who states in her complaint that she feared that the violence could escalate, did not wish to participate in mediation of any issues. Further, she argued that the question of visitation could not be addressed without also addressing the issue of the violence. The court’s order rescinding the order of mediation recites the number of times that the victim objected to mediation and notes that both the Victim-Witness Assistance Program and the Coordinator of the ADR Program contacted the court about the victim’s reluctance to participate in mediation.

4. This case illustrates the important safeguard in the Commission’s guidelines that cases involving serious domestic violence [defined as systematic use of force or threat of force, or serious injury] should never be sent to mediation against the wishes of the victim. In its order rescinding the order sending the case to mediation, the court found probable cause to arrest the father of the victim’s child for the offenses of simple assault, simple battery, and harrassing

telephone calls. This finding certainly places this case within the category of cases involving issues of serious domestic violence which should never be sent to mediation absent the consent of the victim. That the case was inappropriate for mediation is further illustrated by the Complainant's feeling that she was mistreated by the court system because she was forced to make repeated contacts with the court before the court rescinded the order to mediation and because she was chided by the court in its order rescinding the order to mediation.

The Committee on Ethics of the Georgia Commission on Dispute Resolution

Advisory Opinion 3

Findings of Fact

Complainant and her former husband were divorced in Florida in 1990. Under the terms of the divorce decree, they shared custody of their son. After moving to Georgia in 1991, they continued under the terms of the decree, which provided that if they ceased to live in the same school district, the child would spend one year with one parent and the next with the other. Since moving to Georgia the parents lived in the same school district, and the child had attended the same school. Complainant's former husband remarried and moved to another county in 1995. Under the terms of the divorce decree, the child would be with Complainant's former husband during the 1995-96 school year. Complainant filed an action to modify custody.

Respondent, a psychologist and registered mediator, was hired by Complainant's former husband to evaluate his son's emotional and educational status to determine whether it would be detrimental for him to change schools. According to Respondent, she made it a condition of her employment that she would be a neutral evaluator and would report only to the court. Respondent was hired on August 16, 1995, and conducted tests on the child. She interviewed Complainant's former husband. She had only one brief telephone conversation with Complainant. After testing the child she told Complainant's former husband that the transfer to another school would have no detrimental effect upon him. The evaluation was paid for by Complainant's former husband.

An emergency hearing was held on August 22, 1995, in superior court. At that hearing, which took place primarily in chambers with only the lawyers, and later Respondent, present the court decided to send the case to mediation. He appointed Respondent to mediate the case. Both Complainant and Complainant's former husband agreed to Respondent's appointment. Complainant's attorney prepared the order which said that Respondent was the mutually agreed upon mediator and that she would make a report in the best interest of the child to the court if the parties did not resolve the matter by mediation.

The mediation was held August 25, 1995. Both Respondent and Complainant's former husband felt that an agreement had been reached. Complainant says that she never felt that an agreement was reached. A few days before the hearing that had been scheduled for September 28, 1995, after it was clear that there was no agreement, Respondent began to prepare a report for the court. Respondent met once with the child before the September hearing and once before the November hearing to ascertain how he was adjusting to the new school. She testified at the

hearing September 28, 1995, and also at the continuation of the hearing November 6, 1995. The judge who conducted the hearing and its continuation asked the attorney of Complainant's former husband to strike out all references to the mediation in the report. Respondent was instructed not to testify to anything that she learned in the course of the mediation. At the hearing September 28, 1995, Respondent told the court that she was concerned about the confidentiality that she might owe the child. The court said that the privilege rested with the child and the custodial parent and that Complainant's former husband waived the privilege. He acknowledged that Complainant objected to Respondent's testimony about the evaluation of the child but ruled that Complainant's former husband as the primary custodial parent had the final decision as to a waiver. Respondent made no further objection to testifying.

On November 15, 1995, the court entered an order modifying the Florida judgment. The court awarded joint custody to both parents but awarded primary physical custody to Complainant's former husband, giving Complainant what amounted to standard visitation. Complainant brought a complaint to the Ethics Committee of the Georgia Commission on Dispute Resolution concerning Respondent's conduct as a mediator.

At the hearing before the Committee Complainant said that she felt during the mediation that because the Respondent had tested the child and had spent a greater amount of time with Complainant's former husband than with Complainant, Respondent had already reached a conclusion favorable to Complainant's former husband about the appropriate custody arrangement. Complainant said that when she agreed to the mediation she did not realize the implications of accepting a mediator who had already done an evaluation of the child. Complainant said that as a mediator, Respondent's style was more directive than that which she experienced during the two previous mediations. Complainant contends that several parts of Respondent's report came from the mediation. She also contends that part of Respondent's testimony at trial came from knowledge that she could have only gained in the mediation.

Respondent responded that she was concerned about the confidentiality to which the child was entitled and that she did not want to testify. When asked if she felt any discomfort about her dual role at the mediation, she answered, "I'm a psychologist." She also said that she had never served in this dual capacity before and that she made the judges aware of her concerns. Complainant's former husband stated at the hearing before the Committee that nothing at the hearings was gleaned from the mediation. He noted that the judge was "very particular" about this.

Discussion

This case presents a troubling combination of ethical issues which touch on each of the major ethical areas discussed in Appendix C to the Georgia Supreme Court ADR Rules, the Ethical Guidelines for Mediators. The appointment of a person who has been involved in a custody evaluation as a mediator between the parties raises issues of neutrality and the appropriateness of dual roles. The mediator's reversion to the role of evaluator after the

mediation reached impasse raises issues of neutrality and a serious issue of confidentiality. Complainant's complaint of coercion in the mediation session raises the issue of self determination. Finally, there is an issue of overall fairness of the mediation process in this case.

The guidelines of the Academy of Family Mediators and the Georgia Psychological Association, and the Association of Family and Conciliation Courts to which Respondent referred the Committee, all discuss the issues involved in this complaint.

The Standards of Practice for Family and Divorce Mediators of the Academy of Family Mediators provide under the discussion of impartiality and neutrality (IV (C):

> A mediator's actual or perceived impartiality may be compromised by social or professional relationships with one of the participants at any point in time. The mediator shall not proceed if previous legal or counseling services have been provided to one of the participants. If such services have been provided to both participants, mediation shall not proceed unless the prior relationship has been discussed, the role of the mediator made distinct from the earlier relationship, and the participants given the opportunity to freely choose to proceed.

The Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association, adopted by the Georgia Psychological Association, provides in regard to couple and family relationships (§4.03[b]):

> As soon as it becomes apparent that the psychologist may be called on to perform potentially conflicting roles (such as marital counselor to husband and wife, and then witness for one party in a divorce proceeding), the psychologist attempts to clarify and adjust, or withdraw from, roles appropriately.

The Model Standards of Practice for Family and Divorce Mediation of the Association of Family and Conciliation Courts provides in regard to prior relationships (II (B)(1):

> A mediator's actual or perceived impartiality may be compromised by social or professional relationships with one of the participants at any point in time. The mediator shall not proceed if the previous legal or counseling services have been provided to one of the participants. If such services have been provided to both participants, mediation shall not proceed unless the prior relationship has been discussed, the role of the mediator made distinct from the earlier relationship and the participants have been given the opportunity to freely choose to proceed.

Respondent has provided the Committee with articles collected by Gail L. Perlman and Arnold T. Shienvold under the title "The Integrated Child Custody Evaluation: Using Mediation in Evaluations." These articles demonstrate the controversy in the fields of mediation and psychology around the subject of the use of one neutral to perform the functions of mediator and custody evaluator. This brief introduction to the problem makes it clear that the area is fraught

with danger. The authors of these several articles, who are in disagreement about the wisdom of a psychologist accepting dual roles, agree that if dual roles are accepted, it is essential that the roles be defined very carefully and their differences discussed thoroughly with the parties. There is great danger that even if the roles are carefully delineated and discussed with the parties, misunderstanding can result.

Conclusions

The effective date of the Ethical Guidelines for Mediators [whether that date is the September, 1995, date of the Commission's passing the guidelines or the December 13, 1995, date of the Supreme Court order creating Appendix C] occurred after the custody evaluation of the child, after the mediation, and after at least the September hearing. Therefore, there is a threshold jurisdictional issue in this case. This is true even though a draft of the guidelines had been mailed to every registered neutral, including Respondent, during the winter of 1995 and prior to any of the events in this case. Because of this jurisdictional issue, the decision which follows is advisory only.

1. Neutrality. Respondent was placed in an awkward situation by the court's appointing her as mediator. She and her attorney emphasize that Complainant made no objection and that Complainant's attorney prepared the order appointing Respondent. However, the ethical guidelines for mediators set out above require that when a mediator has served one party in a professional capacity in the past it is not appropriate for that person to act as a mediator. If the mediator has served both parties the mediation may proceed following a thorough discussion of the relationship if the parties freely choose to proceed. There is no indication that Complainant ever considered herself the client of Respondent. Before the emergency hearing, she had only one brief phone conversation with Respondent. Even though Respondent identified her role as that of neutral evaluator and made it a condition of her employment that she report only to the court, there is every indication that Complainant considered Respondent to be Complainant's former husband's expert. Under these circumstances, her neutrality was bound to be suspect. In addition, Complainant's former husband had reason to believe that he was in a strong position going into mediation because Respondent had informed him prior to either the emergency hearing or the mediation of her opinion that the transfer of the child to a different school would have no detrimental effect upon him. Although Respondent expressed concern about the relationship to the court there is no evidence that she asked to be relieved from the appointment as mediator.

2. Confidentiality. The portion of transcript furnished to the Committee shows that when asked to testify at the September 28, 1995, hearing Respondent told the court that she was concerned about the confidentiality that she owed the child. There is no indication that she voiced a similar concern to the court about the confidentiality that she owed the parties to the mediation. Even though the court ruled that information gained from the mediation was not admissible, it is impossible to believe that the testimony was not influenced by information and

impressions gained during the mediation.

3. Self-Determination. There are two issues regarding self-determination in this matter. First, there is an issue of whether the parties agreed to the mediation by Respondent voluntarily or whether they were ordered into the mediation process with a neutral who had been hired by one of the parties in another professional capacity. Although both parties ostensibly agreed to Respondent as the mediator, there was no attempt to thoroughly explore the question of dual roles. This level of voluntariness is required under the standards of the Academy of Family Mediators, the Georgia Psychological Association, and the Association of Family and Conciliation Courts. Respondent considered herself bound by the standards of these bodies. Unlike the Ethical Guidelines found in Appendix C, these standards were all in existence at the time of the events in this case.

Secondly, the issue of coercion has been raised. Another aspect of the damage that an appearance of bias can cause is the impression that the mediator is driving the parties towards a particular result. Whether this was the mediator's actual intention would be impossible to determine unless one participated in the mediation. However, the potential for a party to come away from the mediation feeling coerced is great if there is an impression that the mediator is biased.

In conclusion, the Committee recommends in the strongest terms that courts never appoint a mediator who has served the parties in any other professional capacity. The Committee further recommends that the court never allow a mediator to testify in a hearing involving parties to the mediation under any circumstances other than those that might arise in the context of one of the exceptions to confidentiality spelled out in the Supreme Court Alternative Dispute Resolution Rules. Finally, the Committee recommends that a mediator appointed by the court to mediate between parties with whom he or she has another professional relationship or asked to testify in a hearing involving parties to the mediation should decline to serve or to testify unless disobedience of a clear order of the court would put the mediator in danger of being found in contempt of court.

The Committee on Ethics of the Georgia Commission on Dispute Resolution

Advisory Opinion 4

The Committee on Ethics of the Georgia Commission on Dispute Resolution has been asked to consider the following situation: A registered mediator who is also a lawyer mediated a divorce case in which both parties were represented and a full settlement was reached. The divorce was finalized. Several months after the case was settled the former wife contacted the mediator to prepare a will and do some estate planning. She said that her ex-husband had suggested that she call the mediator. The mediator did not accept the representation himself, but one of his partners did accept the representation. The mediator asks for an opinion as to how this type of situation should be handled in the future. He specifically asks that the Committee assume that the other party to the mediation has no knowledge of the contact, since the fact that the former wife consulted her former husband about this matter is probably unusual.

Issue I: Conflict of Interest

Commentary to paragraph III B on Neutrality, Appendix C to the Supreme Court of Georgia Alternative Dispute Resolution Rules, is as follows: " It is the Commission's recommendation that a lawyer/mediator never accept any legal work arising out of the mediation." The acceptance of a professional opportunity during the pendency of the mediation or arising out of the mediation would constitute a clear conflict of interest. The threshold question in this case is whether this legal work arose out of the mediation. While it did not arise out of the mediation itself, it apparently arose out of the subject matter of the mediation since the divorce revoked any previous will as a matter of law.

Issue 2: Solicitation

Assuming that the matter did not arise out of the subject matter of the mediation, the next relevant inquiry would be whether the request for professional services is made so soon after the mediation that acceptance would give at least the appearance of impropriety. Paragraph V on Rules of Fair Practice, Appendix C to the Supreme Court of Georgia Alternative Dispute Resolution Rules governs referrals:

> Mediators should observe the same care to be impartial in their business dealings that they observe in the mediation session. In this regard, mediators should not refer parties to any entity in which they have any economic interest. As a corollary to this principle, mediators should avoid referrals to professionals from whom the mediator expects to receive future business. Similarly, mediators should avoid an ongoing referral relationship with an attorney that would interfere with that attorney's independent judgment.
>
> It is not improper to receive referrals from attorneys or parties. However, mediators

should be aware that their impartiality or appearance of impartiality may be compromised by referrals from parties or attorneys for whom they act as mediators on more than one occasion.

Discussion

The Florida Mediator Qualifications Advisory Panel recently considered a case in which a lawyer/mediator was contacted one and a half years after a divorce mediation and asked to represent one of the parties in the dissolution of a second marriage. The Advisory Panel concluded that since the representation would be for a completely different legal matter than that which was the subject of the mediation, the mediator was permitted to accept this future work. The Panel cautioned that the mediator must avoid solicitation prohibited by the Florida Rules and in addition avoid any appearance of solicitation. Therefore the length of time from the original mediation to the future representation was an important factor to consider.. *The Resolution Report* of the Florida Dispute Resolution Center, Volume 12, Number 2, June 1997

In a related case involving the potential conflict of a therapist/mediator the Florida Panel concluded that a therapist is permitted to mediate a divorce for a couple with whom s/he is providing marriage counseling as long as 1) both parties request the mediation; 2) everyone understands that the counseling role ceases once mediation is undertaken; and 3) the therapist/mediator is certain that s/he can maintain impartiality. The Panel also concluded that the mediator could mediate for former marriage counseling clients if 1) both parties were clients; 2) both requested the mediation; and 3) the therapist/mediator feels that s/he can maintain impartiality. *The Resolution Report* of the Florida Dispute Resolution Center, Volume 12, Number 2, June 1997

In an opinion from The Supreme Court of Texas Professional Ethics Committee (TX Eth. Op/ 496, November 1994) the Committee analogized a mediator to a lawyer acting as an adjudicatory official and concluded as follows: 1) During the pendency of the mediation the mediator is prohibited from accepting representation in a matter either related to or unrelated to the mediation on behalf of or adverse to a party to the mediation. A similar bar would apply to the mediator's law firm unless all parties agreed that the mediator's impartiality would not be compromised. 2) After the conclusion of the mediation neither the mediator nor anyone in his law firm could accept representation in a matter related to the mediation unless all parties agreed after full disclosure.

In *Poly Software International, Inc. v. Su,* 880 F. Supp. 1487 (D. Utah 1995), plaintiff's attorney had acted as mediator in a case involving the same computer software in a lawsuit between the present plaintiff and defendant, who were partners at that time, and a computer software company. The court considered whether the attorney should be disqualified and whether the disqualification should extend to his law firm.

The court discussed the importance of competing policy considerations: 1) encouraging the candor of the parties by assuring that confidential material will not be used by the mediator

in a subsequent case; and 2) defining reasons for disqualification narrowly enough to avoid discouraging lawyers from becoming mediators. The court concluded that the plaintiff's attorney should be disqualified and also disqualified the attorney's law firm, holding that "[w]here a mediator has received confidential information in the course of mediation, that mediator should not thereafter represent anyone in connection with the same or a substantially factually related matter unless all parties to the mediation proceeding consent after disclosure. (Id. at 1493).

Conclusions

Issue 1: Conflict of Interest

In the case at hand, the lawyer/mediator was asked to do legal work that did not arise out of the mediation but did arise out of the divorce action which was the occasion for the mediation. This request came several months after the mediation. Both parties to the mediation were aware of the request for representation of the former wife by the lawyer/mediator, the former husband having apparently suggested the representation. Although estate planning and preparation of a will are not adversarial in nature, it is possible that estate decision could have consequences adverse to some interests of the former husband. Information or insights that the mediator gained during the mediation might be used in the planning in a way that would be disadvantageous to the interests of the former husband. Therefore, in considering the ethical obligation of the mediator to remain free of conflicts, the representation should not go forward without permission of all parties.

To apply this conclusion to the lawyer/mediator's law firm is too harsh, however. The Rules and Regulations of the State Bar of Georgia, Standard 38, provides that if a lawyer is disqualified from serving a client because of a conflict of interest, the law firm of the lawyer is disqualified as well. This is because knowledge that a lawyer possesses is imputed to the members of his or her law firm as well. The same rule should not be applied to a mediator. The mediator is pledged to secrecy about all aspects of the mediation, not only client confidences.

Issue 2: Solicitation

Having discussed the question as a potential conflict of interest question, we turn to a consideration of the matter under the Rules of Fair Practice of Appendix C. Does the fact that the request for legal representation followed the actual mediation within several months raise an issue of the propriety of accepting future business so close in time to the date of the mediation? We conclude that it does not. However, mediators should be sensitive to the fact that future business referrals too close in time to a mediation could cause an appearance of improper solicitation.

The Committee on Ethics of the Georgia Commission on Dispute Resolution

Advisory Opinion 5

The Committee on Ethics of the Georgia Commission on Dispute Resolution received a request for an advisory opinion concerning the following practices in a juvenile court-connected mediation program:

- Mediation program staff members contact a juvenile's school, identifying themselves as mediation staff affiliated with the juvenile court, to request updated contact information for the juvenile. The information requested is limited to asking to speak with the juvenile or seeking contact information, such as confirmation of a correct address and/or telephone number. The contact might include leaving a reminder message for the juvenile regarding scheduling of the mediation session or confirming attendance at the session.

- Mediation program staff members contact a parent's place of employment, identifying themselves as affiliated with the juvenile court mediation program, for the purpose of attempting to reach the parent to discuss scheduling of the mediation or to confirm attendance.

- The same individuals contact the juvenile's relatives or emergency telephone contacts in the same manner as above, for the purpose of attempting to contact the juvenile or parents or confirming scheduling.

The reason for the contacts is to provide reminders or confirmation of a scheduled mediation session, or to schedule a session. Staff members indicate that it is sometimes difficult to reach juveniles and their parents with the information provided to them by the court. Additionally, they may need to contact parties within a time frame for which mail would not be practicable. In all of the above-described activities, the contact could involve speaking with more than one person before reaching the party or a person who could provide the information. By identifying herself or himself as a staff member with the juvenile court mediation program, the caller necessarily discloses that the juvenile is involved in a mediation process, and thus is in some way involved in a juvenile court case.

Issue: Confidentiality

Rule VII of the Georgia Supreme Court Alternative Dispute Resolution Rules provides in pertinent part:

> Any statement made during a court-annexed or court-related mediation or case evaluation or early neutral evaluation conference or as part of intake by program staff in preparation for a mediation, case evaluation or early neutral evaluation is confidential, not subject to disclosure, may not

be disclosed by the neutral or program staff, and may not be used as evidence in any subsequent administrative or judicial proceeding. Rule VII, A.

The issue posed is whether confidentiality is violated by contacts to school personnel, employers, or relatives or other third parties for the purpose of confirming contact information or scheduling matters.

Discussion

The contacts described above are for the purpose of confirming or clarifying information about scheduling to increase the likelihood that the juvenile and his or her parent(s) will attend the mediation session. This discussion assumes that the contact is limited to asking to speak with the juvenile or parent to confirm attendance at the mediation or to confirm contact information. It is assumed that the caller does not disclose anything about the subject matter of the mediation. However, the mere fact that the caller self identifies as a juvenile court mediation program staff member discloses to a third party that the juvenile is somehow involved with the juvenile court process. In the case of a juvenile who is the subject of the proceedings, this disclosure could lead to speculative and negative inferences by school personnel, parents' employers or other third party contacts. In the case of a juvenile who is simply a participant in a mediation as a victim or witness, any such inferences would be particularly damaging.

The provisions on confidentiality, ADR Rule VII and Appendix C, Chapter 1, A., II, are directed toward statements made by the parties during the mediation or the intake process. There is no provision that confidentiality extends to the fact that a party is involved in mediation. However, it is noted that juvenile court proceedings are different from other court proceedings in that they are closed, confidential proceedings.

The Committee concludes that the contacts described herein are not a violation of the confidentiality provisions of the ADR Rules. However, the Committee cautions that whether such contacts may violate juvenile court confidentiality provisions is a matter for those courts, and staff and practitioners are advised to seek appropriate guidance from their courts.

The Committee recognizes that juvenile court mediation programs have an interest in ensuring that juvenile parties and their parents attend scheduled mediation sessions. Furthermore, the Committee recognizes that juvenile court programs experience difficulties in maintaining effective contact with these parties. However, while such contacts do not violate the ADR Rules, there are obviously negative consequences to revealing that a juvenile is involved in juvenile court proceedings. In concern for the parties' privacy as well as the confidentiality that generally attaches to all juvenile court proceedings, it is recommended that the best practice is to use the contacts very sparingly in situations in which there is no other practicable way to contact the parties to confirm scheduling.

Issued: August, 2004

Conclusion

Contacts by juvenile court mediation program staff and mediators to school personnel, parents' employers, and third party contacts for the limited purpose of attempting to contact a juvenile party or parent to confirm scheduling or attendance at the a mediation session do not violate the confidentiality provisions of the Georgia Supreme Court Alternative Dispute Resolution Rules. Such contacts should not disclose anything about the subject matter of the mediation or the underlying juvenile court case, and should only be resorted to when effort to contact to the parties directly has repeatedly failed. This opinion does not address whether or not such contacts may violate any other confidentiality provisions regarding juvenile court proceedings.

Issued: August, 2004.

Issued: August, 2004

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:

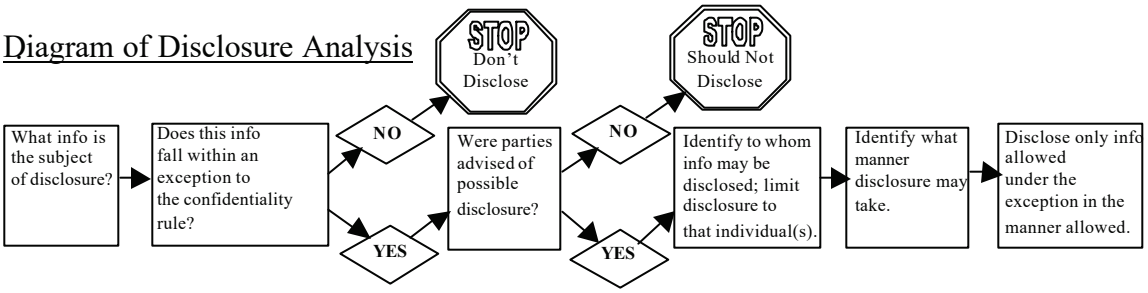
•Threats of imminent violence to self or others
•A written and executed agreement or memorandum of agreement
•Mediator believes that a child is abused
•Mediator believes that the safety of any party or 3rd person is in danger
•Issue of Appearance
•A statutory duty to report information
•Documents or 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?



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.

ADVISORY OPINION 7
COMMITTEE ON ETHICS
GEORGIA COMMISSION ON DISPUTE RESOLUTION

Executive Summary

This Advisory Opinion clarifies the ethical issues for mediators who are called upon to help parties make child support calculations under the provisions of Georgia's newly revised child support statute, commonly referred to as Senate Bill 382, which took effect January 1, 2007. The Committee's general conclusion is that the new law, while certainly longer and more complicated than the old law, poses no new ethical issues for mediators around the unlicensed practice of law. Helping parties use the state-created, legally sanctioned tools needed to agree on a legally acceptable level of child support is not the practice of law. More simply, if mediator practice under the current statute does not constitute the unlicensed practice of law, then there is little likelihood that practice under the new statute would. However, because the calculations require the parties to gather and negotiate over much more financial information, the new law presents unwary mediators many more of the same temptations to wander into unethical practice as existed under the old law. Examples of ethical practice and unethical practices are drawn from specific provisions of the new law.

I. Georgia's Revised Child Support Statute

January 1, 2007, was the much-anticipated implementation date for Georgia's revised child support statute, commonly referred to as Senate Bill 382 and codified as O.C.G.A. § 19-6-15. SB382 updates Georgia law by replacing the "percent of obligor income" model with a modern, "income shares" model of calculating legally appropriate child support awards.

The revised law now contains a statement of underlying public policy – to give children of unmarried parents the same economic standard of living they would enjoy if the family was intact. Also, for the first time the law mandates that its provisions be applied to both temporary and final orders for child support. The law has also changed in several general ways:

■ The new law is much longer than the law it replaces, growing from perhaps three printed pages to more than 50 pages, including tables of basic child support obligations charted by income and number of supported children;

■ The new law is more complicated than the law it replaces, requiring much more detailed financial information from both parents, more calculations and, presumably, more negotiations to arrive at a minimally-acceptable child support figure; and

■ The new law's complexity means that technological aids – in the form of electronic spreadsheets and Web-based calculators designed by Georgia's child support authorities – will likely be indispensable tools for mediators in helping parties determine child support.

These massive revisions have understandably sparked a great deal of anxiety and confusion among the many professionals in Georgia whose work involves child support issues.

The Commission knows that registered domestic relations mediators are among those who are working hard to adapt to this entirely new system. As they have studied the new guidelines, some mediators have expressed concern that the revised child support law poses a minefield of new ethical issues that could paralyze domestic relations mediation. Specifically, non-lawyer mediators worried that they could be engaging in the unlicensed practice of law (UPL) if they helped parties – especially unrepresented or *pro se* parties – make child support calculations required under the new law. Similarly, lawyer-mediators were fearful of accusations of professional conflict of interest if they, as neutrals, helped parties calculate child support.

These issues are of utmost concern to the Committee on Ethics, which seeks through this Advisory Opinion to provide needed guidance so mediators can approach the new child support law with confidence.[1]

II. UPL and Mediation in Georgia, Generally

To protect consumers from incompetent legal advice, all states prohibit the unauthorized or unlicensed practice of law by lay persons. But few states have addressed the question of whether and under what circumstances mediation constitutes the "practice of law." It is not an easy question to answer because of the usually overbroad and vague definitions that vary among states.

In Georgia, the "practice of law" is defined by statute and comprises the following activities:

- representation of litigants;
- conveyancing;
- preparing legal instruments;
- rendering opinions on titles to property;
- giving legal advice; and
- taking any action "for others in any matter connected with the law."[2]

Despite the breadth of this definition, none of these activities facially describes mediating, in which a "neutral facilitates settlement discussions between the parties" by focusing on "needs and interests rather than upon rights and positions."[3] In this sense, mediating is the antithesis of practicing law, the primary function of which is advocacy for a party.

Although the act of mediating would not in itself be construed as the practice of law, in Georgia certain actions that a mediator might take could raise UPL questions. For example, according to the statute above, non-lawyers are prohibited from preparing legal instruments of all kinds whereby a legal right is secured. But often Georgia mediators help their parties prepare settlement agreements, which are essentially contracts securing legal rights. Indeed, court-connected mediators are *expected* to help parties to a dispute prepare settlement agreements.

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[1] It should be noted that neither the Committee nor the Commission, through this Advisory Opinion, can bind the Georgia authorities who have jurisdiction over UPL matters or those who are empowered to discipline lawyers for ethical misbehavior.

[2] O.C.G.A. § 15–19–50.

[3] Ga. ADR Rules, I.

Another example: non-lawyers are prohibited by law from giving any legal advice, but inevitably legal issues and the law itself are frequently topics of discussion in mediations.

So, when do mediators in this state cross the line into UPL? Georgia authorities have not developed clear standards in this regard, but have chosen to address the issue indirectly through ethical standards. The Georgia Supreme Court's ethical standards for court-connected mediators provide some indirect constraints against UPL by advising that, in their explanation of the process, mediators should state that they will not give legal or financial advice[4] and parties should consult lawyers at any time and seek their review of any agreement prior to signing.[5] Also, the ethical standards state that lawyer-mediators should never provide legal advice.[6]

III. UPL and Calculating Child Support in Georgia

While only a few states have clarified when in their jurisdictions mediation constitutes the "practice of law," even fewer have addressed the narrower question of UPL when mediators help parties make child support calculations.[7] Regardless, the Committee on Ethics believes it is unnecessary here to consult the actions of other states. With respect to the unauthorized preparation of legal instruments, the Committee concludes that Georgia's state-created worksheets, schedules, Excel spreadsheet, and on-line calculator are merely tools to be used by the parties – along with anyone willing to help them, be they lawyer or non-lawyer. These tools are designed by Georgia authorities to guide the parties to state-sanctioned outcomes that provide the parameters of their final child support order. Using the tools is not actually the preparation of the settlement agreement itself, and merely providing guidance on how to use these tools is yet another step away from the preparation of the settlement agreement.

Even if using these tools was tantamount to helping the parties draft a settlement agreement, such an activity is clearly accepted mediator practice in Georgia and does not run afoul of the UPL standards.[8]

With respect to the prohibited practice of providing legal advice, the mediator's guiding or helping parties to use the child support tables and calculators is not the same as making judgments for the parties as to how their particular circumstances dictate the inputs to the calculations and deviations. Avoiding UPL in this respect requires the same self-restraint we currently ask of mediators. As always, the mediator's job is to help the parties negotiate the

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[4] Ga ADR Rules, App. C. I (A) (4).
[5] Id. at App. C. I (A) (8).
[6] Id. at App. C. I (E).
[7] Virginia is the only state to have addressed the issue. In their "Guidelines on Mediation and the Unauthorized Practice of Law" (Dept. of Dispute Resolution Services of the Supreme Ct. of Virginia, 1999), Virginia authorities concluded that under state law mediators who complete mandated child support worksheets for parties are not preparing legal instruments and not practicing law. They also determined that, "Providing information to the parties on how to calculate child support under the Guidelines or on the statutory reasons for deviating from them would not constitute the practice of law. Similarly, using a commercially available computer program to calculate child support does not constitute the practice of law."
[8] While less authoritative than the law of another state, the Association for Conflict Resolution classifies "work[ing] with parties to complete child support worksheets" as authorized mediation practice, thereby distinguishing it from UPL. This language comes from a resolution on the "Authorized Practice of Mediation," adopted by ACR October 23 and 24, 2006.

issues; it is not to provide advice or evaluations of strengths or weaknesses of various courses of action.

Georgia divorce mediators – both non-lawyers and lawyers – have been providing assistance in calculating child support under the current version of O.C.G.A. § 19-6-15 and its predecessors since at least 1992. Although arguably more complicated, the revised law would require no substantively different behavior of mediators than that already required. That is, the new law presents no new ethical issues, just more of the same issues mediators have faced under the old law. Therefore, if current mediator practice in calculating child support does not constitute UPL, neither would future practice under the revised statute.

The policy argument for allowing mediators to continue to help parties calculate child support is strengthened by reality – most unrepresented couples have no intention or means to engage an attorney for the calculation of child support. Therefore, they are likely better off working with the help of a mediator who has some experience and knowledge in working with this complicated statute than trying to do the calculations alone.[9] The results of a mediator-assisted child support calculation are more likely to be accurate and complete, thus making it easier for the courts to serve the best interests of the children and advance the policy behind the legislation. If mediators are expected to help parties more accurately calculate child support, then it is critical that mediators be well trained to perform this service.[10]

IV. Examples of Permissible and Impermissible Statements

Though the law has changed, best practices for Georgia court-connected mediators remain the same. Following are examples of statements a mediator might make when helping parties calculate child support under the new guidelines. In each example, the mediator speaking the permissible statement is merely facilitating. The mediator speaking the impermissible statement is providing legal advice, advising a course of action, or stating an opinion in a way that certainly undermines party self-determination and the mediator's impartiality. Such statements may constitute UPL for mediators who are not lawyers and raise charges of professional misconduct and conflict of interest for dual representation for lawyer-mediators.

Example 1:

Permissible: "The cash you said you receive at work each week needs to be counted as income. Let's talk about which category of income on this list you two think best describes this cash and your reasons for choosing that category."

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[9] This does not necessarily mean that mediators are automatically the most appropriate professionals to help *pro se* parties calculate child support or that expanding court mediation programs is the best way to accommodate *pro se* parties' needs for help with child support calculations. Ideally, low-income unrepresented parties should have sufficient access to low-cost or no-cost legal counsel such as that offered through Family Law Information Centers in some of Georgia's more populous jurisdictions.

[10] To that end, the Commission required in 2006 that registered domestic relations mediators train on the new guidelines in an approved six-hour course to be qualified to mediate child support issues in 2007. Georgia's approved domestic relations mediation trainers also are working to accommodate into their 40-hour curricula the substantial increase in time it takes to teach the new child support law.

Not permissible: "The cash you said you receive at work each week needs to be counted as income. Have you considered counting the cash as self-employment income, rather than as tips, so you get the benefit of the Self-Employment Tax Adjustment and reduce your Monthly Adjusted Income? You'll pay less child support that way."

Example 2:

Permissible: "Your Adjusted Income is less than $1,850 a month, which means we must fill out this section of Schedule E that allows you to receive a Low Income Deviation from your Presumptive Child Support Amount at the court's discretion. You will later have to describe in writing for the court why this deviation is or is not in the best interest of your child. What are your thoughts as parents on how claiming the Low Income Deviation will affect the welfare of your child?"

Not permissible: "If you can get your Adjusted Income to less than $1,850 a month, you can lower your Presumptive Child Support Amount by claiming a Low Income Deviation on Schedule E. Have you looked at the other schedules to see if you can reduce your reportable income or increase your child care expenses? With these low income figures, there's no way the judge is going to make you pay child support."

Example 3:

Permissible: "You've shown me that you spend $300 a month on counseling for your child. Both of you, please tell me your thoughts on which of these expense categories on the form – Extraordinary Educational Expenses, Extraordinary Medical Expenses, or Special Expenses of Child Rearing – is the appropriate one to account for your costs."

Not permissible: "If you count counseling for your child as a Special Expense of Child Rearing, the total of those special expenses has to be greater than 7 percent of your Basic Child Support Obligation for it to affect your spouse's Child Support Amount. Instead, you may want to look at whether the counseling can fit into Extraordinary Medical or Educational Expenses so you get the full benefit of paying that cost and increase the Child Support Amount your spouse must pay."

Example 4

Permissible: "The two of you should consider discussing these deviation issues because they are part of the child support law, and therefore the judge is expecting you to. The judge isn't requiring you to agree on the deviations here in mediation, but the judge wants you to at least try. If you don't agree here, the judge or a jury can always decide for you."

Impermissible: "I know this judge, and there's no way she is going to let you come out of mediation without an agreement on these deviations. She'll just send you right back in here. So you might as well stop arguing and start thinking about what you're willing to settle for."

V. Conclusion

Despite its complexity, the new child support statute and the calculating tools provided there under do not create more risk of mediators engaging in UPL or violating legal ethics rules than existed under the previous statute. By helping parties use the tools to make child support calculations and by incorporating the results into the draft memorandum of understanding or settlement agreement, mediators are engaging in essentially the same legally acceptable activities as under the previous statute. From both a legal and ethical perspective, it is incumbent upon mediators to merely facilitate the use of these tools and not to provide advice or direction that may constitute UPL or undermine the ethical principles of self-determination and impartiality.

In general, the Committee recognizes the transitional challenges as the courts, parties, their lawyers, and mediators implement the new law. The Committee advises the following:

- Know the law. More than ever, mediators must understand and be able to explain the child support law in order to mediate effectively.
- Stick to best practices. Rigorously respect your parties' self-determination and protect your impartiality.
- Use a checklist. Develop a checklist to make sure you cover every issue as you guide your parties through the required calculations and negotiations.
- Practice, practice, practice. While the law, the calculations, and the calculators may be intimidating at first, the more you use them, the easier they will become.
- Be patient. The law is new for everyone – mediators, program directors, parties, lawyers, judges, court clerks. It will probably take several months for the courts to adjust to the new law.
- Prepare to be busy. Because the new law is so complicated, mediators likely will be in great demand to help parties with child support calculations. Mediations of child support issues are likely to take longer as well, which means courts will try to meet their needs by hiring more mediators trained in the new guidelines.
- Have confidence. Many other states have adopted an income shares child support law and survived to tell about it. Georgia's mediators are more than up to this latest challenge.

Issued January 3, 2007, by the Committee on Ethics of the Georgia Commission on Dispute Resolution.

ADVISORY OPINION 8
GEORGIA COMMISSION ON DISPUTE RESOLUTION

Executive Summary

This Advisory Opinion focuses on the ethical obligation of mediation confidentiality and the ethical conduct to which all mediators, attorneys and parties involved in mediation should aspire. It is the mediator's responsibility to ensure that all mediation attendees understand the concept and benefit of, and the obligation embedded in, mediation confidentiality. Confidentiality is fundamental to the success of mediation because its assurance encourages participants to communicate freely, openly and honestly in mediation. Confidentiality applies to all types of cases. Other than some limited exceptions, it covers anything said or done in the mediation by all attendees (except* guardians ad litem*). It covers all documents and information produced for mediation. It covers notes and records of the court ADR program. Lastly, the confidentiality promise does not end with the mediation session or the ultimate resolution of the case by dismissal, settlement or court judgment, but obligates the mediator and all attendees indefinitely. The Commission on Dispute Resolution recognizes that the mediation field is competitive. However, all attendees should commit themselves to respect their promise of confidentiality regardless of the temptation to violate it.

The promise of confidentiality is fundamental to the success of mediation. By being assured that what they say and do in mediation will not be used against them in another tribunal, discussed in online forums, or published in tomorrow's newspaper, participants are likely to communicate freely, openly and honestly in mediation. And free, open and honest communication is more likely to result in satisfying and productive resolutions.

The Georgia Commission on Dispute Resolution has been approached to consider whether the confidentiality of certain mediations may have been broken when mediators, as well as attorneys, have appeared to have revealed details related to negotiations occurring within mediations in which they participated to the *Daily Report*, the legal news source in metro Atlanta.[1] The purpose of this advisory opinion is to outline the ethical responsibilities concerning confidentiality of mediation discussions and the conduct to which all mediators, attorneys and parties should aspire.

The Georgia Supreme Court Alternative Dispute Resolution Rules focus on mediator obligations, and the Commission on Dispute Resolution claims jurisdiction over ADR cases arising out of approved ADR court programs and over the conduct of registered mediators in any

[1] Some of the statements that have raised concerns in *Daily Report* articles include participants' discussing demands and offers made in a mediation that failed, but later went to a jury verdict; discussing procedures employed during a mediation that resulted in a mediated settlement; discussing evidence that was presented during a mediation session (even if the evidence was known/obtained outside the mediation); and sharing the content of a mediation statement with the reporter.

ADR setting. However, the Commission encourages respect for confidentiality by all mediation participants – be they mediators, attorneys, witnesses, observers, family, or friends. All participants and attorneys should commit and aspire to complying with the rules of confidentiality.

I. Why is Confidentiality Important?

Both federal law[2] and Georgia law[3] encourage litigants to settle their legal disputes by offering protection through the rules of evidence for offers of settlement and statements of apology or regret. The reason for the rules is to encourage more open communication among the litigants while limiting the disclosure of information that may not be probative, may be inadmissible, or may be prejudicial in a later legal proceeding. The same public policy is the basis for requiring that mediation communications be held confidential.

When the courts do act to protect confidentiality, the consequences for the disclosing participants can be severe. In 2012, a federal district court dismissed a plaintiff's lawsuit with prejudice (meaning he could not revive the lawsuit later) after the plaintiff intentionally e-mailed confidential details of the mediation to nearly four dozen other people, including potential witnesses in the case. The extensive e-mailed information included the mediator's statements and the defendant's settlement offers. In this instance, the District Court wrote, only the sanction of dismissal with prejudice,

> would adequately admonish [the plaintiff] for his complete disregard for and willful violation of the confidentiality rule, deter similar conduct by others in the future, restore respect for [the] Court's authority, repair the damage caused by [the plaintiff] to the integrity of the Court's ADR program and minimize prejudice to the [defendant].[4]

In Georgia, legal authority has acknowledged and honored the principle of mediation confidentiality. For example, in *Byrd v. State,*[5]a criminal conviction was reversed by the Georgia Court of Appeals, which held that the trial court erred by allowing confidential evidence from a mediation to be admitted at a subsequent criminal trial. By doing so, the trial court negated mediation's usefulness, the court wrote:

> For no criminal defendant will agree to "work things out" and compromise his position if he knows that any inference of responsibility arising from what he says and does in the mediation process will be admissible as an admission of guilt in the criminal proceeding which will eventualize if mediation fails.

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[2] 28 U.S.C. Rule 408, Compromise and Offers to Compromise.

[3] O.C.G.A. § 24-3-37.1, In action brought after unanticipated outcome of medical care, statements by health care provider not admissible and not admission of liability or admission against interest; O.C.G.A. § 24-4-408, Evidence, conduct or statements in compromise negotiations; O.C.G.A. § 24-4-416, Expressions of regret or error in civil proceedings against health care providers.

[4] *J. Michael Hand v. Walnut Valley Sailing Club*, Case No. 10-1296-SAC, (D.Kan., 2011).

[5] *Byrd v. State*, 186 Ga. App. 446, 367 S.E.2d 300 (1988).

II. What is Confidential? When Does Confidentiality Apply?

Just as confidentiality applies to all types of mediated cases, whether they are divorce cases, custody cases, personal injury cases, probate cases, misdemeanor warrant application cases, contracts cases or landlord/tenant cases, the nature of the case or the dispute does not affect one's ethical obligations.

Confidentiality covers anything said or done in the mediation, and the process, procedures and conduct of all of those present. Confidential communications include the mediator's and the attendees' words, actions, documents, information, and conduct in mediation, including the mediator's notes and records.[6] For mediators, one bright line that should never be crossed is if a mediation is ever discussed in public, the discussion should not include any information identifying a specific case. In order to honor the promise of confidentiality in mediations, parties and their attorneys should refrain from disclosures of any confidential mediation information whether in a public forum or in a less-open setting. Additionally, any audio or video recording of a mediation is strictly prohibited and would violate confidentiality.

While some documents and information may not be rendered confidential merely by their use in mediation, the fact that certain documents and information were used in mediation is confidential. Moreover, documents prepared exclusively to be disclosed for use in mediation cannot be used outside of the mediation. For example, if a party prepares an offer of settlement for use in mediation, that offer, if not otherwise discoverable outside the mediation, cannot be used for impeachment purposes if the party produces a different offer at a later trial.[7] On the other hand, production by a party of bank records otherwise discoverable would not later render the bank records confidential and immune from discovery.[8]

According to the ADR Rules, "neither the neutral nor any observer present with permission of the parties in a court-annexed or court-referred ADR process may be subpoenaed or otherwise required to testify" concerning any type of ADR proceedings in any subsequent

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[6] Although a mediator's notes and records are not subject to discovery or disclosure, the Commission recommends that mediators destroy their notes after a session if there is no expectation that further sessions will be scheduled in the near future. Mediators should also disclose this practice when going over confidentiality with the participants prior to their signing the mediation guidelines.

[7] The Commission recommends that documents produced exclusively for mediation be clearly identified as such: "Confidential Document Produced Solely for Mediation Purposes. Cannot be Used for Any Purpose Outside the Mediation."

[8] Alternative Dispute Resolution Rules, §VII(A).

administrative or judicial proceeding.[9] If mediators or observers receive a subpoena to testify about a mediation, they should file a Motion to Quash the subpoena.[10]

Lastly, any statements made as part of intake by ADR court program staff in preparation for a mediation are confidential, not subject to disclosure, may not be disclosed by the neutral or program staff, and may not be used as evidence in any subsequent administrative or judicial proceeding. Notes and records of a court ADR program are likewise not subject to discovery to the extent that such notes or records pertain to cases and parties ordered or referred by a court to the ADR program.[11]

III. What is Not Confidential? When Does Confidentiality Not Apply?

Confidentiality does not apply to:

- The fact that a mediation occurred;
- The names of the parties;
- The names of the attorneys;
- The names of the neutrals;
- Information on whether the parties appeared at the mediation;
- The outcome of the mediation or a written and executed mediation agreement (unless there is a confidentiality agreement or court ruling about confidentiality related to the outcome).[12]

The ADR Rules list specific exceptions to confidentiality:

- When threats of imminent violence have been made by a participant to self or others;[13]
- When the mediator believes that a child is abused or that the safety of any party or third person is in danger;[14]
- When legal claims or disciplinary complaints are brought against a neutral or an ADR program and arising out of an ADR process, confidentiality is waived only to the extent necessary to protect the neutral or ADR program.[15]

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[9] Alternative Dispute Resolution Rules, §VII(A).

[10] If assistance is needed for filing a Motion to Quash, the participant should contact the Georgia Office of Dispute Resolution and the local ADR program immediately.

[11] Alternative Dispute Resolution Rules, §VII(A).

[12] Although the parties' written and executed mediation agreement, once filed with the court, is a public document, a mediator exercising caution and best practices would refrain from using or referring to the mediation agreement or the contents therein.

[13] Alternative Dispute Resolution Rules, §VII(B) (a).

[14] Alternative Dispute Resolution Rules, §VII(B) (b). Nothing in the confidentiality rules negates any statutory duty to report information. For example, if a mediator or mediation participant is a mandated reporter of suspected child abuse or neglect under O.C.G.A. § 19-7-5(c)(1), then the reporting requirement trumps the confidentiality rules.

[15] Alternative Dispute Resolution Rules, §VII(B).

Moreover, in the case of *Wilson v. Wilson, the* Georgia Supreme Court created an exception to confidentiality "when a party contends in court that he or she was not competent to enter a signed settlement agreement that resulted from the mediation."[16] [17]

IV. Can Confidentiality be Waived?

The parties to a mediation may agree to allow certain other or all participants to be released from their confidentiality obligations in a limited or unlimited way. The subject of a confidentiality waiver should be treated as another point of negotiation between the parties. Parties should consent to waive confidentiality only after being fully informed of all of the benefits of confidentiality and the consequences of waiving it.

Moreover, waiver should be made only under limited circumstances and should never be included as a default or boilerplate provision in an agreement to mediate, mediation guidelines, or mediated agreement. Of course, any such confidentiality waiver should be made in a detailed written document signed by the parties.

V. Who is Obligated by Confidentiality?

All mediation participants – the mediator, the parties, the attorneys, observers, witnesses, supporters, family members, friends, and anyone else – pledge to keep their discussions confidential when they sign the mediation guidelines at the start of a mediation. The parties can make a promise of confidentiality whether or not they are represented by counsel. People who do not sign the mediation guidelines should not participate in the mediation. Mediators are, of course, ethically obligated to keep mediation communications confidential.

An exception applies to *guardians ad litem*. *Guardians ad litem* are appointed to serve as the eyes and ears of the court, to investigate and report to the court on a particular issue regarding a child or children. They cannot be prevented from disclosing to the court information they learn from the mediation. To balance the right of the parties to confidentiality with the *guardian ad litem*'s need for information, the ethics rules recommend:

> A mediator's opening statement should include an explanation that the *guardian ad litem* is a party to the mediation whose interests may be separate from those of the other parties. Parties should be informed of the limits on confidentiality presented by the *guardian ad litem's* presence in the joint session. The mediator should caucus with the

[16] *Wilson v. Wilson,* 282 Ga. 728, 732 (653 S.E.2d 702) (2007). It is important to note that the Georgia Supreme Court further highlighted that in *Wilson*, "the mediator did not testify about specific confidential statements that Mr. Wilson made during the mediation, but only testified about his general impression of Mr. Wilson's mental and emotional condition, thus diminishing the potential harm to the values underlying the privilege of confidentiality in mediations." *Id* at 733.

[17] In addition, the Georgia Supreme Court in *Wilson* sent a message to trial courts that "[a]lthough we conclude in this case that the trial court did not err in calling the mediator to testify, we acknowledge the significance of the confidentiality of the mediation process and the strong policy considerations that support it, and we thus urge trial courts to exercise caution in calling mediators to testify." *Id* at 733-734.

guardian ad litem separately. The *guardian ad litem* should not be present when the mediator conducts a caucus with a party.[18]

Except for any information provided by a *guardian ad litem*, judges should not inquire as to what occurred during a mediation, and the parties and attorneys are encouraged not to present in court what occurred during a mediation. For example: on a motion to enforce a mediated agreement, except for the capacity exception defined by the *Wilson* case and the other exceptions provided by the rules, no discussion or presentation should be made to the court as to what occurred during the mediation.

VI. How Long Does the Confidentiality Promise Last?

Except in cases where an exception applies, confidentiality applies forever. Confidentiality does not end by virtue of a resolution, whether arrived at during the mediation, after the mediation, or as a result of trial. Confidentiality continues after the conclusion of the mediation session. Confidentiality extends to proceedings in court.

A mediator's ethical obligations, including confidentiality, continue whether there is a mediated agreement, no mediated agreement, a dismissal, a jury verdict, or a court judgment. Like confidentiality of attorney-client communications, mediation confidentiality lives forever.

VII. Recommendations and Suggested Best Practices

There are good reasons to honor confidentiality, and we see no reason for any mediator – whether registered or not – to go against accepted best practice. Mediators contacted by the media are reminded that they should offer no comment about their mediations and respectfully redirect the inquirers to talk to the parties themselves.

In high-dollar and high-profile cases particularly, we recommend that mediators include in their routine discussions with the parties the issue of who, if anyone, should be authorized to speak about the mediation to outside parties and what, if anything, they should be authorized to say. You might start the discussion this way: "Would you like to talk about how you'll portray today's mediation to anyone not here today?" Or, "Should we discuss your preferences for the limits of my [the mediator's] responses to any inquiries I might receive? I'm planning to say 'No comment' unless you have interests in some other approach." Any agreement arising from these discussions should be memorialized in a document signed by all parties, attorneys, and the mediator, ideally in a private document separate from any mediated agreement, which will become public.

We believe also that it is in the parties' and attorneys' best interest to say as little as possible about their mediations. Attorneys certainly would not want to earn a reputation for being indiscreet about their clients' mediation discussions. We recommend that attorneys and clients on both sides discuss together how participants should respond if approached by the media or others outside the mediation. Again, any confidentiality waivers should be documented in a signed agreement that clearly addresses all the relevant issues such as who among the

[18] ADR Rules, Appendix C, Chapter 1, Section A. II

participants is permitted to speak, about what, and to whom. It may also be sound practice for all participants to restate in their mediated agreement their understanding of and commitment to confidentiality.

VIII. Conclusion

The Commission is aware of how competitive the mediation market is, and it supports the publicizing of cases and outcomes of interest. It is pleased that mediation is now an integral part of trial practice in Georgia. Of course, anyone is free to discuss anything about a case that is in the public record. But mediators are bound by their ethical duties of confidentiality, and they should not discuss anything that happened during mediation, or anything else that is confidential or privileged. And mediation attendees should understand the benefits to themselves of limiting public disclosures of confidential mediation communications.

Two rules of thumb can help all attendees avoid problems: "What happens in mediation stays in mediation" and "Mediation confidentiality is forever."

Issued November 18, 2013, by the Georgia Commission on Dispute Resolution. Edited in March 2024.

ADVISORY OPINION 9
GEORGIA COMMISSION ON DISPUTE RESOLUTION

Executive Summary

This Advisory Opinion focuses on a Georgia Court of Appeals case and the practice of negotiating past-due child support. The case prohibits any action by the court or the parties that reduces the total amount of child support owed under an existing court order. First, the total arrearage amount must be accurately calculated using the existing child support order and records of payments made and received. Only then can any repayment plan for child support owed be negotiated or ordered. If past-due child support cannot be accurately determined, then no negotiations around its repayment can occur; instead, a court must hold a hearing to determine the true amount of past-due child support. ADR programs and mediators are encouraged to inform parties prior to mediation that they must bring with them copies of the existing child support order and records of child support payments made and received.

Helping parties to calculate and negotiate arrearages in child support payments has been a common practice among Georgia mediators for many years. The exact amount of past due child support can be difficult to compute as parties' records may be incomplete or lacking, or the parties may have informally agreed to alternative arrangements. Often, as part of a settlement, parties agree upon an estimated arrearage amount that may be lower than the actual amount.

In March 2015, the Georgia Court of Appeals, in *Wright v. Burch*, 331 Ga. App. 839, 771 S.E.2d 490 (2015), issued a decision that requires a significant change to this long-standing practice around the calculation and negotiation of child support arrearages. The Court held that neither a trial court nor the parties could reduce the total amount of child support owed under an existing court order. Only a repayment schedule of the past-due child support can be ordered by the court or negotiated by the parties, as long as the amount of the arrearage can be accurately determined.

To help Georgia mediators to understand the *Wright* case and to prevent them from unwittingly violating the case's holdings, the Commission on Dispute Resolution issues this advisory opinion.

I. What does *Wright* Say?

The parties in *Wright* finalized their divorce in Tennessee in 2003. As part of their agreement, they stipulated that any changes to the terms of their divorce must be made by written agreement of the parties. In May 2013, Wright filed a petition to domesticate the Tennessee divorce decree in Georgia and for money paid and received. The parties agreed in writing to reduce the amount of Burch's past-due child support and submitted the modification to the trial court, which made their agreement an order of the court.

The Court of Appeals affirmed that this modification procedure was correct. However, the Court found that the parties' 2013 agreement and the trial court's order were invalid because they attempted to reduce the amount of child support arrearage Burch owed Wright. A court "cannot simply forgive or reduce the past-due amount owed under a valid child support order," the Court of Appeals wrote, and it ordered the trial court to hold a hearing to determine "the proper amount of any child support arrearage as of the date of the hearing, but disregarding the parties' purported settlement of October 2013 as to such arrearage." *Wright*, 331 Ga. App. at 845. The trial court is then free, the Court ruled, to enter an order laying out a payment schedule of that arrearage, as long as the best interests of the parties' children are met.

Domestic relations mediators must be clear that, under *Wright*, any court order or any party agreement that reduces the total amount of child support arrearage is void because such a reduction "constitutes an improper, retroactive modification of support obligations." *Id.* at 844. *Wright* also made clear that a trial court is authorized only to determine the "true amount" or "proper amount" of the arrearage at issue and to enter orders for repayment. *Id.* at 845. That is, once the total arrearage is accurately calculated, only the repayment schedule, not the total arrearage, can be modified by party agreement or court order.

II. What Does *Wright* Require in Mediation?

It is common for parties (and their attorneys) to come to a mediation without having filled out the financial affidavits required to finalize a divorce or child support modification. Likewise, parties seeking to file a contempt action for nonpayment of child support often attend mediation without records confirming any child support payments made or received, or without a copy of the existing child support order.

Wright requires that any negotiations on the repayment (not the amount) of child support arrearage must be based on an accurate calculation of child support owed. What is a mediator to do if the total arrearage cannot be determined because the parties do not have the necessary information? Can the parties simply agree on a good faith estimate of the arrearage amount? Can the court itself make a good faith estimate? *Wright* says no.

III. What Issues Can Be Mediated?

The role of the mediator is to help the parties determine an accurate amount of child support and assist them in crafting a repayment plan. If parties bring to the mediation session copies of the existing child support orders along with documentation of monies paid and received, then the mediator can help the parties with calculating an accurate amount of arrearage. This total amount can then be used in determining the schedule for repayment.

However, if this key information is not available, then the total amount of arrearage cannot be accurately determined and parties cannot formally agree on an estimated amount. The court will have to hold a hearing to determine the actual arrearage amount. In these cases, until the hearing, the mediator may want to look for alternative solutions such as a temporary agreement so that the custodial parent is receiving some child support. In addition, the mediator

can facilitate discussion of the underlying cause for the missed payments and work to devise a plan for future action.

IV. Recommendations and Suggested Best Practices

If the opportunity arises, mediators should inform the parties and their attorneys directly (or through the court ADR program staff) that any claims regarding unpaid child support must be supported by a copy of the existing child support order and records showing child support payments made and received. It is not enough for both parties to simply agree on an estimated arrearage amount. If there is no way for parties to calculate the actual child support arrearage, then the arrearage amount must be reserved for judicial determination. However, this does not limit the parties' ability to negotiate a repayment schedule for an amount to be determined later by the court.

Issued November 2, 2016, by the Georgia Commission on Dispute Resolution.

The Committee on Ethics of the Georgia Commission on Dispute Resolution

Ethics Opinion 1

Introduction

The Committee on Ethics is asked to consider a complaint against a mediator (Respondent) arising out of a mediation which the Respondent conducted September 24, 1997. The parties were sent to mediation after they appeared for trial on the issue of custody and visitation of the ten-year-old daughter of the Complainant and the father of the child. The parties and their counsel went directly to the Respondent's office from the courthouse. Both parties were represented by counsel at the mediation.

The mediator and the parties worked to establish a visitation schedule with a calendar on a board. No written agreement or memorandum of understanding was finalized at the mediation. On September 25, 1997, the Respondent sent a memorandum to both attorneys containing the points of what she described as an "agreement settling all issues." She reduced the visitation schedule from the board to narrative form and also attached a copy of the schedule, as it appeared on the board, in calendar form.

On October 6, 1997, the Complainant sent a letter to her attorney ". . . rescinding any and all agreements which you may believe to have been made at the mediation session on September 24, 1997." The Complainant asked the Respondent for any documents pertaining to the mediation which contained her signature or that of her attorney. The Respondent responded that the file was privileged and that she could not send the contents of the file or any part of the file to her. After the ADR Program authorized her to release to the Complainant documents which were already furnished to the judge, the Respondent did so. She also executed and sent to both parties an affidavit to the effect that the mediation was held and that the parties had reached agreement.

On October 7, 1997, the Complainant's attorney filed with the clerk of Superior Court a Notice of Withdrawal and Request to Withdraw from representation of the Complainant. Following a hearing, the Superior Court granted the father of the child's Motion to Enforce Settlement on December 19, 1997.

Issues

1. Voluntariness

A. Process issues

1. Whether the Respondent fully explained the mediation process so that the Complainant had the opportunity to bargain from a position of informed consent.

2. Whether the Respondent had a duty to discuss with the Complainant the pros and cons of proceeding with or without an attorney present at the mediation.

3. Whether the Respondent should have informed the Complainant that a guardian ad litem could be present to represent the minor child.

4. Whether the Respondent's asking the parties to sign a blank agreement "checkoff"and billing statement form at the beginning of the mediation violated ethical principles regarding voluntariness.

B. Coercion

Whether the Respondent coerced the Complainant during the mediation process.

2. Neutrality

A. Whether the fact that two members of the Respondent's law firm were on a witness list for the father of the child created a conflict of interest that should have been revealed.

B. Whether the Respondent displayed personal bias against the Complainant during the mediation.

3. Confidentiality

Whether the Respondent breached confidentiality in executing an affidavit about the fact that a mediation was held and that an agreement had been reached.

Findings

1. Voluntariness

A. Process issues

Many of the points of the complaint go to the question of how thoroughly the Respondent explained the mediation process. The Ethical Standards for Mediators, which appears as Appendix C to the Georgia Supreme Court Alternative Dispute Resolution Rules, provide at I.A. as follows:

> *A. 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:*
>
> *1. An explanation of the role of the mediator as a neutral person who will facilitate the discussion between the parties but who will not coerce or control the outcome;*
> *2. An explanation of the procedure which will be followed during the mediation session;*
> *3. An explanation of the pledge of confidentiality which binds the mediator and any limitations upon the extent of confidentiality;*
> *4. An explanation of the fact that the mediator will not give legal or financial advice and that if expert advice is needed, parties will be expected to refer to outside experts;*
> *5. An explanation that where participation is mandated by the court, the participation of the parties is all that is required and settlement cannot be mandated;*
> *6. An explanation that the mediation can be terminated at any time by the mediator or the parties;*
> *7. An explanation that parties who participate in mediation are expected to negotiate in an atmosphere of good faith and full disclosure of matters material to any agreement reached;*
> *8. An explanation that the parties are free to consult legal counsel at any time and are encouraged to have any agreement reviewed by independent counsel prior to signing;*
> *9. An explanation that a mediated agreement, once signed, can have a significant effect upon the rights of the parties and upon the status of the case.*

The Complainant contends that a sense of urgency pervaded the mediation. The parties and counsel went to the courthouse prepared for trial. When the judge ordered the case to mediation, the attorneys for the parties agreed upon the Respondent as the mediator. She was called at home by the judge. The parties and the attorneys walked directly to the Respondent's office from the courthouse and immediately began the mediation. The Complainant contends that because of this, and because of the Respondent's failure to adequately explain the mediation process, she was not prepared for what transpired. Specifically, she contends that the Respondent failed (1) to explain that the mediation could be terminated at any time, (2) to clarify her right to consult her lawyer, and (3) to make her aware that a guardian ad litem could be present to protect her daughter's interests.

The Committee finds that the mediation was conducted under circumstances which did

lead to a sense of urgency. Both the Respondent, who was called from her home to come immediately to the office to conduct the mediation, and the parties and counsel, who came directly from the courthouse, must have felt rushed.

The Committee believes that when a mediation takes place in an atmosphere of urgency, there is a danger that problems will arise because parties do not fully understand the process. It is hard to imagine a situation where there is a genuine need to rush into a mediation. The Committee feels that it is important that every mediator strive to begin every mediation in an atmosphere of calm. It is particularly important that parties unfamiliar with mediation are allowed ample time to feel centered and ready to begin. However, the Committee finds that the Respondent's opening statement was detailed and calculated to give parties an opportunity to collect themselves, to become familiar with the process, and to ask questions. The Committee finds that the mediation itself, which took five hours, was not rushed in any respect. While it is true that the mediator herself worked through lunch, there is no indication that anyone else did so. Therefore, the Committee concludes that the Respondent was not responsible for any feeling of urgency experienced by the parties to the mediation and that she tried to create an atmosphere of calm.

The Committee finds that the Respondent did not tell the parties of their right to terminate the mediation. Although the Respondent's opening statement as described at the Ethics Committee hearing emphasized party choice over and over again, she did not make clear to the parties their right to terminate the mediation. This is an important right, and parties should specifically understand that while they may have been ordered by the court to attend a mediation session, they have the right to terminate the session. Therefore, the Committee concludes that the Respondent technically violated the Ethical Standards for Mediators, I.A.6.

The Complainant contends that at various times during the mediation she was confused about the details of the plan under discussion. She says that she was confused by the chart developed on the board but that it was her understanding that at the end of the day she would still have an opportunity to review any agreement with her lawyer. The Complainant's attorney was present and available for consultation throughout the mediation. The Complainant complains that the Respondent did not discuss the pros and cons of proceeding with or without an attorney present at the mediation. The Committee finds that the Respondent had no such duty. The Mediation Guidelines prepared by the ADR Program provide in part that "If an agreement is reached, all parties will have ten (10) days to have it reviewed by their respective attorneys." Although the Committee finds that the language from the Mediation Guidelines regarding attorney review of any agreement is indeed ambiguous, the Committee finds that the intent of the language from the Mediation Guidelines is that a party who is <u>not represented</u> at the mediation will have an opportunity to have any agreement reviewed by a lawyer. Although the Committee finds that this provision should be clarified in the guidelines, the Committee concludes that responsibility for ambiguity cannot be attributed to the Respondent.

The Committee finds that the Respondent did not inform the parties that a guardian ad litem could be present at the mediation. A guardian ad litem is appointed by the court and owes

a duty to report to the court. Because he or she may not be able to keep confidentiality, the guardian's presence at a mediation conference may be problematic. Since custody agreements are always subject to review by the court, the opportunity for a guardian's input at that juncture can provide protection for the best interest of the child. The Committee concludes that a mediator has no responsibility to inform parties that a guardian ad litem can be appointed or that a guardian could be present at the mediation.

The Committee finds that the Respondent asked the parties to sign in blank a "Mediation Report" form prepared by the ADR Program. The report was filled out at the end of the mediation, indicating that the mediation lasted from 10:15 a.m. until 3:00 p.m., that a full agreement was reached, and that the amount owed by each party was $296.88. The Committee concludes that while asking parties to sign such a form in blank at the beginning of the mediation is not good practice, it is not an ethical violation.

B. Coercion

The Complainant contends that she was coerced by the Respondent at many points during the mediation. The Committee finds that there is no persuasive evidence that the Respondent coerced the Complainant. The Complainant is a very articulate and forceful person who was represented by counsel throughout the mediation. Although there is evidence that the Complainant cried during the mediation and that she may have felt some confusion at different points, it is not at all unusual for parties to experience a wide range of emotion during a mediation. There is no indication that there was anything unusual about the atmosphere of this mediation. Several people present described an atmosphere of relief and lightheartedness at the conclusion of the session. The Complainant's admission at the Committee hearing that she was in general agreement with the content of the visitation schedule would be an odd coincidence had she been coerced. The Committee concludes that the Respondent did not coerce the Complainant at any point.

2. Neutrality

A. The Committee finds that two members of the Respondent's law firm were on a witness list for the father of the child. Further, one of the two lawyers had represented the Complainant in another matter. However, the Committee also finds that the Respondent was unaware of these connections to the parties. The Ethical Standards for Mediators create no duty to conduct a search for conflicts that would have revealed the connections. Therefore, the Committee concludes that the Respondent committed no ethical violation involving a conflict of interest.

B. The Complainant contends that the Respondent exhibited personal bias toward her. The Committee finds that there is no persuasive evidence of personal bias on the part of the Respondent and concludes that there was no ethical violation in this regard.

3. Confidentiality

The Respondent executed an affidavit that was used in the Motion to Enforce Agreement brought by the father of the child. The affiant stated that the mediation occurred. The affiant stated at Paragraph 5 that "At the conclusion of the mediation, when the parties announced an agreement, the attorney for the Complainant turned to the Complainant and specifically asked her if what was contained on the board was her agreement. The Complainant answered in the affirmative." The affiant stated at Paragraph 6 that "At the conclusion of the mediation, when the parties announced an agreement, the attorney for the father of the child turned to the father of the child and specifically asked him if what was contained on the board was his agreement. The father of the child answered in the affirmative." The affiant concluded that "When the parties and their attorneys left my office, it was with the understanding that they had reached a full and binding agreement."

The Georgia Supreme Court Alternative Dispute Resolution Rules provide at VII that "Neither the neutral nor any observer present with permission of the parties in a court-annexed or court-referred ADR process may be subpoenaed or otherwise required to testify concerning a mediation . . . in any subsequent administrative or judicial proceeding." By executing an affidavit, the Respondent was doing voluntarily that which she could not be required to do - testifying. The Committee finds that the execution of the affidavit was not good practice and was very unwise. Further, the Committee concludes that when she revealed in Paragraphs 5 and 6 what was said at the mediation, she used language that might have been broader than necessary to determine whether an agreement was reached.

Sanctions

The Committee has found one ethical violation which is technical in nature. Although the Respondent carefully explained the concepts of self-determination and choice to the parties, she did not specifically explain the right of the parties to terminate the mediation. This was a technical violation of Ethical Standard I.A.6. The Committee believes that technical ethical violations could be found in every mediation. There is no need to sanction technical violations of the Ethical Standards for Mediators. The purpose of sanctions in the context of ethics is to improve mediator performance through education, not to punish. The purpose of stringent sanctions such as removal from registration is to protect the public. The awareness of a technical violation is sufficient to educate the mediator to guard against such a violation in the future.

The Committee finds that the wording of Ethical Standard II and Georgia Supreme Court Alternative Dispute Resolution Rule VII, Section A, could lead to confusion regarding the mediator's testimony as to the <u>fact of the existence of an agreement</u>**.** This confusion could result from the provision of Rule VII that "An agreement resulting from a court-annexed or court-referred mediation . . . is not immune from discovery unless the parties agree in writing." That

language could be read to provide that the existence of oral agreements as well as written agreements is subject to discovery. Even under this reading of the rule, the Respondent may have gone further than necessary to determine whether an agreement was reached when she testified to what was said during the mediation. The rules need to be clarified, and the concept of confidentiality needs to be discussed more thoroughly in mediation training.

Summary

There are several lessons to be learned from this case concerning "best practice." First, mediators should never allow a sense of urgency to pervade the mediation session. The elements of the opening statement should always include the explanation of mediation found at Ethical Standard I.A. Secondly, mediators should never ask parties to sign a form in blank to be filled out later. Although this did not lead to an ethical problem in this case, it could have done so. Thirdly, program rules and guidelines should be clear about the right to have an attorney present. When program rules provide that parties may have an attorney review an agreement after mediation and that the attorney may object to any terms of the agreement within a specified period, the rules should clearly state whether a party who is represented by an attorney at mediation has the right to have an agreement reviewed by an attorney after the mediation.

Finally, this case points up the dangers inherent in failing to reduce an agreement to writing at the mediation session. Where there is agreement, a written memorandum of agreement or points of agreement should be made by the mediator or counsel for the parties and signed by the parties at the mediation. To recommend that all agreements be reduced to writing in at least outline form and signed by parties before leaving the mediation does not mean that mediators should coerce unwilling parties into finalizing an agreement before leaving. If the points of agreement are not clear, the mediator should call a break, schedule another session, or do whatever is necessary to allow parties to satisfy themselves that there is agreement. What is recommended is that if it is clear that parties are in agreement, this agreement should be memorialized while the parties are present. There are several reasons for this recommendation. A written agreement guards against the danger of misunderstanding. Reducing agreements to writing while all parties are present provides the best opportunity to correct misunderstanding. Since the writing would be the highest and best evidence of the agreement, a signed written agreement guards against the danger that the parties will try to call the mediator to testify. Finally, a written agreement protects against serious problems of proof when there is a motion to enforce an oral agreement allegedly made in a highly confidential meeting.

The Committee on Ethics of the Georgia Commission on Dispute Resolution

Ethics Opinion 2002-1

Introduction

The Committee on Ethics was asked to consider a complaint against a mediator (Respondent) arising from a mediation conducted by Respondent on January 18, 2002. The Committee conducted an evidentiary hearing in this matter, taking testimony from all parties who were present at the mediation and other witnesses. The Committee issued a letter opinion to Respondent shortly after the hearing, but believes that a published formal Opinion may serve as a useful guide for mediators. The Committee's Opinion is based upon the following findings of fact.

The parties, former spouses, were referred to court-connected mediation to attempt to resolve issues concerning child support arrearage and unpaid medical expenses for their children. The mediator was selected by counsel for Complainant. Both parties were represented by counsel at the mediation session.

Because of facility limitations that day, some caucuses were conducted in a hallway (with no one nearby who could overhear). The conduct which is the subject of this complaint occurred during such a caucus with the ex-wife (Complainant) and her attorney. The mediator remarked to Complainant (and her counsel) that he didn't understand what she ever saw in her former husband, and that "…he must've had a really big ****." He further told Complainant that she needed to "start thinking with what's between your shoulders". Complainant and her attorney were shocked by these statements, but did not confront the mediator as they were focused on trying to resolve the issues in the case. Complainant felt extremely offended and humiliated by the mediator's remarks. Complainant was so distressed that her father was called immediately after the mediation session to comfort her. Complainant shared the mediator's remarks with her ex-husband, the other party at the mediation. Both parties expressed dismay that they were subjected to insulting behavior in a process that the court had ordered them to attend and for which they had to pay. However, there was no indication that the mediator's behavior affected the outcome of the mediation which resulted in an agreement.

Issues

1. **Neutrality**

   Whether the mediator's conduct compromised his neutrality as to either or both parties.

2. **Fairness of the process**

   Whether the mediator's conduct jeopardized the fairness of the process.

Findings

1. Neutrality

The *Ethical Standards for Neutrals, Appendix C* to the *Georgia Supreme Court Alternative Dispute Resolution Rules* provide that: "A mediator must demonstrate impartiality in word and deed. A mediator must scrupulously avoid any appearance of partiality." Standard III.

In this matter, the mediator's remarks, while only made to one party, were derogatory toward both parties. The inappropriate remarks made in caucus gave a strong appearance that impartiality had been compromised as to both parties. Thus, although there may not have been an appearance of impartiality in the joint sessions, there was certainly an appearance of lack of impartiality to the complainant and her attorney in caucus. After the session, complainant told the opposing party of the remarks, as should have been foreseeable, and thus left him with the impression that the mediation had not been conducted with impartiality.

2. Fairness of the Process / Self Determination

Standard IV of the Ethical Standards for Neutrals provides that: "The mediator is the guardian of fairness of the process. In that context, the mediator must assure that the conference is characterized by overall fairness and must protect the integrity of the process."

The mediator's conduct in this matter violated the dignity of the parties and the integrity of the process. A mediation in which any party feels humiliated or insulted by the mediator, where there is an objective reason for such feeling, is a process that has lost its integrity and is in danger of losing its fairness. In this case, there was no evidence that the remarks did, in fact, affect the parties' decision-making. However, it is important to be aware that any conduct by a mediator that is insulting to a party risks also being intimidating, and any conduct that is intimidating may be coercive and thus undermine the parties' self-determination.

Sanctions

Because this is the first complaint against the mediator, the conduct did not appear to affect the outcome of the mediation, and the mediator acknowledged that the remarks, if made, were entirely inappropriate, the Committee has issued a private reprimand to the mediator and advised that any subsequent misconduct will result in suspension and possible revocation of registration.

Conclusion

While the conduct at issue in this case is never acceptable in any mediation process, it is particularly harmful in a court-mandated mediation. The parties are required to participate by the court, and the mediator serves as a representative of the court system. Vulgar, offensive and demeaning remarks are a reflection on the referring

court, the local ADR program and the process of mediation in general. As was clear from the evidence in this case, parties will likely share their experience in mediation with relatives, friends and the community at large. Thus, the damaging repercussions of such behavior can extend far beyond the immediate parties involved.

The scrupulous demeanor of respect for all participants in mediation is essential. The Committee trusts that the conduct complained of in this matter is extremely rare, but issues this formal Opinion with the expectation that practitioners will take care to ensure that it does not occur again in any mediation.

The Committee on Ethics of the Georgia Commission on Dispute Resolution

Ethics Opinion 3

Introduction

The Committee on Ethics was asked to consider a complaint against a registered mediator (Respondent) arising from a mediation he conducted on November 2 and 6, 2006. The Committee issued a final decision, but it believes that a published formal Opinion may be informative for mediators. This Opinion is based on the following findings of fact:

Complainant and his wife were referred to Respondent in fall 2006 through a church marriage counseling program. Respondent was a licensed psychologist, as well as a mediator registered in General Civil Mediation, Domestic Relations Mediation, and Specialized Domestic Violence Mediation. Complainant and his wife discussed their marital difficulties individually and jointly with Respondent. When the couple stated that their marriage was not salvageable, Respondent gave them the choice of using him as a psychological evaluator for the counseling program or as a mediator of their divorce, but not both. The couple agreed to mediation.

In September 2006, after the initial meetings with Complainant and his wife, Respondent tested Complainant's young son for some educational problems. The testing was at the request of Complainant's wife.

On November 2, 2006, the Complainant and his wife were parties in a mediation conducted by Respondent. Both parties signed the Respondent's "Guidelines for Mediation." Mediation was continued to November 6 for a second session, which ended in impasse. Complainant was unhappy with Respondent and terminated his services November 10, 2006.

Complainant said he was unhappy because Respondent "showed a prejudice" for his wife and "demonstrated partiality" toward her from the start of the mediation. He pointed to the "numerous previous contacts" between Respondent and his wife, apparently referring to the educational testing of the son. Complainant said Respondent repeatedly fabricated settlement terms in his wife's favor. Respondent told Complainant that those points of agreement were Respondent's "mistakes" and offered to correct them. Respondent explained in his response to the ethics complaint that the settlement terms were correct, but that Respondent was using a common technique of showing deference and " 'being wrong' when the clients are angry, hostile, or claim I've made statements in error."

Complainant also said Respondent spent an extra hour counseling his wife alone after the second mediation session ended. This was evidence of bias, Complainant alleged. Respondent explained in his response that the meeting was merely a caucus with Complainant's wife after an hour-long caucus with Complainant. The wife did not receive extra time or any counseling. Respondent stated that his policy is to try to give equal time and equal treatment to parties in joint session and in caucus, without interruption.

Respondent learned after the mediation that there may at some point have been abuse between the couple. The couple scheduled through the local ADR office a second mediation on November 12, 2006, with a different mediator.

A short time later, Complainant's wife asked Respondent to provide counseling to her two children. Respondent counseled the son once in November 2006 and again in March 2007. Respondent counseled the daughter in February and March 2007.

In March 2007, the court heard a motion filed by Complainant's wife. She called Respondent, and he testified on the record that he mediated two sessions with Complainant and his wife and that the mediation ended in impasse. In denying the motion, the court wrote in its order that it "found [Respondent's] testimony and involvement with the parties in this case questionable at best."

In May 2007, Respondent submitted to the court an eight-page affidavit because his "integrity and skill as a mediator was called into question in court." The court needed to know "the true reason for the failed mediation," Respondent stated. "I sought only to clear my name by describing [Complainant's] manner and approach throughout the mediation process. Again, I was careful not to reveal content." In the affidavit he described Complainant's disruptive and uncooperative behavior during the mediation and quoted angry and insulting statements Complainant made in joint session, as well as in caucus.

Issues

1. Conflict of Interest and Impartiality

Whether the mediator failed to "avoid any dual relationship with a party which would cause any question about the mediator's impartiality," in violation of Appendix C, Chapter 1, III, C; and whether the mediator failed to show "impartiality in word and deed" in violation of Appendix C, Chapter 1, III.

2. Confidentiality

Whether the mediator failed to maintain the confidentiality of the statements made in mediation, in violation of Appendix C, Chapter 1, II.

Findings

Jurisdiction

The Commission on Dispute Resolution properly exercised jurisdiction over Respondent's conduct. Mediators registered with the Georgia Office of Dispute Resolution are subject to the Georgia Supreme Court's ADR Rules and the Commission in the context of court-connected mediations. At the time of the mediation at issue, Respondent was registered in the three mediation categories. Therefore, Respondent was subject to the Commission's jurisdiction when conducting court-connected mediations.

A mediation is court-connected when the case is referred to mediation by a court that participates in a court-connected ADR program approved by the Commission. First, it is clear that Respondent conducted a mediation for Complainant and his wife in November 2006. Second, the mediation was court-connected because the couple's divorce was filed in a court that was part of an approved court-connected ADR program. And when the case was filed, there was in effect a standing order that all contested divorces be referred to mediation. Also, Respondent became involved in the case after the case was filed and ordered to mediation. Thus Respondent mediated the case within the court-connected ADR system and the Commission's jurisdiction.

Once a case enters the court-connected ADR system, the parties can petition the court to opt out of the system (Rule 3.1 of the Uniform Rules for Dispute Resolution Programs; Appendix A to the Georgia ADR Rules). There was no evidence that Complainant or his wife petitioned the court or the local ADR program to have the case removed from the court-connected ADR system. Because the parties scheduled through the local ADR office a second mediation with a different mediator, it is clear that they acted within the court-connected ADR system when they mediated with Respondent. Therefore the mediation Respondent conducted was court-connected, and Respondent's conduct is subject to the Commission's jurisdiction.

Conflict of Interest and Impartiality

Complainant alleged that Respondent violated mediator ethics by serving as educational evaluator of his son, as counselor to his children and as mediator of his divorce. Complainant also alleged that Respondent demonstrated partiality before and during the mediation.

The Committee found that Complainant's allegations as to Respondent's multiple relationships with a party were supported by a preponderance of the evidence. The Committee found that Complainant's allegations as to Respondent's partiality were not supported by a preponderance of the evidence. However, the Committee also found that Respondent's actions before and after the mediation led to the appearance of partiality.

The Ethical Standards for Mediators comprise Appendix C to the ADR Rules. Appendix C, Chapter 1, III, C(a), states:

> "A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality. Mediators should avoid any dual relationship with a party which would cause any question about the mediator's impartiality."

Further, Appendix C, Chapter 1, III, C(f), states:

> "Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the

mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest."

Contrary to these ethics rules, Respondent established a professional relationship with a subject matter of the divorce dispute, the Complainant's children, both before and after he mediated the Complainant's divorce. Consequently, Respondent also involved himself professionally with a party to the dispute, Complainant's wife and the children's mother, both before and after the mediation. By providing educational testing for the couple's son before the divorce mediation (September 2006) and counseling for their son (November 2006 and March 2007) and daughter (February and March 2007) after the divorce mediation – both services initiated by Complainant's wife – Respondent served the family in three professional roles within three months' time, in violation of the Ethical Standards for Mediators.

Respondent maintained that serving as the couple's divorce mediator in between the other two professional engagements did not constitute a professional conflict of interest because he did not serve the family in two roles simultaneously. However, Appendix C does not contemplate that only concurrent multiple relationships can create ethical issues, but that prior and future relationships can also. The Committee concluded that Respondent's multiple professional roles in the Complainant's family created a clear professional conflict of interest that reasonably raised questions about Respondent's impartiality as a mediator.

Complainant also accused Respondent of bias toward his wife in the mediation, in part because the Respondent supposedly fabricated settlement terms in the wife's favor and because Respondent apologized to Complainant for miscommunicating the settlement terms. However, the Committee found that the anger-diffusion technique that Respondent used – the mediator's taking responsibility for a party's own misunderstanding – is appropriate and not in itself evidence of bias.

Nor did the Committee find evidence of bias in the amount of time Respondent spent with Complainant and his wife in mediation. Respondent's practice and policy to give equal time and equal treatment to parties in joint session and in caucus with as little interruption as possible is a reasonable explanation for any alleged differential treatment.

However, even if Respondent did not display any actual bias in the mediation, he failed to "scrupulously avoid any appearance of partiality. Impartiality means freedom of favoritism, bias or prejudice," as stated in Appendix C, Chapter 1, III, A. The ethics rules warn that Respondent's engaging in multiple professional relationships with the parties, though it may not create an <u>actual</u> conflict of interest, may create a <u>perceived</u> conflict of interest that erodes party trust in the mediator and jeopardizes the integrity of the mediation. It is evident from the facts that it is this <u>perception</u> of Respondent's bias that predictably led Complainant to question Respondent's impartiality and that helped to undermine the couple's mediation.

It was predictable that Complainant, a party in emotional crisis, may be primed to suspect that Respondent's prior professional relationship with his wife (testing of son at her request) biased Respondent toward her in mediation, even if Respondent showed no actual bias.

Respondent's later professional relationship with Complainant's wife (counseling of children at her request) only served to bolster Complainant's conclusions. It was also foreseeable that Complainant would perceive Respondent's testing of his son and Respondent's counseling of his children, not as two discrete engagements, but as a single professional relationship that Respondent maintained while also serving as the couple's divorce mediator.

Having already had a prior professional relationship with the Complainant's family, Respondent should have declined to mediate the couple's divorce. But having begun mediating, Respondent should have realized by the end of the first session that Complainant clearly questioned Respondent's credibility. When it became apparent that Complainant had lost trust in Respondent, he had a duty to discontinue mediation. Appendix C, Chapter 1, III, C(f), states:

> "If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary."

The Committee found that Respondent established relationships with the subject matter of the couple's divorce, and that Respondent engaged in multiple professional relationships with Complainant's family, in violation of the Ethical Standards for Mediators. Respondent's multiple roles created a clear conflict of interest and eroded the integrity of the mediation process. And it was foreseeable that Respondent's multiple roles would prompt Complainant to question Respondent's impartiality as a mediator, even if Respondent did not display any actual partiality. When it was clear that Respondent's credibility was beyond repair, Respondent did not withdraw as mediator as the rules require.[1]

Confidentiality

Complainant alleged that Respondent violated mediator ethics by testifying at the March 2007 hearing and by submitting an affidavit detailing Respondent's counseling and mediation work with Complainant's family for a May 2007 hearing in the case. The Committee found that Complainant's allegations were supported by a preponderance of the evidence. Appendix C, Chapter 1, II states:

> "Statements made during the conference and documents and other material, including a mediator's notes, generated in connection with the conference are not subject to disclosure or discovery and may not be used in a subsequent administrative or judicial proceeding. ... Information given to a mediator in confidence by one party must never be revealed to another party absent permission of the first party."

Likewise, the confidentiality rules in the ADR Rules, VII, A, state:

[1] Advisory Opinion 3 arises out of a similar set of circumstances. A psychologist and registered mediator who served as educational and emotional evaluator of a child was appointed by the court to mediate the child's parents' divorce. In her complaint to the Commission, the mother alleged that the mediator showed bias against her and toward the father, who had paid the mediator for the child's evaluation.

> "Neither the neutral nor any observer present with permission of the parties in a court-annexed or court-referred ADR process may be subpoenaed or otherwise required to testify concerning a mediation . . . in any subsequent administrative or judicial proceeding."

Respondent was called by Complainant's wife and testified at the March 2007 hearing on the record. There was no evidence that he refused to testify or fought to quash a subpoena. There was no evidence that he sought a waiver of confidentiality from the family. Respondent did voluntarily what he could not be required to do under the rules.[2] (When Respondent testified he spoke about how he came to mediate for the couple and the result of the mediation. These matters in themselves are not confidential in a court-connected mediation.)

After the March 2007 hearing the judge issued an order that criticized Respondent's professional credibility. Respondent executed an affidavit in May 2007 to defend his integrity as a mediator. Ironically, by submitting the affidavit Respondent undermined his credibility by once again doing voluntarily what he could not be required do under the rules – testify as to the content of the mediation.

No exceptions to confidentiality applied here. Under ADR Rules, VII, B, the confidentiality of mediation may be broken by the mediator in two situations, where:

> "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."

While Respondent described Complainant's behavior as manipulative and volatile, there was no evidence that Complainant threatened himself or anyone in the mediation with violence. Although Respondent learned after the mediation that there may have been abuse between the couple, there is no evidence that he believed during the mediation that a child was abused or anyone's safety was in danger. Therefore, no exception excused Respondent's revealing confidential mediation communications in his affidavit.

Confidentiality in a court-connected mediation can be waived to the degree necessary for a mediator to defend against an ethical complaint, under Appendix C, Chapter 2, III, G. The waiver applies to defending against formal complaints filed with the Georgia Office of Dispute Resolution. When Respondent submitted the affidavit, there was no formal ethical complaint against him, but merely criticism of his professional judgment within a court order. No waiver applied to the affidavit. Therefore, Respondent violated the confidentiality rules.

Appendix C, Chapter 1, II, prohibits "statements" made during mediation and "information" given in confidence from being disclosed, discovered or used in a subsequent

[2] Respondent's appearance also was contrary to his own Guidelines for Mediation, which state in part, "The mediator shall not willingly testify for or against either party involved should either party end the mediation process and litigate the matter in court."

judicial proceeding.[3] By recounting in his affidavit Complainant's behavior during the mediation, Respondent apparently believed that Complainant's behavior was not a "statement" or "information" and therefore not subject to confidentiality requirements. That is incorrect, as emphasized by Advisory Opinion 6.[4] Therefore Respondent's description in his affidavit of Complainant's behavior in the mediation violated the confidentiality rules. [5]

Of course, a party's oral statements during a mediation would certainly be "information" and thus confidential. Therefore Respondent's quoting and paraphrasing of Complainant's mediation and caucus statements in the affidavit violated the confidentiality rules. [6]

To sum up, Respondent's testifying voluntarily in open court about the mediation and Respondent's voluntary submission to the court of an affidavit detailing Complainant's behavior and words in the mediation constituted multiple violations of the confidentiality rules.

Sanctions

The Committee found that Respondent violated mediator ethics in several instances during the November 2 and 6, 2006, mediation and found that sanction is appropriate, as permitted by Appendix C, Chapter 2, II, K(1). Further, under Appendix C, Chapter 2, II, L, "Where there are repeated complaints, gross incompetence, or conduct which rises to the level of moral turpitude or is potentially injurious to the public, removal from registration would be appropriate."

Considering the breadth of Respondent's mediation training and his registration in three mediation categories, the Committee determined that his conduct constituted gross incompetence. After considering all other remedies, the Committee voted to remove Respondent from registration as a mediator, effective immediately. As required by the Appendix C, Chapter 2, III, D, notice of Respondent's removal from registration was disseminated to all ADR program directors throughout the state.

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[3] Respondent's own Guidelines for Mediation state, "Information gathered in the mediation process is confidential and privileged."

[4] "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. … Confidentiality even extends to the mediator's impressions derived from the communications in mediation."

[5] Oddly, Respondent wrote in his affidavit that "the contents of the mediation agreement cannot be discussed." Of course, in a court-connected mediation, a signed and executed mediation agreement becomes a public document and thus is one of the few pieces of information than can be discussed. Appendix C, Chapter 1, II: "A written and executed agreement or memorandum of agreement resulting from a court-annexed or court-referred ADR process is discoverable unless the parties agree otherwise in writing."

[6] Respondent's serving as counselor to the couple's children after serving as mediator of their parents' divorce was ethically dangerous also in that it could have led him to disclose confidential mediation information in the counseling sessions. Respondent was not accused of such a breach.

Conclusion

This case demonstrates the fragility of a mediator's credibility and the need for the mediator to scrupulously guard against even the perception of impartiality and bias. It also shows how that credibility, once lost, is nearly impossible to restore. Therefore, the Committee strongly cautions against mediators handling cases in which the parties have engaged or intend to engage the mediator in another professional capacity. Mediators may find themselves violating not just the ethics rules for mediators, but also the ethics rules governing their other professions.

The Committee further recommends that mediators never voluntarily testify about their mediations under any circumstances other than those covered by the exceptions to confidentiality in the Supreme Court ADR Rules. If necessary, subpoenaed mediators should enlist the assistance of the local court ADR program director or the Georgia Office of Dispute Resolution in quashing the subpoena and educating court and counsel. Likewise courts should never require or allow mediators to testify about their mediations. The mediator's promise of privacy to the parties – which allows them to communicate fully and openly without fear that the information would be used against them later – is critical to the success of the mediation process.

June 5, 2009

The Committee on Ethics of the Georgia Commission on Dispute Resolution

Ethics Opinion 4

Introduction

The Committee on Ethics was asked to consider a complaint against a registered mediator arising from a mediation she conducted in 2009. The Committee issued a final decision and accepted the mediator's petition for voluntary discipline.[1] The Committee believes that a published formal Opinion based on a complaint may be useful to help mediators avoid serious potential ethical issues in their practices. This Opinion is based on the following summary of its finding of facts:

On August 31, 2009, Respondent, a mediator registered with the Georgia Office of Dispute Resolution, mediated a contested probate court case where the parties were represented by counsel. Complainant, one of the attorneys in the case, attended with one client; opposing counsel attended with two clients. The parties and attorneys signed an agreement to mediate. A representative of the estate at issue was not present.

A proposed settlement went through four drafts. Respondent prepared the first draft, then Respondent left before the parties finalized the terms with the following three drafts. Respondent left the parties to finalize their proposed settlement agreement after receiving their assurances that they agreed on all issues of the case. The final settlement agreement was signed by all parties to the mediation and both attorneys, but not the mediator. The Respondent reported the outcome of the mediation to the local ADR office as a full settlement.

Several days later, on September 15, 2009, at a probate court hearing, Complainant asked the court to enter judgment for one of his clients, based on the signed settlement agreement. Opposing counsel was surprised by the motion, as she believed that all claims among all parties had been settled in the mediation, and she protested that the final settlement agreement proffered did not accurately convey that understanding. The judge granted permission for the attorneys to call Respondent from court to ask her help in resolving their disagreement.

With both attorneys listening on a speaker phone, Respondent confirmed that she understood and reported that the signed August 31 agreement was a "full and final settlement" as to all claims. Back in court, both attorneys continued to disagree over the terms of the August 31 settlement agreement, and the judge agreed to read the proffered agreement and make a decision later as to its meaning.

Two days after the phone call, in a letter dated September 17, 2009, Respondent accused one of the attorneys of using her name and position as mediator "in support of [his] posturing in front of a probate judge." The attorney's conduct was "distasteful and appalling," she wrote. Respondent went on to declare her opinion that the mediation agreement was to be a "full and

[1] Before final adjudication, the mediator filed a Petition for Voluntary Discipline accepting "responsibility for the clear violations (i.e., sending the letter and demonstrating bias)" and "acknowledge[d] fault in the more complicated, but clearly troubling issues (breach of self determination and confidentiality)." This Petition was accepted by the Ethics Committee. The mediator agreed to a 30-day suspension as a registered mediator.

final settlement" as to all claims among all parties. To opine otherwise," she wrote, "seems to be disingenuous and reflecting a mean spirited bad faith." If the mediation agreement was not clear as to the full and final settlement, then the drafter of the agreement – in this case the Complainant – was to blame, Respondent asserted. The probate court should also consider the mediation agreement to be a full and final settlement, she contended. And finally, while citing her duty to maintain confidentiality of the mediation, Respondent copied the letter to a third party – the director of the local ADR Program.

One of the attorneys filed a written complaint with the Georgia Office of Dispute Resolution alleging Respondent had violated the Ethical Standards for Mediators.

Jurisdiction of the Ethics Committee[2]

The Georgia Commission on Dispute Resolution is charged with the responsibility to ensure the quality and integrity of all court-connected mediation. To fulfill its mandate, the Commission has implemented standards of conduct to be observed by all mediators working within the context of court-annexed or court-referred programs. In order for the Commission to fulfill its mandate to ensure the integrity of the mediation process and the high ethical standards of mediators working in conjunction with court programs, the Committee took a broad view of its jurisdiction to review the actions of mediators in all but exclusively private mediations. The public has a reasonable expectation that the mediation process will be conducted in a way that protects the rights of the parties and the integrity of the mediation process when it entrusts its disputes to that process in the court system as an alternative to trial.

The Ethics Committee holds jurisdiction over registered mediators, as well as pending court cases that are mediated. Since this mediation involved a registered mediator and a pending court action in a circuit with an approved alternative dispute resolution program, the Ethics Committee found that this mediation and subsequent acts fall within the jurisdiction of the Committee. Additional facts that supported the finding of jurisdiction include the fact that the court action was scheduled for a hearing at the time of the mediation and that the mediator reported the outcome of the mediation to the local ADR office.

Complainant's Allegations

Complainant asserted that the Respondent violated the Ethical Standards for Mediators in the following areas:

Self-Determination

Allegation: The mediator failed to maintain the parties' right to self-determination by giving legal advice and coercing the parties, which is prohibited by Appendix C, Chapter 1(A)

[2] During the pendency of the Complaint, Petitioner appealed an adverse decision by the Ethics Committee to the Commission on Dispute Resolution, raising jurisdiction among other issues. Respondent had argued that even if the Commission claimed jurisdiction over the mediation session itself, her complained-of unethical conduct occurred after the actual mediation session and therefore fell outside the Commission's jurisdiction.

The Commission did not agree: "Whereas the ending of the mediation session ceases any interplay between the parties, the attorneys and the mediator, it is axiomatic that a mediator's ethical responsibilities to a mediated case, to the parties, to the attorneys, and to any settlement do not end with the mediation session itself but continue indefinitely; and, therefore, we disagree." The Commission affirmed the Committee's finding of jurisdiction over the mediation session.

(I)(E);

Discussion and Findings: Self-determination is the very bedrock of mediation. The parties are in control of settling all, some or none of the issues raised in the dispute that led to mediation. The Committee noted that Respondent did not violate the principle of self-determination during the mediation proper nor was there any evidence that she gave legal advice to the parties during the mediation proper. However, the principle of self-determination is, in its essence, the ability of individuals to bargain for themselves. It is not appropriate for a mediator, whether at the mediation itself or later in an attempt by the parties to interpret their own agreement, to enhance the scope of the agreement beyond that which was reached. It is up to the parties and not the mediator to establish the scope of the settlement.

The Committee found as a matter of fact that Respondent attempted to convince the parties of the meaning of terms in the agreement by strongly suggesting what the phrase "full and final settlement" included. Respondent facilitated the first draft of the agreement but did not remain at the mediation and did not participate in drafts two, three or four. Although she did not participate in the final draft, Respondent, in her letter of September 17, told the parties what the intent of the agreement was, what legal effect it had and how it should be interpreted by a trial judge.

The Committee found as a matter of fact that Respondent violated the principle of self-determination of the parties by publishing her letter of September 17, 2009, in which she sought to impose her interpretation of the agreement. Appendix C, Chapter 1(A)(I).

The Complainant also alleged that Respondent gave legal advice prohibited by the ADR Rules. The Committee noted that there was no evidence that Respondent gave legal advice during the mediation proper. Later, however, when the parties were attempting to establish the scope of the agreement reached, she gave legal opinions as to the meaning of "full and final" and gave her legal opinion as to the construction of contracts. Again this was outside the proper role of a neutral mediator, and the Committee found that Respondent violated Appendix C, Chapter 1 (A)(I)(E).

Impartiality

Allegation: The mediator failed to maintain impartiality as required in Appendix C, Chapter 1 (A)(III) (A).

Discussion and Findings: The Complainant alleged that the Respondent showed partiality toward the parties represented by opposing counsel, by misrepresenting the scope of the agreement. Again the Committee found that the gravamen of the Respondent's offense occurred after the mediation session proper and during the parties' attempt to establish the scope and meaning of the agreement in a subsequent proceeding. In her letter of September 17, 2009, to the parties, the Respondent showed that she was biased against Complainant and the clients whom he represented:

> "I do not understand why there is any further argument unless the parties acting in their individual or corporate capacities simply cannot understand the term 'full and final settlement' as you have surely explained it. I believe that to now infer that this case was not a full and final settlement and/or that there was not a complete release *seems to be disingenuous and reflecting a mean spirited bad faith.* (Emphasis supplied.) While I do

not know the probate judge in this matter, I hope that he/she shares the wisdom consistently demonstrated by several of our superior court judges in the [local jurisdiction]. If so, I am certain he/she will explain the term 'full and final settlement' in a manner your clients, individually and in their corporate capacities, can fully appreciate. As I recall any discrepancies in drafting a contract are charged against the drafter, who in this case was [Complainant]. By the full and final settlement, the intent of the agreement was clearly to release the Estate from all claims of any of these parties."

The Respondent may not have had any personal knowledge of what the intent of the parties was after the first draft because she had left and had no further participation in the mediation session. The Respondent's letter of September 17, 2009, took a clear position in opposition to Complainant and in favor of the clients of opposing counsel. By advocating for her contention that Complainant was wrong and that he had engaged in bad faith and disingenuous legal positions, Respondent was no longer impartial in word or deed.

The Committee found that the Respondent's actions constituted a violation of the rule of impartiality. Appendix C, Chapter 1 (A)(III)(A): "A mediator must demonstrate impartiality in word and deed. A mediator must scrupulously avoid any appearance of partiality. Impartiality means freedom from favoritism, bias or prejudice."

Confidentiality

Allegation: The mediator failed to maintain confidentiality as required in Appendix C, Chapter 1(A)(II).

Discussion and Findings: The hallmark of confidentiality is set out in Chapter C (A)(II) and "is the attribute of the mediation process which promotes candor and full disclosure. Without the protection of confidentiality, parties would be unwilling to communicate freely, and the discussion necessary to resolve disputes would be seriously curtailed."

There is no evidence that the Respondent breached confidentiality by responding to both attorneys after the mediation. However, by mailing a copy to the local ADR program director, Respondent's actions broke through the confines of confidentiality. There was no valid reason to file this letter with a third party who was at best only administratively related to the mediation. The program director had no need or right to know the details or opinions concerning the mediation as set forth by Respondent in her letter to the parties.

The Committee did not reach the issue of how or under what circumstances a mediator might seek advice on how best to handle a dispute arising out of a mediation. In this case the Respondent included in her letter of September 17, 2009, facts and opinions which should not have been shared.

The Committee found that Respondent violated the principle of confidentiality by providing a copy of her September 17, 2009, letter to the program director.

Conclusion

This case demonstrates that mediators must be careful when communicating with mediation participants and court staff about mediations. In this case, the mediator's single ill-conceived letter to the parties – unsolicited, unnecessary, voluntary and shared with a person who had no need to know its contents – violated party self determination, impartiality and confidentiality. When given a choice, it is always prudent for the mediator to say less about a mediation, not more.

The working relationship between mediators and their court ADR program directors is unique and critical to the efficient functioning of the court-connected ADR system. While program directors do not and should not have unlimited access to confidential mediation information, some circumstances nonetheless call for mediators and program directors to discuss sensitive information about a mediation with some candor.[3] For example, a program director may advise a mediator on how to best to handle an ethical dilemma that arose during a session. Or a mediator may alert a program director to potential safety issues arising out of a session. If the mediator feels the need to talk with the program director during a session, the mediator should seek the consent of the parties first if doing so will not endanger the participants or significantly enflame the discussion. The mediator should reveal confidential information to the program director only to the extent necessary[4].

Mediators should be wary of the zealous pursuit of settlement, which might lead a mediator astray from the strict adherence to ethical process. External pressures such as a desire for a strong settlement rate should be tempered to avoid taking shortcuts or applying pressure on the parties rather than allowing the parties to arrive at agreeable solutions themselves. Honoring party self-determination requires time and patience. A mediator's credibility is built on a foundation of skill, fairness, integrity, and ethical conduct. Mediators should take utmost care to protect their professional reputations; after all, they have the most at stake in their reputations.

Lastly, this case emphasizes that a mediator's ethical obligations to a case and to its participants do not end with the conclusion of the mediation session but continue indefinitely. There is no point in time after the mediation when the parties' right of self-determination should be subjugated to the mediator's intervention. There is no point in time after the mediation when the mediator should not be conscious of the appearance of impartiality or bias. There is no point in time after the mediation when it is ethical to break the mediator's promise of confidentiality.

July 26, 2012

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[3] Of course, those circumstances involve a mediator talking with the program director *responsible for the administration of the case in question*, not any program director. The Uniform Rules for Dispute Resolution Programs, Appendix A to the ADR Rules, Section 7, clearly expect that neutrals will need to communicate with their program directors. Neutrals are reminded to review the confidentiality rules and the exceptions to confidentiality in the ADR Rules, VII.A. and B.

[4] While this case was court-connected, bringing it within the jurisdiction of the commission, the case was neither court-ordered nor court-referred; it was not administered through the local ADR Program, and the local program was not responsible for servicing it or monitoring it. It was not a local program case; therefore, the local program director had no need or right to know the details that were disclosed in the letter.

The Committee on Ethics of the Georgia Commission on Dispute Resolution

Ethics Opinion 5

Introduction

The Committee on Ethics was asked to consider a complaint against a registered mediator arising from a divorce mediation conducted in 2010. The Committee issued a final decision and accepted the mediator's petition for voluntary discipline.[1] The Committee believes that a published formal Opinion based on the complaint may be useful to help mediators avoid serious potential ethical issues in their practices. This Opinion is based on the following summary of its finding of facts:

Findings of Facts

The mediator mediated a divorce case that began mid-afternoon. The mediation was contentious, had no breaks for dinner, and lasted until 3 a.m. the next day. During the lengthy mediation session, the Complainant alleged that she could hear frequent laughter while the mediator caucused with the opposing party, and the Complainant believed the mediator spent more time with the opposing party and counsel. The mediator stated that equal time was spent with both parties, except during the drafting of the mediation agreement, which was done in the room where the opposing party and attorney sat.

Late in the mediation process, the Complainant and the Complainant's attorney also viewed the mediator speaking in close proximity to the opposing party. It was the Complainant's perception that the conversation was more flirtatious than professional. The mediator admitted that the mediation agreement was drafted in a relatively small area and if someone saw them together in the room without hearing their discussion, one could assume that the mediator's conversation with the opposing party was social rather than professional.

During the mediation, the parties reached a final settlement. They filed it with the court almost three months after the mediation, and the divorce was finalized a week after that.

Three months after the mediation session, the opposing party contacted the mediator for a dinner date. The mediator inquired of the party about the status of the divorce, and was told that the divorce was final. The mediator then agreed to go out and had two dinners with the party. The mediator did not seek independent verification from the court or the parties' attorneys that the divorce was final. The first dinner was prior to the court's final divorce decree in the case. The mediator and the party did not socialize thereafter.

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[1] Before final adjudication, the mediator filed a Petition for Voluntary Discipline accepting responsibility for actions that led the Complainant to believe that the mediator was biased. This Petition was accepted by the Ethics Committee. The mediator agreed to a private Formal Letter of Admonition, pursuant to the Georgia Supreme Court Alternative Dispute Resolution Rules, Appendix C, Chapter 2, II(L)(1). The Committee issued a private sanction, rather than a public one, because of the mediator's lack of prior discipline, reputation in the legal and mediation community, and sincere remorse for an isolated lapse of judgment. The Committee concluded that the imposition of a private Formal Letter of Admonition sufficiently protected the public and instructed the mediator on the impropriety of the conduct.

The Complainant found out about the dinners and was concerned by the mediator's conduct, especially since the divorce was not final until after the first dinner. The Complainant filed an ethics complaint against the mediator with the Georgia Office of Dispute Resolution.

Jurisdiction of the Ethics Committee

The Commission claimed jurisdiction over the complaint because the mediator was registered with GODR, there was a standing order from the court referring contested divorce cases to mediation, and the parties did not opt out of the court-connected ADR system.

Complainant's Allegations

Complainant asserted that the Respondent violated the Ethical Standards for Mediators in the following area:

Impartiality and Conflict of Interest: The mediator failed to maintain impartiality as required in Appendix C, Chapter 1(A)(III)(A) and created a conflict of interest or the appearance thereof during and after the mediation as prohibited by Appendix C, Chapter 1(A)(III)(C)(a),(b), and (f).

Discussion and Findings: The Committee found that during and after the mediation, the mediator's conduct caused the Complainant to question the integrity of the mediation. Furthermore, the Committee found that the mediator violated Appendix C, Chapter 1(A)(III)(A), which states: "A mediator must demonstrate impartiality in word and deed. A mediator must scrupulously avoid any appearance of partiality. Impartiality means freedom from favoritism, bias or prejudice."

A reasonable person could easily conclude that having two dinners with a party three months after a contentious 12-hour divorce mediation, and prior to the final divorce decree, would create a perceived or actual conflict of interest for the mediator. Perceived or actual conflicts of interest that raise questions about a mediator's impartiality, especially in the case of a dual relationship with a participant, should be avoided during and after the mediation. The Committee found that the mediator violated this ethical standard. Appendix C, Chapter 1(A)(III)(C)(a), and (f).

Moreover, the mediator did not make an independent inquiry to determine if a potential or actual conflict of interest existed before having dinner with a participant. Accordingly, the Committee found the mediator violated Appendix C, Chapter 1(A)(III)(C)(b).

Conclusion

When a court refers a case to mediation, it is because the parties are in crisis and need a skilled mediator and the mediation process to develop a mutually satisfactory solution. Mediators in those situations need to be ever vigilant and mindful of their actions before, during and after mediation because of the vulnerable state of the participants. Mediators are also expected to be the guardians of the overall fairness of the mediation process. Social contact, or conduct that could be misinterpreted as social contact, should always be assiduously avoided

with parties to a mediation as it can lead to allegations of mediator misconduct even months after a mediation session.

November 7, 2012

The Committee on Ethics of the Georgia Commission on Dispute Resolution

Ethics Opinion 6

Introduction

The Committee on Ethics was asked to consider a complaint against a registered neutral who acted as an attorney (hereafter Respondent) representing one of the parties in a court-ordered child custody mediation in 2015. The complainant also filed a complaint against the actual mediator, who was not registered with the Georgia Office of Dispute Resolution (GODR). The court's standing order permitted parties to select a "private" mediator of their choosing. Respondent and the unregistered neutral opened their own mediation and law firm roughly one month after the mediation occurred and while the case was still pending. The Committee issued to the Respondent a confidential Committee reprimand but dismissed the complaint against the unregistered neutral based on a lack of jurisdiction. The Committee believes that a published formal Opinion based on the complaints may be useful to help neutrals and attorneys avoid serious potential ethical issues in their practices.

Jurisdiction

Rule II.5. of the Supreme Court of Georgia's Alternative Dispute Resolution (ADR) Rules states that the "[Georgia] Commission [on Dispute Resolution] has jurisdiction . . . [t]o receive, investigate, and hear complaints about neutrals registered with the Commission." The Committee made a determination that the Commission had jurisdiction over Respondent because Respondent is a neutral registered with the GODR.

Allegations

Respondent and the opposing attorney (representing Complainant) both agreed to use the unregistered neutral in the case. Complainant's attorney, however, did not inform Complainant of the rights and protections Complainant was waiving by using an unregistered neutral. Complainant asserted that Respondent knew or should have known that Respondent was required to select a registered neutral in accordance with the ADR Rules. Complainant further alleged that Respondent and the unregistered neutral improperly started a mediation and law firm roughly one month after the mediation took place. According to Complainant, this business arrangement posed an actual conflict of interest, or in the alternative, a perceived conflict of interest.

Opinion

The Committee imposed discipline when it concluded that the Respondent violated both Appendix C, Chapter 1, Rule III.C.a. "Conflicts of Interest/Bias"[1] and Appendix C, Chapter 1,

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[1] "A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality. Mediators should avoid any dual relationship with a party which would cause any question about the mediator's impartiality."

Rule III.C.f. "Conflicts of Interest/Bias"[2] of the ADR Rules. The latter rule offers criteria by which to evaluate a conflict of interest: (1) time elapsed following the mediation; (2) the nature of the relationships established; and (3) services offered when determining whether the relationships might create a perceived or actual conflict of interest. In this case, the Committee found that the business arrangement between Respondent and the unregistered neutral was formed too soon after the mediation occurred, the nature of the arrangement involved mediation, and it consequently created at least a perceived conflict of interest.

While the ADR Rules do not state that a registered neutral acting as an attorney in a matter may be disciplined for selecting an unregistered neutral to mediate, the Committee expects registered neutrals, in any capacity, to be aware that the ADR Rules require registered neutrals to be used in court-ordered or court-referred mediations. *See* Appendix A, Rule 9.1 ("[N]eutrals in a court-annexed or court-referred ADR process will be chosen from neutrals registered by the Georgia Office of Dispute Resolution.").

The Committee also finds that the language in this court's ADR standing order allowing parties to select a "private mediator" is ambiguous. The court has an obligation to ensure that all neutrals conducting court-ordered or court-referred ADR sessions be registered in the appropriate category. As such, any ADR order should specifically require the parties to select an appropriately registered neutral.

Conclusion

Registered neutrals act as guardians of the overall integrity of the process and in doing so should demonstrate impartiality in word and deed and act conscientiously to avoid any appearance of partiality. The business arrangement between the Respondent and unregistered neutral/attorney created a dual relationship that caused at least one party to question the integrity of the mediation and the neutrality of the mediator. While it is conceivable that relationships will develop between attorneys and neutrals involved in the same dispute, it is important for neutrals to be sensitive to the fact that future business dealings with parties or their attorneys may create the appearance of impropriety. Additionally, court ADR programs must ensure that ADR orders as well as all rules, policies and procedures comply with the ADR Rules and Appendices as approved by the Georgia Supreme Court.

August 24, 2016

[2] "Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest."

The Committee on Ethics of the Georgia Commission on Dispute Resolution

Ethics Opinion 7

Introduction

The Committee on Ethics (Committee) received a complaint against a registered neutral. This complaint did not arise from a mediation, but instead arose from a Zoom calendar call in which the mediator and Complainant were both present. During this calendar call, the Complainant, a self-represented litigant, saw an individual on the Zoom call with the label "Mediator". The Complainant said they were confused about the calendar call and privately messaged the mediator about whether they could reschedule their court appearance. The self-represented litigant assumed the mediator was in a position of authority and could help. The mediator took a screenshot of the communication and proceeded to post the screenshot of the Complainant's communication to the mediator's private Facebook page. The mediator captioned the post with a snide comment alluding to the mediator's annoyance with the Complainant's inquiry, and included several annoyed looking emoji's with the post.

The post received several views and comments and was eventually seen by a mutual friend of the mediator and the Complainant. The mutual friend sent the Facebook post to the Complainant who was upset by this post and subsequently filed a complaint against the mediator with Office of Dispute Resolution. After review, the Committee issued a private reprimand, requiring the mediator (Respondent) to issue a formal apology to the Complainant, and decided to issue a formal ethics opinion. The Committee believes that a formal opinion based on the complaint may be useful to assist mediators in understanding their role and representation of the court system, as well as helping to guide mediators with appropriate uses of social media.

Jurisdiction

Rule II.5. of the Supreme Court of Georgia's Alternative Dispute Resolution (ADR) Rules states that the "[Georgia] Commission [on Dispute Resolution] has jurisdiction . . . [t]o receive, investigate, and hear complaints about neutrals registered with the Commission." The Committee made a determination that the Commission had jurisdiction over the Respondent because the Respondent is a neutral registered with the GODR.

Allegations

The Complainant asserted that the Respondent's actions violated the ethical standards for mediators by publishing a private courtroom communication between Complainant and Respondent to the Respondent's Facebook page.

Opinion

The Committee found no mediation had been conducted, and there was no technical breach of confidentiality between the mediator and the complaining party. The Committee did, however, decide to issue a private reprimand to the mediator, as the Committee found the mediator's actions

to be unprofessional and did not adhere to the high ethical standards established by the Commission for registered neutrals.

Pursuant to Appendix B of the Supreme Court of Georgia ADR Rules, the Commission seeks to ensure that courts and litigants have access to well-trained, highly skilled neutrals who adhere to the highest ethical standards. Appendix B requires that all neutrals serving in Georgia programs be of good moral character.

Additionally, the Model Code of Conduct for Court Professionals provides exceptional guidance on how the behaviors of courtroom professionals have an impact on the public's trust of the judiciary. The Model Code of Conduct for Court Professionals provides that the foundation of our society rests in the ability of our citizens to judge the value of the courts and to appreciate the integrity of our judiciary as a fundamental, coequal branch of government. Court professionals who work for the judicial branch should be faithful to its values and held accountable to this trust. The Model Code of Conduct for Court Professionals is promulgated by the National Association for Court Management. The Model Code of Conduct may be found on the National Association of Court Managements webpage, accessible at the following link: https://nacmnet.org/resources/education/ethics/.

When a neutral is participating in court, particularly via Zoom with a name tag indicating they are a "Mediator" to the courtroom attendees, they are perceived as an official member of the court and immediately held to a higher standard of decorum and conduct. To promote the public's confidence in the judiciary, and by association, confidence in alternative dispute resolution, mediators must conduct themselves in such a way to not call into question the morals and integrity of themselves and the court system. Many members of the public find the judicial system to be confusing and intimidating, and even those with the most experience in the courtroom have found it challenging to adjust to virtual format. When an individual seeks basic assistance from those they view to be in a position of authority, it is prudent to treat them with respect and offer them as much assistance as they are permitted to give.

We find ourselves in the day and age where social media is extremely popular and one of the primary ways societies communicate and obtain information. Social media allows individuals to communicate through the internet via many different platforms. We have the ability to share every thought and idea with the public through social media, and while this creates an easy way to communicate with trusted friends and family, it also presents the danger of sharing these posts with others with whom we did not intend to share. No matter how private a social media profile may be, what is posted should be considered public, as those you have privately shared it with can easily share the post with anyone.

In this case, a mutual friend of the Complainant and mediator shared the post with the Complainant. The mediator certainly never intended the post to be shared with said individual, but the mediator nonetheless created a hurtful and embarrassing situation for the Complainant. While the mediator may not have intended for the post to be seen by the Complainant, this situation produced an instructive example of just how exposed the judiciary and the court room professionals are to the public. When a mediator is in court and represents to the public that they are a mediator in a

courtroom setting, either in person or on a virtual platform such as Zoom, their actions reflect directly on the court and the Office of Dispute Resolution.

When the Office of Dispute Resolution registers mediators, they are affirming to the public that they trust these individuals to conduct themselves ethically, and that these neutrals have a high sense of integrity. This event could have been the Complainant's first impression and interaction with the Court. Neutrals must remember and the Code of Court Professionals suggests that all courtroom professionals must act in such a way as to promote trust in the judiciary. The mediator's actions in this instance are a prime example of how to erode trust in the court system and the alternative dispute resolution process.

Appropriate Social Media Usage

The Office of Dispute Resolution does not seek to censor or limit a neutral's right to free speech and express that right through social media platforms. The Committee does, however, caution its neutrals that any communication that threatens the integrity of the Office of Dispute Resolution and the court system will be addressed to ensure it aligns with the Supreme Court of Georgia ADR rules and ethical standards, specifically being of good moral character. Neutrals who apply to be a mediator do so with the understanding that once registered, they have agreed to be of and maintain good moral character, adhering to the highest ethical standards. The Committee cautions neutrals that the rules of ethics still apply whether the neutral is mediating or not, and neutrals are always expected to uphold and promote the public trust and confidence in the judiciary.

Neutrals are highly visible, especially while appearing as a "Mediator" for a court calendar, whether in person or remote, and should exercise discretion in posting about the court process. Furthermore, many courts have implemented social media policies to which each neutral must be familiar with and abide by while working in that court. While court proceedings may seem routine and simple to the mediator, the same court proceeding may be foreign and stressful to the litigant. Neutrals should offer professional assistance when appropriate and always refrain from making fun or light of those who are less knowledgeable about our court system and processes. Neutrals should be respectful and never assume that a post to Facebook (or any social media platform), even on a private page, cannot be seen by the public. Inappropriate posts, such as mocking or ridiculing an individual regarding a dispute resolution or court proceeding will not be tolerated by the Office of Dispute Resolution.

Conclusion

While the Office of Dispute Resolution trusts all neutrals to conduct themselves morally and with discretion when posting on social media, the Ethics Committee reminds all neutrals of their obligation to hold themselves to a high ethical standard. Social media has become a cornerstone of our society and is one of the central ways courts communicate information to the public. Social media is not inherently bad, as it can afford neutrals a unique opportunity to engage with the community, promoting public trust and confidence in the judiciary and the processes and procedures in place.

In this instance, the neutral in question posted a seemingly private communication to their Facebook page about a court proceeding making fun of the Complainant who had reached out for assistance. This behavior does not comport with the ethical guidelines and negatively impacts the public's trust and perception of the judiciary. Neutrals have a commitment to the judiciary to assist members of the community in reaching a resolution for their respective disputes. While no mediation occurred in this instance, and no confidential communications were shared, the Committee nevertheless found that the ethics rules and standards continue to apply to neutrals in the absence of a mediation, and neutrals are encouraged to act in a way that does not erode the public's confidence in the judiciary.

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MEMORANDUM

TO: Registered Neutrals with the Georgia Office of Dispute Resolution
FROM: Carole Collier, Staff Attorney
SUBJECT: Recording of Virtual Mediations
DATE: October 26, 2022

I. Introduction

The Georgia Office of Dispute Resolution (hereinafter the "GODR") is pleased that registered neutrals who transitioned to virtual platforms for mediation sessions during the COVID pandemic continue to provide these virtual services in a successful and efficient manner. As virtual mediations continue to evolve, becoming a more common practice in resolving disputes, the GODR has deemed it beneficial to release a best practices manual designed to guide mediators in all mediations, including a section dedicated solely to remote mediation sessions. While this manual is being drafted, the GODR would like to remind neutrals that the recording of virtual mediation conferences, specifically the agreements of the parties, remains prohibited. Below is an explanation of the applicable Supreme Court Alternative Dispute Resolution Rules (hereinafter, the "Rules"), and a recommendation for best practices when reaching an agreement during virtual mediations.

II. Mediation Recording Implications

Pursuant to the Rules, the recording of agreements reached by parties during virtual mediations is not an approved practice and is strictly prohibited by the Rules. Additionally, the recording of a statement that parties have reached an agreement without formalizing the agreement in a signed document is also ill advised. Both instances breach the confidentiality provisions of the Rules and is inadmissible in subsequent judicial proceedings. The recording of mediations, whether conducted in-person or virtually, violates the confidentiality provisions of the Supreme Court's Alternative Dispute Resolution Rules, and the Georgia Uniform Mediation Act. Furthermore, mediation agreements, even if recorded, are not binding absent a written agreement.

The Supreme Court Alternative Dispute Resolution Rules, Appendix C, Chapter 1.A., Section II. Confidentiality, states as follows:

> "Confidentiality is the attribute of the mediation process which promotes candor and full disclosure. Without the protection of confidentiality, parties would be unwilling to communicate freely, and the discussion

> necessary to resolve disputes would be seriously curtailed. Statements made during the conference and documents and other material, including a mediator's notes, generated in connection with the conference are not subject to disclosure or discovery and may not be used in subsequent administrative or judicial proceedings. A written and executed agreement or memorandum of an agreement resulting from a court-annexed or court-referred ADR process is discoverable unless the parties agree otherwise in writing. Any exceptions to the promise of confidentiality such as a statutory duty to report certain information must be revealed to the parties in the opening statement. Information given to a mediator in confidence by one party must never be revealed to another party absent permission of the first party."

Similarly, the Georgia Uniform Mediation Act states in O.C.G.A. §9-17-3:

> "Except as provided in Code Section 9-17-6, a mediation communication is privileged as provided in subsection (b) of this code section and is not subject to or admissible as evidence in a proceeding unless waived or precluded as provided by Code Section 9-17-4.
>
> In a proceeding, the following privileges apply: 1) a mediation party may refuse to disclose and may prevent any other person from disclosing a mediation communication; 2) a mediator may refuse to disclose a mediation communication and may prevent any other person from disclosing a mediation communication of the mediator; and 3) a nonparty participant may refuse to disclose and may prevent any other person from disclosing a mediation communication of the nonparty participant."

Additionally, the Supreme Court Alternative Dispute Resolution Rules, Section VII. Confidentiality and Immunity, states as follows:

> "A written and executed agreement or memorandum of agreement resulting from a court-annexed or court-referred ADR process is not subject to the confidentiality described above . . . [N]either the neutral nor any observer present with permission of the parties in a court-annexed or court-referred ADR process may be subpoenaed or otherwise required to testify concerning a mediation or case-evaluation or early neutrals evaluation conference or, unless otherwise provided by court ADR rules, a non-binding arbitration, in any subsequent administrative or judicial proceeding. A neutral's notes or records are not subject to discovery."

O.C.G.A. §9-17-5(a)(1) states:

> "There shall be no privilege under code section 9-17-3 for a mediation communication that is in an agreement evidenced by a record signed by all parties to an agreement."

O.C.G.A. §9-17-6(a) states:

> "Except as provided in subsection (b) of this code section, a mediator shall not make a report, assessment, evaluation, recommendation, finding or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation."

Lastly, O.C.G.A. §9-17-7 states:

> "Notwithstanding any provision of this chapter to the contrary, mediation and mediation communications, and such related conduct, shall not be admissible or subject to disclosure, except to the extent agreed to by the parties in writing or as provided in Code Section 24-4-408 or other law or court required rule of this state, unless such communications are subject to Article 4 of Chapter 18 of Title 50, relating to open records."

Recording virtual mediations to formalize a mediated agreement does not replace a written agreement that is binding and admissible in court. As the rules clearly state above, statements made during the mediation conference and documents and other material, including the mediator's notes generated in relation to the mediation, are not discoverable and may not be used in a subsequent judicial proceeding. A written and executed agreement or a memorandum of an agreement resulting from a court-annexed or court-referred ADR process is discoverable unless the parties agree otherwise in writing. Recording the parties orally stating that they have reached a mediated agreement does not bind the parties without a written, formal document memorializing the agreement.

III. Guidance

As stated in the Rules, confidentiality is the attribute in mediations that promotes candor and disclosure from all parties. Confidentiality and protection from disclosure in judicial proceedings are crucial for a successful mediation, allowing parties the confidence that what is said will not extend beyond the mediation, with few exceptions outlined in the mediator's guidelines. It is extremely important that parties feel they may enter into agreements freely and voluntarily. If mediators record that parties have reached a mediated agreement without formalizing that agreement in writing, then there is no agreement and no purpose for the recording. For those cases wherein an agreement at mediation is reached, parties can only be assured of a formalized, enforceable document if an agreement or memorandum of understanding is signed at the mediation session. Since the rules clearly state that only written agreements are allowed to be used in

subsequent judicial proceedings, it makes little sense for mediators to record an oral agreement. Parties are never required to reach an agreement and if a written agreement is not possible at the mediation session, the parties are free to enter into an agreement at a later time. In the event one of the parties needs to enforce an agreement reached at mediation, a recording of a mediated agreement could not be used in place of a written agreement. Without a signed written agreement, there is no admissible record of any agreement reached at mediation, and any production of a recording violates the confidentiality provision of the Rules.

There are many benefits to virtual mediations, including accessibility and flexibility (parties can participate in mediation from any location at any time), as well as monetary (travel costs are reduced). While mediations may occur in different formats (in-person, virtual, hybrid, etc.), the Rules still apply. Unless there is a written agreement, the recording of a mediated agreement or the recorded statement that the parties have an agreement do not circumvent the Rules and will not be admissible to replace a written agreement in court. Confidentiality is the cornerstone of the mediation process, and parties will be less apt to fully negotiate if they fear that their otherwise confidential statements may be used against them after the mediation is over. The recording of mediations is prohibited, and any violations of the Rules will be addressed by the Supreme Court Commission's Committee on Ethics.

SAMPLE GUIDELINES FOR MEDIATION

This is sample language to be used or altered as a mediator or program wishes, and the use of this template is not required under the ADR Rules or by the GODR

The parties have agreed to participate in mediation under the following guidelines:

1. The parties understand that the purpose of mediation is to work together to find a mutually acceptable resolution of the issues. To achieve a mutually acceptable resolution, the mediator and the parties and their attorneys agree to work cooperatively to ensure that each party understands the factual issues, the effects of any agreement reached, and any possible consequences of not reaching an agreement. The mediator will lead negotiations to assist in developing a settlement that is acceptable to the parties. The mediator does not make decisions for the parties.

2. The parties agree to be respectful in all communication, allowing each participant to finish his/her comment or statement before responding.

3. For mediation to be successful, open and honest communication, negotiations, and statements are essential. By signing this, the parties agree to make an accurate disclosure of all matters relevant to the process of settlement. This includes providing each party and the mediator with all information relevant to the process of settlement which would be available in the discovery process in a legal proceeding. If a party deliberately withholds information or supplies false information relevant to the settlement, the agreement reached in mediation may be set aside. Materials which are otherwise discoverable are not rendered immune from discovery by use in mediation.

4. The parties will receive copies of any agreement for printing and signing and will be responsible for returning the executed copies to the mediator via mail or overnight delivery service.

5. Information gathered in the mediation process is confidential and privileged. By their signatures below, all parties acknowledge their understanding that there is always some inherent risk when confidential information is conveyed via telecommunication platforms, including but not limited to, virtual conferencing services, email services, and telephone calls. All communications, in person and virtual, by the parties shall be treated as strictly confidential by the mediator and the parties, including emails, chat and text messages, notes, telephone calls and all other communications. The mediator has taken reasonable steps to provide a confidential and secure virtual environment, and all parties are affirming that they are alone in the room and cannot be overheard while participating. No additional persons shall participate in the mediation process except for the mediator and the parties and their attorneys (e.g. no new partners, grandparents, etc.) unless both parties and the mediator agree to include such person(s) and such person(s) sign this document. The presence of any and all persons participating in and/or listening to the mediation session must be disclosed to and approved in advance by the mediator. The mediator will not disclose any information learned during the mediation without the express permission of the parties.

Confidential matters disclosed in a private meeting with one party will not be divulged to the other party without the verbal consent of the party making the disclosure. Parties agree not to record any portion of a mediation session, even those taking place in a private meeting (caucus). The parties also acknowledge by their signatures below that they will preserve the confidentiality of a mediation session, even if the confidentiality of a portion or all a mediation session is breached due to technical failure or for any other reason.

6. For those times when the mediator needs to speak with each party individually ("caucus"), the mediator may place you in a separate room so your conversation will not be heard by the other party(ies). In the event you are able, for any reason, to hear the communication intended to be private with the other party(ies), you agree to IMMEDIATELY notify the mediator.

7. Nothing in these guidelines shall be construed to prevent or excuse the mediator from reporting situations in which a) there are threats of imminent violence to self or others; or b) the mediator believes that a child is being abused or that the safety of any party or third person is in danger.

8. It is expressly understood by the parties that the mediator does not offer legal or financial advice in this mediation and is not functioning as an attorney or in another professional capacity, whether or not the mediator is in fact an attorney or other professional. The mediator's role is to aid the parties in seeking a fair agreement in accordance with their respective interest. The construction of a proposed agreement and any question of law should be referred by the parties to their own legal counsel. All parties are encouraged to have an independent attorney look over any completed agreements. A completed stipulation form will incorporate all issues agreed upon. All parties further agree that, unless and until an agreement/memorandum of understanding is reduced to writing AND signed by all parties present, it is not final and binding on the parties.

9. The mediator is not liable for any statements or decisions made during the course of the mediation. Any written agreement is the agreement of the parties reached at the mediation. The mediator in a court program shall not be held liable for civil damages for any statement, action, omission, or decision made in the course of the mediation 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 mediation process.

10. Parties acknowledge that, even where participation in mediation is mandated by the court, a settlement is not required, and the mediation can be terminated at any time by the mediator or the parties. However, the court may require the parties to participate in good faith in the mediation process, and the parties acknowledge their willingness to participate in the process in good faith and to genuinely attempt to resolve their dispute. If the parties do not come to an agreement on one or more of the issues, the parties understand that the case will proceed in regular fashion through the court process with the assigned judge. If the parties are successful in reaching an agreement through mediation, the written and executed agreement shall be [insert applicable court process for submitting agreements to the judge].

11. In the event that there is a subsequent adversarial action, either initiated or continued, following the mediation process, parties agree not to call as a witness or subpoena the mediator nor any agents or employees of the [firm or program] regarding this mediation. Likewise, the parties will not subpoena or seek discovery of any documents developed for or utilized in the course of this mediation.

12. Parties understand that payment of the mediator shall be made at the time services are rendered. Fees will accrue at the rate of $[hourly/daily rate]. Parties understand that all payments due will be processed electronically and that the mediator uses [payment software website link (e.g. Venmo, PayPal, Zelle)] to process all electronic financial payments.

13. Parties acknowledge that, by their participation, they 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.

I HAVE READ AND UNDERSTAND the above guidelines for online mediation for all matters relevant to the process of settlement.

[signatures]

SAMPLE MEDIATION NOTICE TEMPLATE

The Georgia Office of Dispute Resolution has put together the following information and examples to consider when drafting the mediation notice for parties and attorneys.

1. **Session Information:**

   A mediation session has been scheduled for [Date], at [Time], to be conducted in person at [Location]. Please confirm your attendance no later than 24 hours prior to the mediation session.

2. **Attach guidelines for online mediation:**

   I am attaching a copy of the guidelines to mediate, which includes the requirements to mediate. I ask that you review this document and return a signed copy at your earliest opportunity, before the session, if possible.

3. **Payment:**

   The fee for the mediation session is $[hourly/daily rate], due at the time of the mediation session. All payments will be processed electronically using [payment software website link (e.g. Venmo, PayPal, Zelle)]. If you are unable to pay electronically, please email me at [email address] so we may make alternative arrangements.

4. **Best Practices and Troubleshooting:**

   a. Please arrive for mediation 15 minutes early, or at the time designated by me. Plan to spend the day in mediation, and it may be necessary to adjust your schedule accordingly, including but not limited to arranging appropriate childcare and notifying family and friends of your unavailability.

   b. Silence all electronic devices to limit distractions.

   c. You have the right to bring an attorney to the mediation and review any agreement prior to signing. I am neutral and I will not give either party financial or legal advice. If you intend to bring a support person to the mediation, please contact me via email prior to the session for approval.

SAMPLE GUIDELINES FOR ONLINE MEDIATION

This is sample language to be used or altered as a mediator or program wishes, and the use of this template is not required under the ADR Rules or by the GODR

The parties have agreed to participate in online mediation under the following guidelines:

1. The parties understand that the purpose of mediation is to work together to find a mutually acceptable resolution of the issues. To achieve a mutually acceptable resolution, the mediator and the parties and their attorneys agree to work cooperatively to ensure that each party understands the factual issues, the effects of any agreement reached, and any possible consequences of not reaching an agreement. The mediator will lead negotiations to assist in developing a settlement that is acceptable to the parties. The mediator does not make decisions for the parties.

2. The parties agree to use an online platform for the mediation session. Parties understand that the mediator uses [online program (e.g. Zoom Pro, WebEx, Microsoft Teams, Legaler)], which is an online platform, to conduct the online mediation session(s). Parties agree that they will download and install the software from [program website] and establish a free account, if necessary, to participate in the online mediation session(s). The parties agree to familiarize themselves with the operation of the [online program] platform so that they are able to operate the system and participate in the online mediation session(s).

3. The parties agree to be respectful in all communication, allowing each participant to finish his/her comment or statement before responding. The online format may amplify and exaggerate sound so maintaining a regular speaking voice is important. In addition, please remember that the camera does not always transmit hand gestures or non-verbal cues, so it is important to verbalize all communication during an online mediation session.

4. For mediation to be successful, open and honest communication, negotiations, and statements are essential. By signing this, the parties agree to make an accurate disclosure of all matters relevant to the process of settlement. This includes providing each party and the mediator with all information relevant to the process of settlement which would be available in the discovery process in a legal proceeding. If a party deliberately withholds information or supplies false information relevant to the settlement, the agreement reached in mediation may be set aside. Materials which are otherwise discoverable are not rendered immune from discovery by use in mediation.

5. Parties understand that the mediator uses [document sharing program (e.g. Dropbox, Google docs, OneDrive] as an online platform for storing and transmitting any documents and information relative to the online mediation process. Parties affirm that they have downloaded the required software and established a free [document sharing account type (i.e. free, personal)] account, if necessary, to use the program. Parties agree to utilize [document sharing program] to send and receive all documents relative to the online mediation process.

6. Parties understand that the mediator uses [document execution program (e.g. DocuSign, Formstack, Adobe)] as an online platform for obtaining signatures in the execution of documents required

during the mediation process. Parties affirm they have created an account with [document execution program], if necessary, to utilize the service. In the event that parties have chosen not to use [document execution program] for the execution of documents, or in those instances when original signatures are required, then parties will receive copies for printing and signing and will be responsible for returning the executed copies to the mediator via mail or overnight delivery service.

7. Information gathered in the mediation process is confidential and privileged. By their signatures below, all parties acknowledge their understanding that there is always some inherent risk when confidential information is conveyed via telecommunication platforms, including but not limited to, virtual conferencing services, email services, and telephone calls. All communications, in person and virtual, by the parties shall be treated as strictly confidential by the mediator and the parties, including emails, chat and text messages, notes, telephone calls and all other communications. The mediator has taken reasonable steps to provide a confidential and secure virtual environment, and all parties are affirming that they are alone in the room and cannot be overheard while participating. No additional persons shall participate in the mediation process except for the mediator and the parties and their attorneys (e.g. no new partners, grandparents, etc.) unless both parties and the mediator agree to include such person(s) and such person(s) sign this document. The presence of any and all persons participating in and/or listening to the mediation session must be disclosed to and approved in advance by the mediator. The mediator will not disclose any information learned during the mediation without the express permission of the parties. Confidential matters disclosed in a private meeting with one party will not be divulged to the other party without the verbal consent of the party making the disclosure. Parties agree not to record any portion of a mediation session, even those taking place in a private meeting (caucus). The parties also acknowledge by their signatures below that they will preserve the confidentiality of a mediation session, even if the confidentiality of a portion or all a mediation session is breached due to technical failure or for any other reason.

8. For those times when the mediator needs to speak with each party individually ("caucus"), the mediator may place you in a separate breakout room so your conversation will not be heard by the other party(ies). In the event you are able, for any reason, to hear the communication intended to be private with the other party(ies), you agree to IMMEDIATELY terminate participation in the online mediation session and call in to your mediator at [XXX-XXX-XXXX].

9. Parties acknowledge they have a strong and secure WiFi or ethernet (hard-wired) connection for their computer. Parties further affirm that they are not on a public WiFi connection.

10. Nothing in these guidelines shall be construed to prevent or excuse the mediator from reporting situations in which a) there are threats of imminent violence to self or others; or b) the mediator believes that a child is being abused or that the safety of any party or third person is in danger.

11. It is expressly understood by the parties that the mediator does not offer legal or financial advice in this mediation and is not functioning as an attorney or in another professional capacity, whether or not the mediator is in fact an attorney or other professional. The mediator's role is to aid the parties in seeking a fair agreement in accordance with their respective interest. The construction of a proposed agreement and any question of law should be referred by the parties to their own legal counsel. All parties are encouraged to have an independent attorney look over any completed agreements. A completed stipulation form will incorporate all issues agreed upon. All parties further agree that, unless and until an agreement/memorandum of understanding is reduced to writing AND signed by all parties present, it is not final and binding on the parties.

12. The mediator is not liable for any statements or decisions made during the course of the mediation.

Any written agreement is the agreement of the parties reached at the mediation. The mediator in a court program shall not be held liable for civil damages for any statement, action, omission, or decision made in the course of the mediation 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 mediation process.

13. Parties acknowledge that, even where participation in mediation is mandated by the court, a settlement is not required, and the mediation can be terminated at any time by the mediator or the parties. However, the court may require the parties to participate in good faith in the mediation process, and the parties acknowledge their willingness to participate in the process in good faith and to genuinely attempt to resolve their dispute. If the parties do not come to an agreement on one or more of the issues, the parties understand that the case will proceed in regular fashion through the court process with the assigned judge. If the parties are successful in reaching an agreement through mediation, the written and executed agreement shall be [insert applicable court process for submitting agreements to the judge].

14. In the event that there is a subsequent adversarial action, either initiated or continued, following the mediation process, parties agree not to call as a witness or subpoena the mediator nor any agents or employees of the [firm or program] regarding this mediation.. Likewise, the parties will not subpoena or seek discovery of any documents developed for or utilized in the course of this mediation.

15. Parties understand that payment of the mediator shall be made at the time services are rendered. Fees will accrue at the rate of $[hourly/daily rate]. Parties understand that all payments due will be processed electronically and that the mediator uses [payment software website link (e.g. Venmo, PayPal, Zelle)] to process all electronic financial payments.

16. Parties acknowledge that, by their participation, they 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.

17. Parties understand that, despite all best efforts, there may be interruption with technology that is beyond the control of the mediator and parties. If your connection to the meeting is interrupted, please attempt to log in again. If you are unable to log back in, please call your mediator at [XXX-XXX-XXXX]. If the technology issues cannot be resolved in reasonable time, the online mediation session will be canceled and rescheduled as soon as possible.

I HAVE READ AND UNDERSTAND the above guidelines for online mediation for all matters relevant to the process of settlement.

[signatures]

SAMPLE ONLINE MEDIATION NOTICE TEMPLATE

The Georgia Office of Dispute Resolution has put together the following information and examples to consider when drafting the mediation notice for parties and attorneys.

1. **Session Information:**

   A mediation session has been scheduled for [Date], at [Time], using [online program (e.g. Zoom Pro, WebEx, Microsoft Teams, Legaler)]. Join the [online program] meeting by following this link: [insert meeting link]

2. **Specific online program platform information:**

   Prior to the session, you must visit the [online program] website at [online program website] to download & install the program and establish a [type of account (i.e. free membership, personal account)] account, if necessary. If you are unfamiliar with [online program], there are several tutorials and resources available on the website for your review.

3. **Attach guidelines for online mediation:**

   I am attaching a copy of the guidelines to mediate, which includes the requirements to mediate online. I ask that you review this document and return a signed copy at your earliest opportunity, before the session, if possible.

4. **Technical Requirements:**

   You must have a computer (laptop or desktop preferred) with a camera and microphone. You will need to have your computer connected to a power source for the duration of the session.

   You must have a strong and secure WiFi or ethernet (hard-wired) connection during the mediation session. You may not use a public WiFi connection, such as those that may be available in public spaces or at certain businesses.

5. **Document Sharing Program:**

   Please have all your documents available electronically.

   I use [document sharing program (e.g. Dropbox, Google docs, OneDrive)] as an online platform for storing and transmitting any documents and information relative to your online mediation process. Prior to the mediation session, you must download the software and/or apps from [document sharing program] and establish a [document sharing account type i.e. free, personal] account, if necessary, to use the program. I am asking that you agree to utilize [document sharing program] to send and receive all documents relative to your online mediation process. More information can be found at [document sharing website].

6. **Document Execution Program:**

   Whenever possible, I use [document execution program (e.g. DocuSign, Formstack, Adobe)] as a platform for obtaining your signature for documents that are required during your mediation process. You agree to create any account with [document execution program], if necessary, to utilize the service. In the event that you choose not use [document execution program] for the

execution of documents, or in those instances when original signatures are required, copies will be transmitted to you for printing and signature, and you will be responsible for returning the executed copies to me via mail or overnight delivery service. More information can be found at [document execution website].

7. **Payment:**

   The fee for the mediation session is $[hourly/daily rate], due at the time of the mediation session. All payments will be processed electronically using [payment software website link (e.g. Venmo, PayPal, Zelle)]. If you are unable to pay electronically, please email me at [email address] so we may make alternative arrangements.

8. **Best Practices and Troubleshooting:**

   a. You must be in a safe location where you can be alone and not overheard. You agree to take all reasonable measures to ensure that you are not interrupted during the mediation session. This includes adjusting your schedule accordingly, including but not limited to arranging appropriate childcare and notifying family and friends of your unavailability.

   b. Turn off all other computer functions and close unnecessary software programs and internet tabs, especially those with notifications, to limit distractions. This will also help with the quality of the video.

   c. I suggest you log on for your session at least ten (10) minutes early in case there are any technical issues. If you have any issues with logging into the session, please call [XXX-XXX-XXXX].

   d. When you log on for the first time, you will be placed in a waiting room. This function is enabled to 1) keep all uninvited guests from entering the session; and 2) help preserve the neutrality of the mediator by limiting one-on-one conversations prior to the start of the session. You will not be able to hear or see anyone else while in the virtual waiting room. Once all parties are logged on and in the waiting room, I will admit you to the meeting. If all parties are not signed into the waiting room ten (5) minutes after the scheduled start time for your mediation session, I will admit all parties who have signed in so that a determination can be made as to how to proceed.

   e. Despite all our best efforts, there will be times when technology does not operate properly and may cause a delay in the start of a mediation session or the interruption of one. If you are unable to join a scheduled mediation session, please contact me immediately at [XXX-XXX-XXXX] to discuss how to proceed. If your connection to the meeting is interrupted, please attempt to log on again. If you are unable to log back on, please contact me at the number above. If the technology issues cannot be resolved in reasonable time, the online mediation session will be canceled and rescheduled as soon as possible.

Sample Motion to Quash Subpoena

IN THE SUPERIOR COURT OF _____COUNTY

STATE OF GEORGIA

_____,	**)**	
	)	
Plaintiff,	**)**	**CIVIL ACTION FILE NO.**
-vs-	**)**	
	)	
	)	
_____,	**)**	
	)	
Defendant.	**)**	

MOTION TO QUASH SUBPOENA FOR

WITNESS TESTIMONY

COMES NOW, _____, a registered mediator with the Georgia Office of Dispute Resolution, and moves this court to quash the subpoena served on him/her in the above styled action, and files this, *Motion to Quash Subpoena for Witness Testimony* and shows the Court the following:

1.

_____ is a non-party to the above styled case. _____ conducted a mediation for the above-mentioned parties on _____. The parties signed the Agreement to Mediate which informed each party that the mediator could not be subpoenaed to testify about the mediation.

2.

The subpoena seeks to have the mediator sworn as a witness and provide testimony about the mediation that he/she conducted for the parties on _____.

3.

Pursuant to O.C.G.A. §24-4-408(b), evidence of conduct or statements made in compromise negotiations or mediation shall not be admissible.

4.

Additionally, pursuant to the Georgia Uniform Mediation Act, O.C.G.A. §9-17-3(a) and (b)(2), except as otherwise provided in O.C.G.A. §9-17-6, a mediation communication is privileged as provided in subsection (b) of this Code section and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by O.C.G.A. §9-17-4. A mediator may refuse to disclose a mediation communication and may prevent any other person from disclosing a mediation communication of the mediator.

5.

Lastly, pursuant to the Supreme Court Alternative Dispute Resolution Rules, § VII (A) Confidentially and Immunity,

> "Any statement made during a court-annexed or court-referred mediation or case evaluation or early neutral evaluation conference or as part of intake by program staff in preparation for a mediation, case evaluation or early neutral evaluation is confidential, not subject to disclosure, may not be disclosed by the neutral or program staff, and may not be used as evidence in any subsequent administrative or judicial proceeding… Neither the neutral nor any observer present with permission of the parties in a court-annexed or court-referred ADR process may be subpoenaed or otherwise required to testify concerning a mediation or case evaluation or early neutral evaluation conference or, unless otherwise provided by court ADR rules, a non-binding arbitration, in any subsequent administrative or judicial proceeding."

6.

Here, the parties signed the agreement to mediate and agreed that the mediator would not be subpoenaed to testify about the mediation. Additionally, the rules of evidence clearly establish that statements made in an effort to compromise or in a mediation are not subject to discovery and may not be used as evidence in a proceeding.

7.

Pursuant to the rules of evidence, the Georgia Uniform Mediation Act, and the Supreme Court ADR Rules, _____ requests that the *Subpoena for Witness Testimony* be quashed, and _____ be dismissed from testifying before this Court.

WHEREFORE, _____ prays as follows:

a) That this Court grant the *Motion to Quash Subpoena for Witness Testimony*; and

b) That this Court dismiss *Subpoena for Witness Testimony*.

This _____ day of _____ 20__.

_____

Name

Georgia Family Law ADR Mediation Checklist

Equitable Division of Property

_____Real Property (Marital)

How to transfer or sell

Mortgage

_____Division of Marital Property[1]

_____Cash Accounts

_____Brokerage/Investment Accounts

_____Stock Options (Marital Portion)

_____Retirement Accounts

_____Trustee to Trustee transfer:

IRA

_____Qualified Domestic Relations Order Needed and who will draft?

401(k)

Pension

_____Annuity

_____Business Interests

Valuation

_____Executive Compensation

_____Cash Value Life Insurance

_____Reward Points (ie. Airline Points, Credit Card points, Hotel Points)

_____Automobiles

_____Boat(s), Recreational Vehicles

_____Timeshares

_____Indebtedness

_____Credit Card(s)

_____Loan(s)

_____Medical Bills Outstanding

_____Mortgage

[1] This is not an exhaustive list. Make sure the parties comply with providing verified Domestic Relations Financial Affidavits and disclose all marital assets.

_____Taxes

_____Refund or Owing

_____Collectibles

_____Personal Property

Alimony

_____Lump Sum

_____Periodic

Child Custody

_____Parenting Plan

_____Legal Custody

Final Decision Making

Medical
Education
Extracurricular
Religion

_____Physical Custody

Weekday/Weekend
Holiday

Child Support

_____Monthly Support

_____Special Needs

_____Health Insurance for the Children

_____Work Related Child-Care

_____Private School Tuition

Health Insurance of the Parties

Miscellaneous

_____Life Insurance Policies (term?)

_____Last Will & Testament

_____Beneficiaries

Attorney's Fees

_____COUNTY SUPERIOR COURT
STATE OF GEORGIA

_____	)
Plaintiff,	) Civil Action
	) Case Number _____
vs.	)
	)
_____	)
Defendant.	)

PARENTING PLAN

( ) The parties have agreed to the terms of this plan and this information has been furnished by both parties to meet the requirements of OCGA Section 19-9-1. The parties agree on the terms of the plan and affirm the accuracy of the information provided, as shown by their signatures at the end of this order.

( ) This plan has been prepared by the judge.

This plan ( ) is a new plan.

( ) modifies an existing Parenting Plan dated _____.

( ) modifies an existing Order dated _____.

Child's Name	Date of Birth

I. Custody and Decision Making:

A. Legal Custody shall be (choose one:)

( ) with the Mother
( ) with the Father
( ) Joint

B. Primary Physical Custodian

For each of the children named below the primary physical custodian shall be:

	d/o/b:	( ) Mother	( ) Father	( ) Joint
	d/o/b:	( ) Mother	( ) Father	( ) Joint
	d/o/b:	( ) Mother	( ) Father	( ) Joint
	d/o/b:	( ) Mother	( ) Father	( ) Joint
	d/o/b:	( ) Mother	( ) Father	( ) Joint

WHERE JOINT PHYSICAL CUSTODY IS CHOSEN BY THE PARENTS OR ORDERED BY THE COURT, A DETAILED PLAN OF THE LIVING ARRANGEMENTS OF THE CHILD(REN) SHALL BE ATTACHED AND MADE A PART OF THIS PARENTING PLAN.

C. Day-To-Day Decisions

Each parent shall make decisions regarding the day-to-day care of a child while the child is residing with that parent, including any emergency decisions affecting the health or safety of a child.

D. Major Decisions

Major decisions regarding each child shall be made as follows:

Educational decisions	( ) mother ( ) father ( ) joint
Non-emergency health care	( ) mother ( ) father ( ) joint
Religious upbringing	( ) mother ( ) father ( ) joint
Extracurricular activities	( ) mother ( ) father ( ) joint
_____	( ) mother ( ) father ( ) joint
_____	( ) mother ( ) father ( ) joint

E. Disagreements

Where parents have elected joint decision making in Section I.D above, please explain how any disagreements in decision-making will be resolved.

_____

_____

_____

II. Parenting Time/Visitation Schedules

A. Parenting Time/Visitation

During the term of this parenting plan the non-custodial parent shall have at a minimum the following rights of parenting time / visitation (choose an item):

( ) The weekend of the first and third Friday of each month.

( ) The weekend of the first, third, and fifth Friday of each month.

( ) The weekend of the second and fourth Friday of each month.

( ) Every other weekend starting on _____.

( ) Each _____starting at _____a.m./p.m. and ending _____a.m./p.m.

( ) Other: _____.

( ) and weekday parenting time / visitation on (choose an item):

( ) None
( ) Every Wednesday Evening
( ) Every other Wednesday during the week prior to a non-visitation weekend.
( ) Every _____and _____evening.
( ) Other: _____

For purposes of this parenting plan, a weekend will start at _____a.m./p.m. on [Thursday / Friday / Saturday / Other:_____] and end at _____a.m./p.m. on [Sunday / Monday / Other:_____].

Weekday visitation will begin at _____a.m./p.m. and will end [at _____p.m. / when the child(ren) return(s) to school or day care the next morning / Other:_____ _____].

This parenting schedule begins:

( ) _____ OR ( ) date of the Court's Order
(day and time)

B. Major Holidays and Vacation Periods

Thanksgiving

The day to day schedule shall apply unless other arrangements are set forth:

_____

_____

beginning _____.

Winter Vacation

The ( ) mother ( ) father shall have the child(ren) for the first period from the day and time school is dismissed until December _____ at _____ a.m./p.m. in ( ) odd numbered years ( ) even numbered years ( ) every year. The other parent will have the child(ren) for the second period from the day and time indicated above until 6:00 p.m. on the evening before school resumes. Unless otherwise indicated, the parties shall alternate the first and second periods each year.

Other agreement of the parents:

_____

_____

_____.

Summer Vacation

Define summer vacation period: _____

The day to day schedule shall apply unless other arrangements are set forth:

_____

_____

beginning _____.

Spring Vacation (if applicable)

Define:_____

The day to day schedule shall apply unless other arrangements are set forth:

_____

_____

beginning _____.

Fall Vacation (if applicable)

Define:_____

The day to day schedule shall apply unless other arrangements are set forth:

_____

_____

beginning _____.

C. Other Holiday Schedule (if applicable)

Indicate if child(ren) will be with the parent in ODD or EVEN numbered years or indicate EVERY year:

	MOTHER	FATHER
Martin Luther King Day	_____	_____
Presidents' Day	_____	_____
Mother's Day	_____	_____
Memorial Day	_____	_____
Father's Day	_____	_____
July Fourth	_____	_____
Labor Day	_____	_____
Halloween	_____	_____
Child(ren)'s Birthday(s)	_____	_____
Mother's Birthday	_____	_____
Father's Birthday	_____	_____
Religious Holidays:	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
Other: _____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
Other: _____	_____	_____
Other: _____	_____	_____
	_____	_____

D. Other extended periods of time during school, etc. (refer to the school schedule)

_____

_____

_____

E. Start and end dates for holiday visitation

For the purposes of this parenting plan, the holiday will start and end as follows (choose one):

( ) Holidays that fall on Friday will include the following Saturday and Sunday
( ) Holidays that fall on Monday will include the preceding Saturday and Sunday
( ) Other: _____

F. Coordination of Parenting Schedules

Check if applicable:

( ) The holiday parenting time/visitation schedule takes precedence over the regular parenting time/visitation schedule.

( ) When the child(ren) is/are with a parent for an extended parenting time/visitation period (such as summer), the other parent shall be entitled to visit with the child(ren) during the extended period, as follows:

_____

_____

G. Transportation Arrangements

For visitation, the place of meeting for the exchange of the child(ren) shall be:

_____

_____

The _____ will be responsible for transportation of the child at the beginning of visitation.

The _____ will be responsible for transportation of the child at the conclusion of visitation.

Transportation costs, if any, will be allocated as follows:

_____

_____

Other provisions: _____

H. Contacting the child

When the child or children are in the physical custody of one parent, the other parent will have the right to contact the child or children as follows:
( ) Telephone
( ) Other:_____
( ) Limitations on contact:

_____

I. Supervision of Parenting Time (if applicable)

( ) Check here if Applicable

Supervised parenting time shall apply during the day-to-day schedule as follows:

Place: _____

Person/Organization supervising: _____

Responsibility for cost: ( ) mother ( ) father ( ) both equally

J. Communication Provisions

Please check:

( ) Each parent shall promptly notify the other parent of a change of address, phone number or cell phone number. A parent changing residence must give at least 30 days notice of the change and provide the full address of the new residence.

( ) Due to prior acts of family violence, the address of the child(ren) and victim of family violence shall be kept confidential. The protected parent shall promptly notify the other parent, through a third party, of any change in contact information necessary to conduct visitation.

III. Access to Records and Information

Rights of the Parents

Absent agreement to limitations or court ordered limitations, pursuant to O.C.G.A. § 19-9-1 (b) (1) (D), both parents are entitled to access to all of the child(ren)'s records and information, including, but not limited to, education, health, extracurricular activities, and religious communications. Designation as a non-custodial parent does not affect a parent's right to equal access to these records.

Limitations on access rights: _____

_____

_____

Other Information Sharing Provisions:

_____

_____

IV. Modification of Plan or Disagreements

Parties may, by mutual agreement, vary the parenting time/visitation; however, such agreement shall not be a binding court order. Custody shall only be modified by court order.

Should the parents disagree about this parenting plan or wish to modify it, they must make a good faith effort to resolve the issue between them.

V. Special Considerations

Please attach an addendum detailing any special circumstances of which the Court should be aware (e.g., health issues, educational issues, etc.)

_____

_____

VI. Parents' Consent

Please review the following and initial:

1. We recognize that a close and continuing parent-child relationship and continuity in the child's life is in the child's best interest.

Mother's Initials: _____ Father's Initials: _____

2. We recognize that our child's needs will change and grow as the child matures; we have made a good faith effort to take these changing needs into account so that the need for future modifications to the parenting plan are minimized.

Mother's Initials: _____ Father's Initials: _____

3. We recognize that the parent with physical custody will make the day-to-day decisions and emergency decisions while the child is residing with such parent.

Mother's Initials: _____Father's Initials: _____

( ) We knowingly and voluntarily agree on the terms of this Parenting Plan. Each of us affirms that the information we have provided in this Plan is true and correct.

_____ _____

Father's Signature Mother's Signature

ORDER

The Court has reviewed the foregoing Parenting Plan, and it is hereby made the order of this Court.

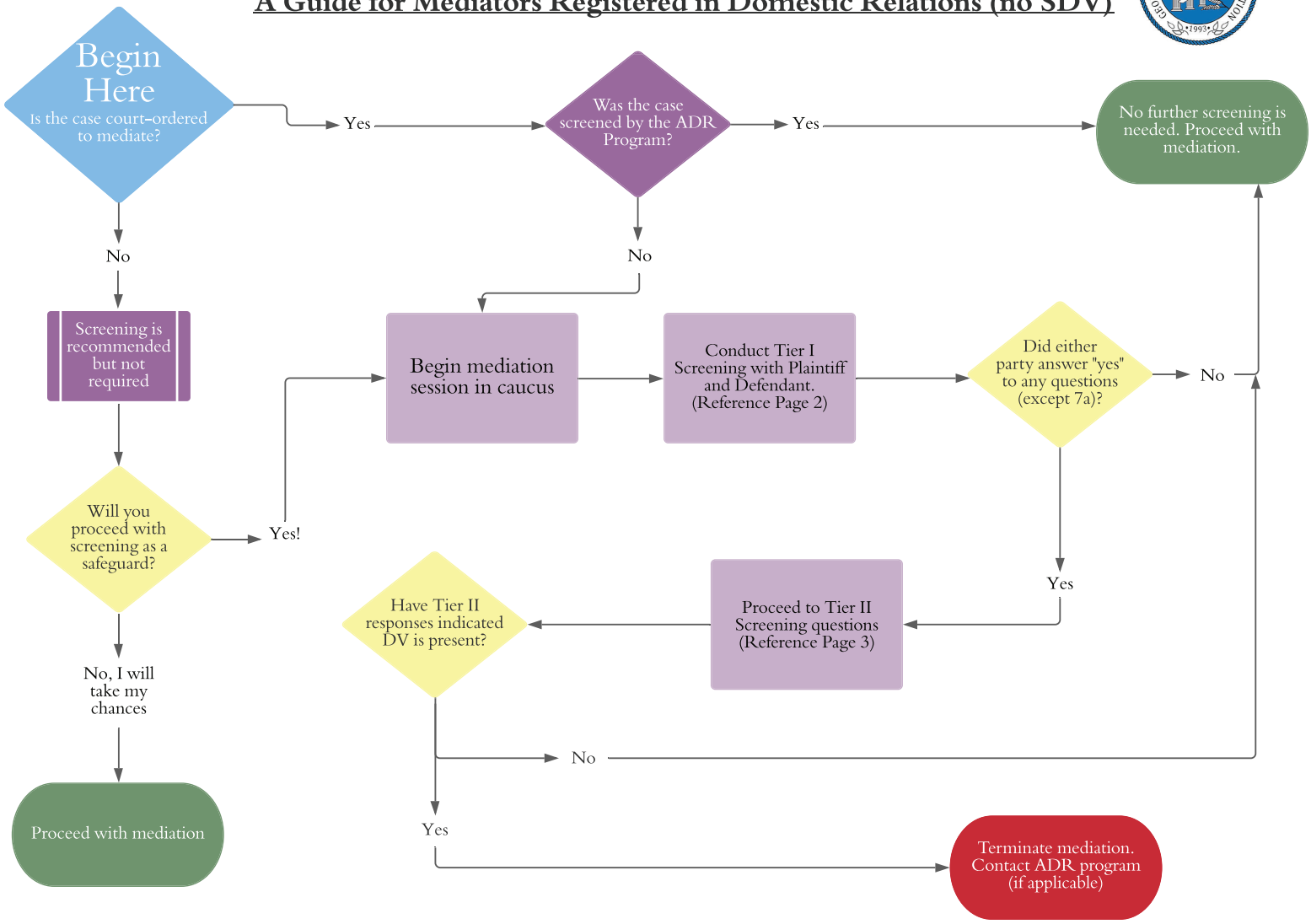
This Order entered on _____, 20 _____ .

_____

JUDGE

_____ COUNTY SUPERIOR COURT

Screening Domestic Relations Cases:
A Guide for Mediators Registered in Domestic Relations (no SDV)



Rev. 1/29/2021

Screening Domestic Relations Cases:
Tier I Questions

Conducting Tier I screening with Plaintiff and Defendant can be done via the GODR Online Screening Tool (https://godr.org/adr-screening/) or using a paper questionnaire form with the following:

1) Have you ever applied for or been granted a protective order, restraining order or stalking order against the other party?

2) Is the Division of Family and Children Services (DFCS) and/or Adult Protective Services (APS) involved in this case? (Does not include requests for financial assistance).

3) Has the other party ever been arrested for an act of violence or making threats against another person?

4) Are you afraid of the other party?

5) Do you have any concerns for your safety when the other party does not get his/her/their way?

6) Has the other party ever tried or threatened during the course of the relationship to: (check all that apply)
   a. Harm you
   b. Harm the children
   c. Harm other family members
   d. Harm family pets
   e. Use a weapon to harm or intimidate you or others
   f. Harm self
   g. None of these apply

7) A. Are you currently living in the same home with the other party?
   B. If so, do you think you would feel safe in returning home after discussing the issues in your case in mediation?

8) Are there any other concerns about safety?
   - If yes, please explain.

Screening Domestic Relations Cases:
Tier II Questions

Conducting Tier II screening with Plaintiff and Defendant should be done verbally, with the mediator using a paper questionnaire form with the following:

1) Review Tier I Questions.

2) Do you know what mediation is and why it has been ordered in your case?

3) What happens when you speak your mind and express your point of view to [insert name]?

4) Has the other party ever denied you the right to access family resources such as money, transportation, a phone, etc.?
   - If yes, please describe.

5) Are you afraid of disagreeing with [name]?
   - If yes, what happens when you disagree?
   - Would you feel able to disagree with [name] if the two of you were in separate rooms and the mediator worked with you one on one?

6) Has [name] discouraged you from spending time with friends and family?

7) Has the other party ever sent you repeated e-mails, calls, social media contacts or other unwanted communication after you asked him/her/them to stop? Has the other party monitored your communication, social media, or your whereabouts?
   - If yes, please explain.

8) Have you ever cancelled a temporary protective order or allowed one to expire against [name]?

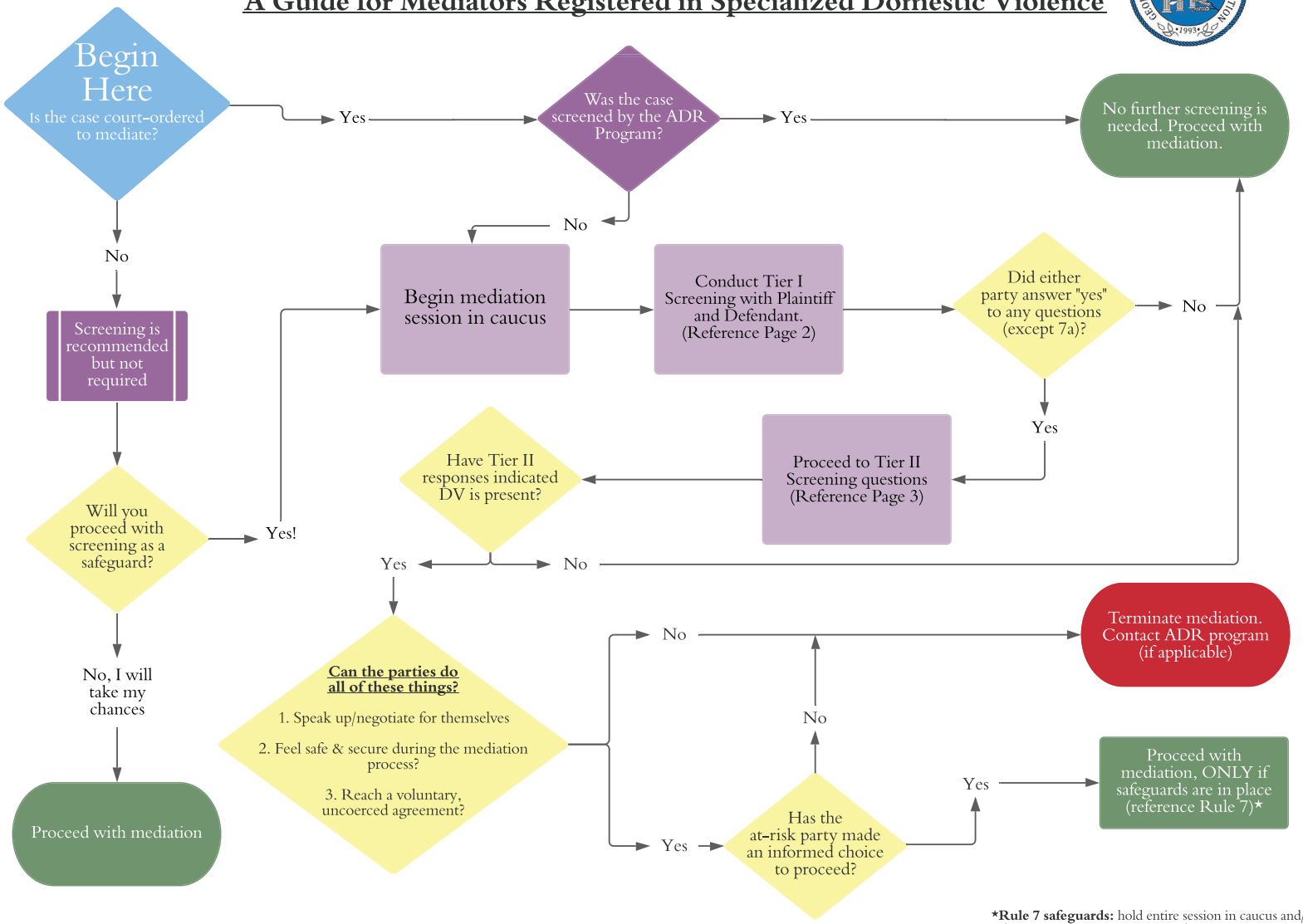
9) Has [name] interfered with your ability to speak to an attorney or other advocate?

10) Has [name] discouraged you from working, accepting promotions, going to school, and being independent in general?
   - If yes, how so?

11) Has the other party ever hit, strangled, pushed, or slapped you?

Rev. 5/11/2021

Screening Domestic Relations Cases:
A Guide for Mediators Registered in Specialized Domestic Violence



***Rule 7 safeguards:** hold entire session in caucus and/or within a virtual environment (or other remote means); offer varying arrival/departure times for the parties; encourage at-risk party to have attorney or DV advocate present

Screening Domestic Relations Cases:
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3) Has the other party ever been arrested for an act of violence or making threats against another person?

4) Are you afraid of the other party?

5) Do you have any concerns for your safety when the other party does not get his/her/their way?

6) Has the other party ever tried or threatened during the course of the relationship to: (check all that apply)
   a. Harm you
   b. Harm the children
   c. Harm other family members
   d. Harm family pets
   e. Use a weapon to harm or intimidate you or others
   f. Harm self
   g. None of these apply

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8) Are there any other concerns about safety?
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Screening Domestic Relations Cases:
Tier II Questions

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1) Review Tier I Questions.

2) Do you know what mediation is and why it has been ordered in your case?

3) What happens when you speak your mind and express your point of view to [insert name]?

4) Has the other party ever denied you the right to access family resources such as money, transportation, a phone, etc.?
   - If yes, please describe.

5) Are you afraid of disagreeing with [name]?
   - If yes, what happens when you disagree?
   - Would you feel able to disagree with [name] if the two of you were in separate rooms and the mediator worked with you one on one?

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Rev. 5/11/2021

_____COUNTY SUPERIOR COURT
STATE OF GEORGIA

_____	)
Plaintiff,	) Civil Action
	) Case Number _____
vs.	)
	)
_____	)
Defendant.	)

NOTICE OF COMPLETION OF MEDIATION

The parties appeared [virtually or in person] for their scheduled mediation on the ___ day of _____, 202_.

_____ conducted the mediation for the parties; and the mediation resulted in the following outcome:

_____ Full Settlement
_____ Partial Settlement
_____ Impasse

This ___ day of _____, 202_.

_____	_____
Plaintiff	Defendant
_____	_____
Plaintiff's Counsel	Defendant's Counsel
_____	
Mediator	