# Georgia Commission on Dispute Resolution
# Best Practices Manual for
# Registered Neutrals

May 2024

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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.*
>
> *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).*

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*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.*

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> ***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.*
>
> 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).*

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***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."*

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### 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.

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*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.*

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## 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.

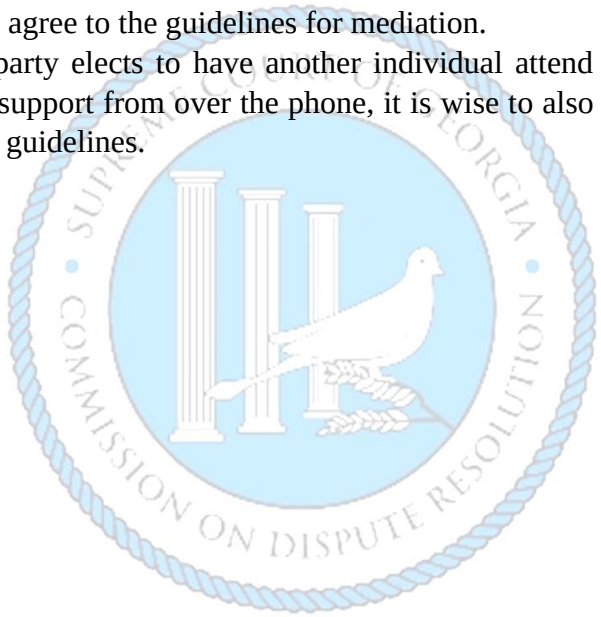
### How the GUMA Relates to the Supreme Court ADR Rules

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.*

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***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.*

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*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.*

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# 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 attached template ____.

## 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**.

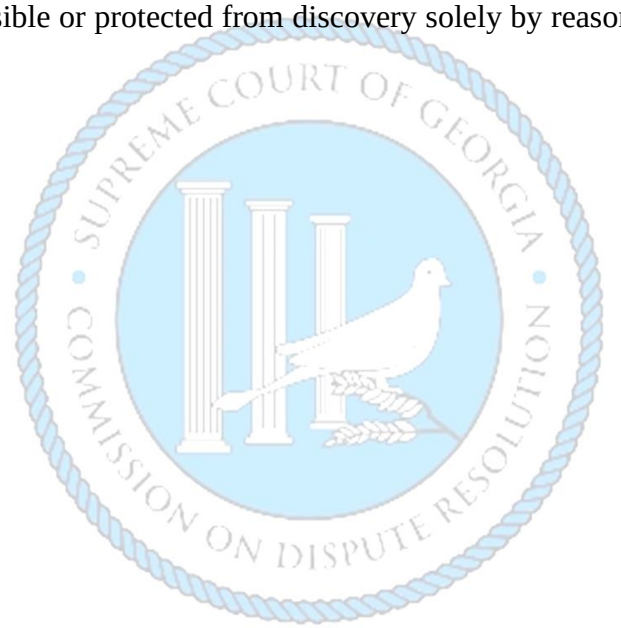
c) This Code section shall not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations and **mediation**. This Code section shall not require exclusion of evidence offered for another purpose, including, but not limited to, 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.

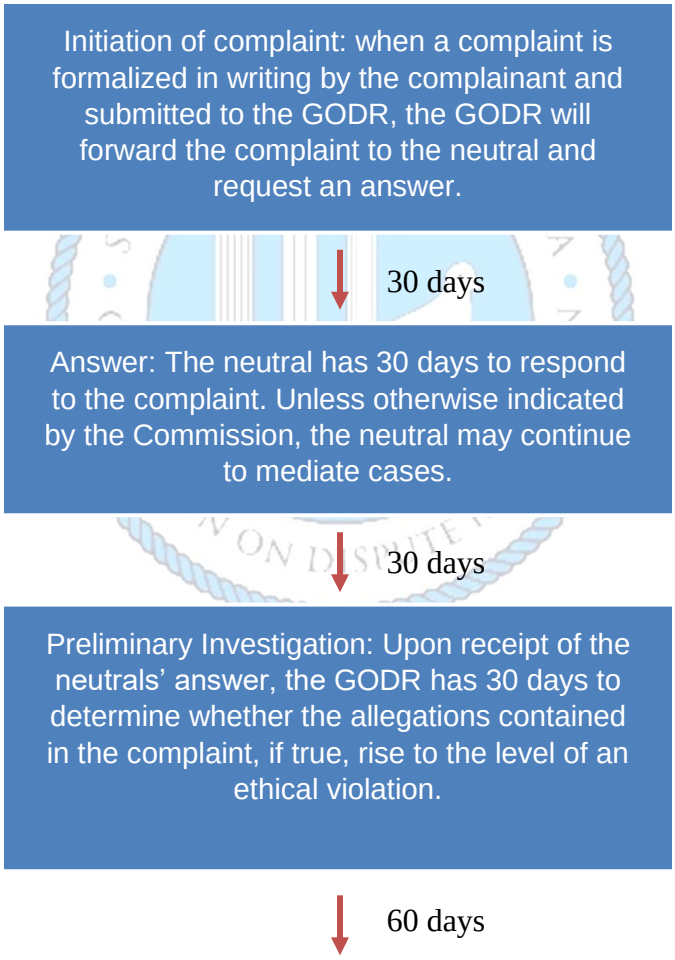


# Ethical Review Process

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**