

## **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.



## GEORGIA OFFICE OF DISPUTE RESOLUTION

244 WASHINGTON STREET, S.W., SUITE 300

ATLANTA, GEORGIA 30334-5900

OFFICE: 404-463-3808

FAX: 404-463-3790

www.godr.org

---

---

### 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.