

**ADVISORY OPINION 7
COMMITTEE ON ETHICS
GEORGIA COMMISSION ON DISPUTE RESOLUTION**

Executive Summary

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

I. Georgia’s Revised Child Support Statute

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

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

- The new law is much longer than the law it replaces, growing from perhaps three printed pages to more than 50 pages, including tables of basic child support obligations charted by income and number of supported children;
- The new law is more complicated than the law it replaces, requiring much more detailed financial information from both parents, more calculations and, presumably, more negotiations to arrive at a minimally-acceptable child support figure; and
- The new law’s complexity means that technological aids – in the form of electronic spreadsheets and Web-based calculators designed by Georgia’s child support authorities – will likely be indispensable tools for mediators in helping parties determine child support.

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

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

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

II. UPL and Mediation in Georgia, Generally

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

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

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

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

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

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

² O.C.G.A. § 15–19–50.

³ Ga. ADR Rules, I.

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

So, when do mediators in this state cross the line into UPL? Georgia authorities have not developed clear standards in this regard, but have chosen to address the issue indirectly through ethical standards. The Georgia Supreme Court's ethical standards for court-connected mediators provide some indirect constraints against UPL by advising that, in their explanation of the process, mediators should state that they will not give legal or financial advice⁴ and parties should consult lawyers at any time and seek their review of any agreement prior to signing.⁵ Also, the ethical standards state that lawyer-mediators should never provide legal advice.⁶

III. UPL and Calculating Child Support in Georgia

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

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

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

⁴ Ga ADR Rules, App. C. I (A) (4).

⁵ Id. at App. C. I (A) (8).

⁶ Id. at App. C. I (E).

⁷ Virginia is the only state to have addressed the issue. In their "Guidelines on Mediation and the Unauthorized Practice of Law" (Dept. of Dispute Resolution Services of the Supreme Ct. of Virginia, 1999), Virginia authorities concluded that under state law mediators who complete mandated child support worksheets for parties are not preparing legal instruments and not practicing law. They also determined that, "Providing information to the parties on how to calculate child support under the Guidelines or on the statutory reasons for deviating from them would not constitute the practice of law. Similarly, using a commercially available computer program to calculate child support does not constitute the practice of law."

⁸ While less authoritative than the law of another state, the Association for Conflict Resolution classifies "work[ing] with parties to complete child support worksheets" as authorized mediation practice, thereby distinguishing it from UPL. This language comes from a resolution on the "Authorized Practice of Mediation," adopted by ACR October 23 and 24, 2006.

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

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

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

IV. Examples of Permissible and Impermissible Statements

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

Example 1:

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

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

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

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

Example 2:

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

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

Example 3:

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

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

Example 4

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

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

V. Conclusion

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

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

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

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