

## APPENDIX D

### RULES FOR MEDIATION IN

### CASES INVOLVING ISSUES OF DOMESTIC VIOLENCE<sup>1</sup>

(Also Referred to As *Intimate Partner Violence and Abuse [IPV/A]*)

As amended by the Georgia Commission on Dispute Resolution, August 5, 2020<sup>2</sup>  
Effective January 1, 2021

The Georgia Commission on Dispute Resolution has studied the issue of domestic violence (DV) and its impact on the mediation process intermittently since 1994. In 1994, the Domestic Violence advocacy community was divided, with some members of the community believing mediation could be beneficial in these cases while others remained skeptical. The drafters ultimately decided that depriving a survivor of domestic violence the right to mediate could be seen as another form of victimization. Decreasing survivor autonomy by delaying or denying mediation rights could reduce empowerment and self-determination while increasing the costs associated with family law matters. On April 6, 1995, the Commission adopted the Guidelines for Mediation in Cases Involving Issues of Domestic Violence.

The Guidelines put in place were innovative for their time, however, a great deal of research and practice occurred in the intervening years. Therefore, in 2015, the Commission decided to revisit and update the processes used in Georgia for addressing these concerns in mediation. This effort became a collaboration between the Georgia Commission on Dispute Resolution, the Georgia Commission on Family Violence and individuals with expertise in the issue of domestic violence and/or mediation.

Throughout 2016-2018, a domestic violence working group composed of individuals with knowledge and experience in the areas of domestic violence, family violence, mediation, and Alternative Dispute Resolution (ADR) court policies and procedures met to update the guidelines and changed the policies to be consistent with new research in the field of domestic violence. Furthermore, the working group recommended that the Guidelines be changed to rules. The group also considered how courts currently address the issues and how clients experience mediation in court, as well as information from collaboration across fields.

As a key partner and contributor, the Georgia Commission on Family Violence has both endorsed these rules and is committed to continued collaboration with the Georgia Commission on Dispute Resolution.<sup>3</sup>

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<sup>1</sup> The Guidelines for Mediation in Cases Involving Issues of Domestic Violence, promulgated by the Georgia Commission on Dispute Resolution, are hereby repealed, effective January 1, 2021.

<sup>2</sup> The Rules for Mediation in Cases Involving Issues of Domestic Violence were adopted by the Georgia Commission on Dispute Resolution August 22, 2018, and amended on August 5, 2020.

<sup>3</sup> On June 22, 2018, the Georgia Commission on Family Violence voted unanimously to endorse the Rules and to support a joint committee with the Commission on Dispute Resolution to oversee implementation, training, review, and revision of the Rules

## **GUIDING PRINCIPLES:**

The Working Group developed the following Guiding Principles to frame the work done.

- a) **Safety:** The rules should maximize safety for all participants. Cases referred to mediation must be properly screened for a history of violence and abuse. Mediators and program directors must be properly trained to understand the safety needs of victims during the process of mediation and understand the safety needs of victims and children in terms of any agreement obtained as a result of mediation.
- b) **Self-Determination:** Mediators and program directors must be properly trained to understand the dynamics of domestic violence and potential power imbalances between the parties to provide the victim a meaningful opportunity for self-determination and the ability to use her (or his) voice to advocate for a desired outcome.
- c) **Best Practices:** The rules should align with current best practices for providing safety to victims of violence and or abuse, conducting mediations, and training mediators.
- d) **Practical Implementation:** As applied on an individual and program level, the rules should be reasonable to implement so that mediators and local mediation programs are able to fully comply while continuing to provide speedy, efficient, and inexpensive resolution of disputes.

## **DEFINITIONS:**

- a) **Domestic violence** (also known as Intimate Partner Violence and Abuse (IPV/A)): causing or attempting to cause physical harm to a current or former intimate partner or spouse/ partner; placing that person in fear of physical harm; or causing that person to engage involuntarily in sexual activity by force, threat of force, or duress. In addition to acts or threats of physical violence, for purposes of these rules, domestic violence may include abusive and controlling behaviors (such as intimidation, isolation, and emotional, sexual or economic abuse) that one current or former intimate partner or spouse/partner may exert over the other as a means of control, generally resulting in the other partner changing her or his behavior in response. Even if physical violence is not present in these circumstances, such a pattern of abusive behavior may be a critical factor in whether or not a party has the capacity to bargain effectively. Therefore, a person conducting screening for domestic violence must be alert to patterns of behavior that, while not overtly violent, may indicate a pattern of domestic abuse that shall be treated as domestic violence for purposes of these rules.
- b) **Screening:** the evaluation of individuals to assess their suitability for participation in mediation; gathering information from parties to determine the presence of DV risk factors; the verification of the existence of a current or past temporary protective order through the Georgia State registry; the optional examination of available records to

determine if domestic violence is an issue in the case<sup>4</sup>. ADR Program staff will endeavor to encourage full and honest disclosure of any domestic violence history or concerns by reassuring the party that their sensitive information will be handled appropriately and their concerns are taken seriously.

- c) **ADR Program Staff:** individuals charged with administering the ADR program.
- d) **At-Risk Party:** the individual who is the focus of the domestic violence screening done to determine suitability for mediation.
- e) **Domestic Violence (DV) Advocate:** An individual who has specialized training and is employed by or volunteers for an organization that provides services and support to survivors of domestic violence (IPV/A). The DV Advocate's role for the mediation session is to offer support and serve as a resource to the at-risk party. DV Advocates are required to sign the agreement to mediate as evidence of their understanding and agreement to the terms of confidentiality as outlined by the Supreme Court ADR Rules and Appendices.

#### **GODR AND LOCAL PROGRAM REQUIREMENTS:**

- a) The Georgia Commission on Dispute Resolution and the Georgia Office of Dispute Resolution (GODR) has developed rules to assist courts in designing appropriate intake procedures and training for intake personnel. Existing programs shall send a description of their intake and screening procedures based on these rules to the Georgia Commission on Dispute Resolution for review. New programs shall provide a description of intake and screening procedures with any rules submitted to the Commission for approval.
- b) The Georgia Commission on Dispute Resolution and the Georgia Office of Dispute Resolution will assist courts in developing appropriate screening training.
- c) Every program should have no fewer than two mediators who are registered in Specialized Domestic Violence Mediation. All domestic violence mediators shall have completed 14 hours of *specialized issues of domestic violence in mediation* training and shall be registered in the category of Specialized Domestic Violence Mediation.
- d) No ADR program staff member, neutral, or court personnel can be held liable for civil damages for any statement, action, omission or decision made in the course of carrying out any of the activities described in these Rules or in any ADR process.

### **RULES FOR MEDIATION IN CASES INVOLVING ISSUES OF DOMESTIC VIOLENCE (Also referred to as Intimate Partner Violence and Abuse IPV/A)**

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<sup>4</sup> Temporary Protective Order, O.C.G.A. § 19-13-4 (2010).

## **RULE 1. REFERRAL TO MEDIATION**

- a) Criminal cases that involve domestic violence shall never be referred to mediation from any court.
- b) Cases arising solely under the Family Violence Act shall not be referred to mediation from any court.<sup>5</sup> Mediators shall not facilitate the negotiation of issues related to criminal charges or the terms of any protective order in a domestic relations matter.
- c) All court programs shall screen domestic relations cases using the screening process outlined below.<sup>6</sup> Those domestic relations cases referred to mediation directly from the bench are also subject to the domestic violence screening process.

## **RULE 2. SCREENING**

- a) **Purpose of screening.** The purpose of the mediation screening is to determine whether mediation can be done safely and free from coercion. Screening for domestic violence is a shared responsibility of court personnel, ADR program directors and staff, attorneys, mediators, and parties. However, the final determination as to the appropriateness of mediation will be made by the ADR program staff. Mediation brochures and parenting seminars for divorcing couples may be vehicles for dissemination of this information. GODR will maintain a webpage with DV resources, including the statewide hotline number (1.800.33HAVEN).
- b) **Informed consent.** The Ethical Standards for Neutrals (Appendix C, Chapter 1, Alternative Dispute Resolution Rules) place primacy on the principles of self-determination and voluntariness. These standards also require that parties be fully informed about the mediation process. In keeping with these principles and the necessity of protecting at-risk parties, ADR staff and court personnel, at-risk parties will be given the opportunity by the screener to exercise choice about whether to proceed with mediation prior to assignment of the case. The dynamics of a relationship characterized by a pattern of intimate partner violence and abuse may manifest in mediation. Thus, an at-risk party in such a relationship is provided with the choice of whether to mediate or not, in order to avoid further victimization and/or endangerment. To ensure that the at-risk party's choice to proceed with mediation is self-determined, the at-risk party must be provided with sufficient information about the process to make an informed choice. Listed below are the elements of mediation that must be shared with the at-risk party to ensure informed consent.

1. Neutrality: an explanation of the role of the mediator as a neutral person who will facilitate the discussion between the parties but who will not coerce or control the

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<sup>5</sup> A case filed as a divorce action or other domestic relations matter that contains a count under the Family Violence Act is not precluded from referral to mediation and should be screened pursuant to these rules. Mediators are specifically prohibited from mediating away protective orders or criminal charges related to criminal cases of domestic violence. This provision was added by the Georgia Commission on Dispute Resolution on March 22, 2005.

<sup>6</sup> While it is intended that the intake and screening protocol will be routinely applied to all domestic relations cases, programs should also use the screening process when allegations of domestic violence arise in other types of cases such as magistrate, juvenile, probate, and other court matters.

outcome; explanation that the mediator will not allow abusive behavior and, while having skills in balancing power, will not in any way serve as an advocate for the at-risk party.

2. Confidentiality: an explanation of confidentiality of the mediation session and any limitations on the extent of confidentiality.
3. Termination: an explanation that the mediation can be terminated at any time by either party or the mediator.
4. Legal counsel: an explanation that the at-risk party may bring an attorney to the mediation or consult her or his attorney by telephone during the mediation as needed; and an explanation that if the at-risk party does not have an attorney, she or he may bring a DV advocate.
5. Expert advice: an explanation that the mediator will not provide any legal or financial advice to the parties.
6. Process: an explanation of how mediation is conducted (joint sessions, caucus, etc.) with an explanation of the option of shuttle (caucus only) mediation.
7. Good faith: an explanation that parties will be expected to negotiate in good faith and therefore should be prepared to make full disclosure of matters material to any agreement reached; but that good faith does not in any way require parties to enter an agreement about which they have any reservations.
8. Effect of agreement: an explanation that a mediated agreement, once signed, can have a significant effect on the rights of the parties and the status of the case.

- c) **Confidentiality in Screening for Domestic Violence.** ADR program directors and staff conducting screening for domestic violence shall keep information elicited confidential. Such information shall not be communicated to the court unless absolutely necessary for the safety of the parties and court personnel. If ADR program staff determine that the case is inappropriate for mediation based on the screening process, then the court will simply be notified of that determination.

### **RULE 3. CONTACTING THE AT-RISK PARTY**

- a) If the at-risk party is represented by counsel, ADR program staff should consult with her or his attorney regarding the need to contact the at-risk party to conduct an interview to learn more about the allegations and to provide information about mediation so that the at-risk party can make an informed choice about whether to participate in mediation.
- b) When communicating with either party about the mediation, the ADR program staff should take care not to provide the at-risk party's address or other contact information to the other party.
- c) When calling to arrange an interview, ADR program staff should take precautions to ensure that the party is able to speak privately before beginning the screening; i.e. asking if the party is comfortable speaking on the subject at that time, or if they would prefer to reschedule.
- d) During the phone contact with the at-risk party, ADR program staff should explain how

the case came to his/her attention for further screening and the purpose of the screening, which is to allow the person to make an informed choice.

- e) When screening, ADR program staff should be aware that the screening process itself could place an at-risk party in danger and must therefore ensure that the screening is conducted under safe and confidential circumstances.

#### **RULE 4. PHASES OF SCREENING**

- a) **Tier I.** For Tier I screening, the program should inform the parties and attorneys of the screening requirements, which includes notice to complete the survey. If there is an attorney of record, the notice shall initially be sent to the attorney. If there is no attorney, the notice shall be sent directly to the parties. Notice may be sent by U.S. Mail, email, or other means as determined by the court program. If parties do not complete the survey online, they can email, mail, or call program staff to conduct the survey over the phone. The following statement shall be included in the questionnaire: “If you are concerned about the privacy of your responses or if you prefer to answer the question by telephone, please call\_\_\_\_\_.” The information from the screening will be easily accessed as needed by ADR program staff and mediators.
- b) If parties do not submit the Tier I survey prior to the scheduled mediation OR if the Tier I survey is returned and a party answers yes to any question (with the exception of Question #7a), then a screener shall conduct Tier II screening, contacting each party, preferably by phone; if a phone number is not available, the contact shall be made by mail or email.
  - 1. If parties appear for mediation having never completed a DV screening, either the ADR program staff or the mediator shall conduct Tier I screening.
  - 2. If there has been no response to the Tier I screening survey, it cannot be determined that there is no domestic violence, and therefore the mediation should only be conducted by mediator who is registered in the category of specialized domestic violence.
- c) **Survey Questions for Tier I.**
  - 1. Is there now or has there ever been a protective order, restraining order or stalking order sought or issued for you and/or the other party?
  - 2. Is the Division of Family and Children Services (DFCS) and/or Adult Protective Services (APS) involved in this case? (Does not include requests for financial assistance).
  - 3. Have you or the other party ever been arrested for an act of violence or making threats against another person?
  - 4. Are you afraid of the other party?
  - 5. Do you have any concerns when the other party does not get his/her/their way?
  - 6. Have you or the other party ever tried or threatened to: (check all that apply)
    - i. Commit suicide
    - ii. Harm the other party

- iii. Harm the children
  - iv. Harm other family members
  - v. Harm family pets
  - vi. Use a weapon
  - vii. None of these apply
7. A. Are you currently living in the same home with the other party?  
B. If so, do you think you would feel safe in returning home after discussing the issues in your case in mediation?
  8. Are there any other concerns about safety? If yes, please explain.

d) **Survey Questions for Tier II**

1. Review Tier I Questions.
2. Do you know what mediation is and why it has been ordered in your case?
3. What happens when you speak your mind and express your point of view to [insert name]?
4. Has the other party ever denied you the right to access family resources such as money, transportation, a phone, etc.? If yes, please describe.
5. Are you afraid of disagreeing with [name]? If yes, what happens when you disagree? Would you feel able to disagree with [name] if the two of you were in separate rooms and the mediator worked with you one on one?
6. Has [name] discouraged you from spending time with friends and family?
7. Has the other party ever sent you repeated e-mails, calls, social media contacts or other unwanted communication after you asked him/her/them to stop? Has the other party monitored your communication, social media, or your whereabouts? If yes, please explain.
8. Have you ever cancelled a temporary protective order or allowed one to expire against [name]?
9. Has [name] interfered with your ability to speak to an attorney or other advocate?
10. Has [name] discouraged you from working, accepting promotions, going to school, and being independent in general? If yes, how so?
11. Have you and the other party ever hit, strangled, pushed, or slapped one another?
12. Do you believe that mediation will be beneficial? Why or why not?

e) **Mediation Recommendation.** Based on the answers from the Tier II questions and on the presence or absence of any other indicators of abuse or coercion as perceived by the screener, the screener or ADR program director should determine if the case is appropriate for mediation. If it is determined that the case is appropriate for mediation, screeners shall discuss the following with the at-risk party:

1. If arrangements need to be made for the parties to arrive and leave the mediation session separately.
2. If arrangements need to be made for the session to be held entirely in caucus.

**RULE 5. NEXT STEPS AFTER SCREENING**

After presenting information about the process of mediation and discussing the information

elicited by the questions in Rule 4(e), the screener shall ask whether the at-risk party needs any further information about the mediation process in order to decide whether or not the at-risk party is willing to mediate.

The mediation process should proceed only if accommodations can be put in place that will enable the parties to:

- speak up and negotiate for themselves,
- feel safe and secure during and after the mediation, and
- reach a voluntary, un-coerced agreement.

## **RULE 6. REFERRAL TO MEDIATION IF DOMESTIC VIOLENCE ALLEGED**

After Tier II screening and the subsequent discussions described in Rules 4(e) and 5, the at-risk party may choose whether or not he or she wants to proceed with mediation. If represented, the party should be encouraged to discuss that decision with counsel and be given an opportunity to do so before making that decision.

- a) If the ADR program staff determines that the case is inappropriate for mediation based on the information from the screening, then they should convey this information to the court.
- b) If the at-risk party prefers to proceed with mediation, the case shall be sent to mediation unless the ADR program staff or the court determines that there is a compelling reason that this particular case should not be referred.
- c) If referred, the ADR program must take reasonable steps to ensure that the safeguards set forth in Rule 7 herein are in place for the mediation session.
- d) ADR program staff has final decision-making authority as to whether the mediation shall proceed, with great weight given to the preferences of the party who is perceived by ADR program staff to be at risk.
- e) ADR program staff and/or mediators shall provide at-risk parties the link to the GODR webpage and/or the Georgia's Statewide Domestic Violence Hotline (1.800.334.2836)

## **RULE 7. SAFEGUARDS FOR THE MEDIATION SESSION IN CASES INVOLVING ISSUES OF DOMESTIC VIOLENCE**

- a) All mediation sessions in cases involving issues of domestic violence must be conducted by a mediator registered in the Specialized Domestic Violence category.
- b) If screening was not completed prior to the time of mediation, the program or mediator shall screen the parties separately immediately prior to the scheduled mediation. If domestic violence is indicated during this screening, mediation cannot proceed without appropriate Tier I and, if applicable, Tier II screening.

- c) At the earliest possible point in the mediation, the mediator should explore power dynamics in order to:
  - a. confirm the comfort of each party with the mediation format, and
  - b. confirm the ability of each party to bargain for her/himself.
- d) ADR program staff and the mediator shall exercise care to avoid disclosure of the parties' place of residence, telephone numbers, email address, etc., by either the program staff or the mediator.
- e) The ADR program staff and/or mediator should encourage at-risk parties to have an attorney or DV advocate available for the entire session or sessions.
- f) The ADR program staff and/or mediator shall offer to arrange for the parties to arrive and leave the mediation session separately and shall make such arrangement if requested.
- g) The ADR program staff and/or mediator shall offer the option of the entire session being in caucus and/or in a virtual environment and shall make such arrangements if requested.
- h) All mediations sessions in cases involving issues of domestic violence must be held in a secure venue. The ADR program staff shall take reasonable steps to make the mediation session safe.
- i) ADR Program staff is responsible for ensuring that the mediator knows the status of the case and the outcomes of the screening. And, the mediator is responsible for ensuring that he or she is aware of the status of the case.