



## 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.