

The Committee on Ethics of the Georgia Commission on Dispute Resolution

Ethics Opinion 6

Introduction

The Committee on Ethics was asked to consider a complaint against a registered neutral who acted as an attorney (hereafter Respondent) representing one of the parties in a court-ordered child custody mediation in 2015. The complainant also filed a complaint against the actual mediator, who was not registered with the Georgia Office of Dispute Resolution (GODR). The court's standing order permitted parties to select a "private" mediator of their choosing. Respondent and the unregistered neutral opened their own mediation and law firm roughly one month after the mediation occurred and while the case was still pending. The Committee issued to the Respondent a confidential Committee reprimand but dismissed the complaint against the unregistered neutral based on a lack of jurisdiction. The Committee believes that a published formal Opinion based on the complaints may be useful to help neutrals and attorneys avoid serious potential ethical issues in their practices.

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 Respondent because Respondent is a neutral registered with the GODR.

Allegations

Respondent and the opposing attorney (representing Complainant) both agreed to use the unregistered neutral in the case. Complainant's attorney, however, did not inform Complainant of the rights and protections Complainant was waiving by using an unregistered neutral. Complainant asserted that Respondent knew or should have known that Respondent was required to select a registered neutral in accordance with the ADR Rules. Complainant further alleged that Respondent and the unregistered neutral improperly started a mediation and law firm roughly one month after the mediation took place. According to Complainant, this business arrangement posed an actual conflict of interest, or in the alternative, a perceived conflict of interest.

Opinion

The Committee imposed discipline when it concluded that the Respondent violated both Appendix C, Chapter 1, Rule III.C.a. "Conflicts of Interest/Bias"¹ and Appendix C, Chapter 1,

¹ "A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality. Mediators should avoid any dual relationship with a party which would cause any question about the mediator's impartiality."

Rule III.C.f. “Conflicts of Interest/Bias”² of the ADR Rules. The latter rule offers criteria by which to evaluate a conflict of interest: (1) time elapsed following the mediation; (2) the nature of the relationships established; and (3) services offered when determining whether the relationships might create a perceived or actual conflict of interest. In this case, the Committee found that the business arrangement between Respondent and the unregistered neutral was formed too soon after the mediation occurred, the nature of the arrangement involved mediation, and it consequently created at least a perceived conflict of interest.

While the ADR Rules do not state that a registered neutral acting as an attorney in a matter may be disciplined for selecting an unregistered neutral to mediate, the Committee expects registered neutrals, in any capacity, to be aware that the ADR Rules require registered neutrals to be used in court-ordered or court-referred mediations. *See* Appendix A, Rule 9.1 (“[N]eutrals in a court-annexed or court-referred ADR process will be chosen from neutrals registered by the Georgia Office of Dispute Resolution.”).

The Committee also finds that the language in this court’s ADR standing order allowing parties to select a “private mediator” is ambiguous. The court has an obligation to ensure that all neutrals conducting court-ordered or court-referred ADR sessions be registered in the appropriate category. As such, any ADR order should specifically require the parties to select an appropriately registered neutral.

Conclusion

Registered neutrals act as guardians of the overall integrity of the process and in doing so should demonstrate impartiality in word and deed and act conscientiously to avoid any appearance of partiality. The business arrangement between the Respondent and unregistered neutral/attorney created a dual relationship that caused at least one party to question the integrity of the mediation and the neutrality of the mediator. While it is conceivable that relationships will develop between attorneys and neutrals involved in the same dispute, it is important for neutrals to be sensitive to the fact that future business dealings with parties or their attorneys may create the appearance of impropriety. Additionally, court ADR programs must ensure that ADR orders as well as all rules, policies and procedures comply with the ADR Rules and Appendices as approved by the Georgia Supreme Court.

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² “Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.”