

ADVISORY OPINION 8
GEORGIA COMMISSION ON DISPUTE RESOLUTION

Executive Summary

This Advisory Opinion focuses on the ethical obligation of mediation confidentiality and the ethical conduct to which all mediators, attorneys and parties involved in mediation should aspire. It is the mediator’s responsibility to ensure that all mediation attendees understand the concept and benefit of, and the obligation embedded in, mediation confidentiality. Confidentiality is fundamental to the success of mediation because its assurance encourages participants to communicate freely, openly and honestly in mediation. Confidentiality applies to all types of cases. Other than some limited exceptions, it covers anything said or done in the mediation by all attendees (except guardians ad litem). It covers all documents and information produced for mediation. It covers notes and records of the court ADR program. Lastly, the confidentiality promise does not end with the mediation session or the ultimate resolution of the case by dismissal, settlement or court judgment, but obligates the mediator and all attendees indefinitely. The Commission on Dispute Resolution recognizes that the mediation field is competitive. However, all attendees should commit themselves to respect their promise of confidentiality regardless of the temptation to violate it.

The promise of confidentiality is fundamental to the success of mediation. By being assured that what they say and do in mediation will not be used against them in another tribunal, discussed in online forums, or published in tomorrow’s newspaper, participants are likely to communicate freely, openly and honestly in mediation. And free, open and honest communication is more likely to result in satisfying and productive resolutions.

The Georgia Commission on Dispute Resolution has been approached to consider whether the confidentiality of certain mediations may have been broken when mediators, as well as attorneys, have appeared to have revealed details related to negotiations occurring within mediations in which they participated to the *Daily Report*, the legal news source in metro Atlanta.¹ The purpose of this advisory opinion is to outline the ethical responsibilities concerning confidentiality of mediation discussions and the conduct to which all mediators, attorneys and parties should aspire.

The Georgia Supreme Court Alternative Dispute Resolution Rules focus on mediator obligations, and the Commission on Dispute Resolution claims jurisdiction over ADR cases arising out of approved ADR court programs and over the conduct of registered mediators in any

¹ Some of the statements that have raised concerns in *Daily Report* articles include participants’ discussing demands and offers made in a mediation that failed, but later went to a jury verdict; discussing procedures employed during a mediation that resulted in a mediated settlement; discussing evidence that was presented during a mediation session (even if the evidence was known/obtained outside the mediation); and sharing the content of a mediation statement with the reporter.

ADR setting. However, the Commission encourages respect for confidentiality by all mediation participants – be they mediators, attorneys, witnesses, observers, family, or friends. All participants and attorneys should commit and aspire to complying with the rules of confidentiality.

I. Why is Confidentiality Important?

Both federal law² and Georgia law³ encourage litigants to settle their legal disputes by offering protection through the rules of evidence for offers of settlement and statements of apology or regret. The reason for the rules is to encourage more open communication among the litigants while limiting the disclosure of information that may not be probative, may be inadmissible, or may be prejudicial in a later legal proceeding. The same public policy is the basis for requiring that mediation communications be held confidential.

When the courts do act to protect confidentiality, the consequences for the disclosing participants can be severe. In 2012, a federal district court dismissed a plaintiff's lawsuit with prejudice (meaning he could not revive the lawsuit later) after the plaintiff intentionally e-mailed confidential details of the mediation to nearly four dozen other people, including potential witnesses in the case. The extensive e-mailed information included the mediator's statements and the defendant's settlement offers. In this instance, the District Court wrote, only the sanction of dismissal with prejudice,

would adequately admonish [the plaintiff] for his complete disregard for and willful violation of the confidentiality rule, deter similar conduct by others in the future, restore respect for [the] Court's authority, repair the damage caused by [the plaintiff] to the integrity of the Court's ADR program and minimize prejudice to the [defendant].⁴

In Georgia, legal authority has acknowledged and honored the principle of mediation confidentiality. For example, in *Byrd v. State*,⁵ a criminal conviction was reversed by the Georgia Court of Appeals, which held that the trial court erred by allowing confidential evidence from a mediation to be admitted at a subsequent criminal trial. By doing so, the trial court negated mediation's usefulness, the court wrote:

For no criminal defendant will agree to “work things out” and compromise his position if he knows that any inference of responsibility arising from what he says and does in the mediation process will be admissible as an admission of guilt in the criminal proceeding which will eventualize if mediation fails.

² 28 U.S.C. Rule 408, Compromise and Offers to Compromise.

³ O.C.G.A. § 24-3-37.1, In action brought after unanticipated outcome of medical care, statements by health care provider not admissible and not admission of liability or admission against interest; O.C.G.A. § 24-4-408, Evidence, conduct or statements in compromise negotiations; O.C.G.A. § 24-4-416, Expressions of regret or error in civil proceedings against health care providers.

⁴ *J. Michael Hand v. Walnut Valley Sailing Club*, Case No. 10-1296-SAC, (D.Kan., 2011).

⁵ *Byrd v. State*, 186 Ga. App. 446, 367 S.E.2d 300 (1988).

II. What is Confidential? When Does Confidentiality Apply?

Just as confidentiality applies to all types of mediated cases, whether they are divorce cases, custody cases, personal injury cases, probate cases, misdemeanor warrant application cases, contracts cases or landlord/tenant cases, the nature of the case or the dispute does not affect one's ethical obligations.

Confidentiality covers anything said or done in the mediation, and the process, procedures and conduct of all of those present. Confidential communications include the mediator's and the attendees' words, actions, documents, information, and conduct in mediation, including the mediator's notes and records.⁶ For mediators, one bright line that should never be crossed is if a mediation is ever discussed in public, the discussion should not include any information identifying a specific case. In order to honor the promise of confidentiality in mediations, parties and their attorneys should refrain from disclosures of any confidential mediation information whether in a public forum or in a less-open setting.

While some documents and information may not be rendered confidential merely by their use in mediation, the fact that certain documents and information were used in mediation is confidential. Moreover, documents prepared exclusively to be disclosed for use in mediation cannot be used outside of the mediation. For example, if a party prepares an offer of settlement for use in mediation, that offer, if not otherwise discoverable outside the mediation, cannot be used for impeachment purposes if the party produces a different offer at a later trial.⁷ On the other hand, production by a party of bank records otherwise discoverable would not later render the bank records confidential and immune from discovery.⁸

Any audio or video recording of a mediation session would violate confidentiality, unless the parties expressly consent to the recording in writing. If a mediation is recorded, careful consideration should be given to whether the recording should include discussions in caucus. Also worth consideration are limitations on how any recording will be used and by whom. Consideration must be given as to whether any recording would, no matter how slightly, affect how willing participants are to be open and honest in their mediation discussions.

According to the ADR Rules, "neither 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 any type of ADR proceedings in any subsequent

⁶ Although a mediator's notes and records are not subject to discovery or disclosure, the Commission recommends that mediators destroy their notes after a session if there is no expectation that further sessions will be scheduled in the near future. Mediators should also disclose this practice when going over confidentiality with the participants prior to their signing the mediation guidelines.

⁷ The Commission recommends that documents produced exclusively for mediation be clearly identified as such: "Confidential Document Produced Solely for Mediation Purposes. Cannot be Used for Any Purpose Outside the Mediation."

⁸ Alternative Dispute Resolution Rules, §VII(A).

administrative or judicial proceeding.⁹ If mediators or observers receive a subpoena to testify about a mediation, they should file a Motion to Quash the subpoena.¹⁰

Lastly, any statements made as part of intake by ADR court program staff in preparation for a mediation are confidential, not subject to disclosure, may not be disclosed by the neutral or program staff, and may not be used as evidence in any subsequent administrative or judicial proceeding. Notes and records of a court ADR program are likewise not subject to discovery to the extent that such notes or records pertain to cases and parties ordered or referred by a court to the ADR program.¹¹

III. What is Not Confidential? When Does Confidentiality Not Apply?

Confidentiality does not apply to:

- The fact that a mediation occurred;
- The names of the parties;
- The names of the attorneys;
- The names of the neutrals;
- Information on whether the parties appeared at the mediation;
- The outcome of the mediation or a written and executed mediation agreement (unless there is a confidentiality agreement or court ruling about confidentiality related to the outcome).¹²

The ADR Rules list specific exceptions to confidentiality:

- When threats of imminent violence have been made by a participant to self or others;¹³
- When the mediator believes that a child is abused or that the safety of any party or third person is in danger;¹⁴
- When legal claims or disciplinary complaints are brought against a neutral or an ADR program and arising out of an ADR process, confidentiality is waived only to the extent necessary to protect the neutral or ADR program.¹⁵

⁹ Alternative Dispute Resolution Rules, §VII(A).

¹⁰ If assistance is needed for filing a Motion to Quash, the participant should contact the Georgia Office of Dispute Resolution and the local ADR program immediately.

¹¹ Alternative Dispute Resolution Rules, §VII(A).

¹² Although the parties' written and executed mediation agreement, once filed with the court, is a public document, a mediator exercising caution and best practices would refrain from using or referring to the mediation agreement or the contents therein.

¹³ Alternative Dispute Resolution Rules, §VII(B) (a).

¹⁴ Alternative Dispute Resolution Rules, §VII(B) (b). Nothing in the confidentiality rules negates any statutory duty to report information. For example, if a mediator or mediation participant is a mandated reporter of suspected child abuse or neglect under O.C.G.A. § 19-7-5(c)(1), then the reporting requirement trumps the confidentiality rules.

¹⁵ Alternative Dispute Resolution Rules, §VII(B).

Moreover, in the case of *Wilson v. Wilson*, the Georgia Supreme Court created an exception to confidentiality “when a party contends in court that he or she was not competent to enter a signed settlement agreement that resulted from the mediation.”^{16 17}

IV. Can Confidentiality be Waived?

The parties to a mediation may agree to allow certain other or all participants to be released from their confidentiality obligations in a limited or unlimited way. The subject of a confidentiality waiver should be treated as another point of negotiation between the parties. Parties should consent to waive confidentiality only after being fully informed of all of the benefits of confidentiality and the consequences of waiving it.

Moreover, waiver should be made only under limited circumstances and should never be included as a default or boilerplate provision in an agreement to mediate, mediation guidelines, or mediated agreement. Of course, any such confidentiality waiver should be made in a detailed written document signed by the parties.

V. Who is Obligated by Confidentiality?

All mediation participants – the mediator, the parties, the attorneys, observers, witnesses, supporters, family members, friends, and anyone else – pledge to keep their discussions confidential when they sign the mediation guidelines at the start of a mediation. The parties can make a promise of confidentiality whether or not they are represented by counsel. People who do not sign the mediation guidelines should not participate in the mediation. Mediators are, of course, ethically obligated to keep mediation communications confidential.

An exception applies to *guardians ad litem*. *Guardians ad litem* are appointed to serve as the eyes and ears of the court, to investigate and report to the court on a particular issue regarding a child or children. They cannot be prevented from disclosing to the court information they learn from the mediation. To balance the right of the parties to confidentiality with the *guardian ad litem*'s need for information, the ethics rules recommend:

A mediator's opening statement should include an explanation that the *guardian ad litem* is a party to the mediation whose interests may be separate from those of the other parties. Parties should be informed of the limits on confidentiality presented by the *guardian ad litem*'s presence in the joint session. The mediator should caucus with the

¹⁶ *Wilson v. Wilson*, 282 Ga. 728, 732 (653 S.E.2d 702) (2007). It is important to note that the Georgia Supreme Court further highlighted that in *Wilson*, “the mediator did not testify about specific confidential statements that Mr. Wilson made during the mediation, but only testified about his general impression of Mr. Wilson's mental and emotional condition, thus diminishing the potential harm to the values underlying the privilege of confidentiality in mediations.” *Id* at 733.

¹⁷ In addition, the Georgia Supreme Court in *Wilson* sent a message to trial courts that “[a]lthough we conclude in this case that the trial court did not err in calling the mediator to testify, we acknowledge the significance of the confidentiality of the mediation process and the strong policy considerations that support it, and we thus urge trial courts to exercise caution in calling mediators to testify.” *Id* at 733-734.

guardian ad litem separately. The *guardian ad litem* should not be present when the mediator conducts a caucus with a party.¹⁸

Except for any information provided by a *guardian ad litem*, judges should not inquire as to what occurred during a mediation, and the parties and attorneys are encouraged not to present in court what occurred during a mediation. For example: on a motion to enforce a mediated agreement, except for the capacity exception defined by the *Wilson* case and the other exceptions provided by the rules, no discussion or presentation should be made to the court as to what occurred during the mediation.

VI. How Long Does the Confidentiality Promise Last?

Except in cases where an exception applies, confidentiality applies forever. Confidentiality does not end by virtue of a resolution, whether arrived at during the mediation, after the mediation, or as a result of trial. Confidentiality continues after the conclusion of the mediation session. Confidentiality extends to proceedings in court.

A mediator's ethical obligations, including confidentiality, continue whether there is a mediated agreement, no mediated agreement, a dismissal, a jury verdict, or a court judgment. Like confidentiality of attorney-client communications, mediation confidentiality lives forever.

VII. Recommendations and Suggested Best Practices

There are good reasons to honor confidentiality, and we see no reason for any mediator – whether registered or not – to go against accepted best practice. Mediators contacted by the media are reminded that they should offer no comment about their mediations and respectfully redirect the inquirers to talk to the parties themselves.

In high-dollar and high-profile cases particularly, we recommend that mediators include in their routine discussions with the parties the issue of who, if anyone, should be authorized to speak about the mediation to outside parties and what, if anything, they should be authorized to say. You might start the discussion this way: “Would you like to talk about how you’ll portray today’s mediation to anyone not here today?” Or, “Should we discuss your preferences for the limits of my [the mediator’s] responses to any inquiries I might receive? I’m planning to say ‘No comment’ unless you have interests in some other approach.” Any agreement arising from these discussions should be memorialized in a document signed by all parties, attorneys, and the mediator, ideally in a private document separate from any mediated agreement, which will become public.

We believe also that it is in the parties’ and attorneys’ best interest to say as little as possible about their mediations. Attorneys certainly would not want to earn a reputation for being indiscreet about their clients’ mediation discussions. We recommend that attorneys and clients on both sides discuss together how participants should respond if approached by the media or others outside the mediation. Again, any confidentiality waivers should be documented in a signed agreement that clearly addresses all the relevant issues such as who among the

¹⁸ ADR Rules, Appendix C, Chapter 1, Section A. II

participants is permitted to speak, about what, and to whom. It may also be sound practice for all participants to restate in their mediated agreement their understanding of and commitment to confidentiality.

VIII. Conclusion

The Commission is aware of how competitive the mediation market is, and it supports the publicizing of cases and outcomes of interest. It is pleased that mediation is now an integral part of trial practice in Georgia. Of course, anyone is free to discuss anything about a case that is in the public record. But mediators are bound by their ethical duties of confidentiality, and they should not discuss anything that happened during mediation, or anything else that is confidential or privileged. And mediation attendees should understand the benefits to themselves of limiting public disclosures of confidential mediation communications.

Two rules of thumb can help all attendees avoid problems: “What happens in mediation stays in mediation” and “Mediation confidentiality is forever.”

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