

APPENDIX C⁷⁶

CHAPTER 1: ETHICAL STANDARDS FOR NEUTRALS

A. Ethical Standards for Mediators

IN JUNE, 1994, THE GEORGIA COMMISSION ON DISPUTE RESOLUTION TURNED ITS ATTENTION TO THE DEVELOPMENT OF A CODE OF ETHICAL BEHAVIOR FOR MEDIATORS SERVING COURT PROGRAMS IN GEORGIA. WE INITIATED A DIALOGUE WITH PRACTICING MEDIATORS IN THE STATE. THIS DIALOGUE SERVED AS THE STARTING POINT FOR THE DEVELOPMENT OF THE CODE.

THE CODE CONSISTS OF TWO PARTS. THE FIRST PART CONTAINS STANDARDS OF PRACTICE, THE FOUNDATION OF ETHICAL BEHAVIOR BY MEDIATORS. BECAUSE THE COMMISSION IS COGNIZANT OF THE LIMITED GUIDANCE PROVIDED THROUGH MERE ARTICULATION OF STANDARDS, COMMENTARY, INCLUDING SPECIFIC EXAMPLES FROM PRACTICE, ACCOMPANIES EACH STANDARD, ENHANCING AND STRENGTHENING THIS FOUNDATION.

SPECIFIC PRACTICE RULES, TREATING MATTERS OF CONDUCT WHICH ARE SETTLED AND DO NOT LEND THEMSELVES TO THE EXERCISE OF DISCRETION ON THE PART OF THE MEDIATOR, APPEAR AS PART V. RULES OF FAIR PRACTICE.

INTRODUCTION

The Georgia Commission on Dispute Resolution believes that ethical standards for mediators can be most easily understood in the context of the three fundamental promises that the mediator makes to the parties in explaining the process: 1) the mediator will protect the self-determination of the parties; 2) the mediator will protect the confidentiality of the mediation process; 3) the mediator is a neutral who is impartial and is without bias or prejudice toward any party. Besides maintaining fidelity to these principles, a mediator acts as guardian of the overall fairness of the process.

I. SELF-DETERMINATION/VOLUNTARINESS.

Where the court orders that parties participate in a dispute resolution process other than trial, the process must be non-binding so as not to interfere with parties' constitutional right to trial. To that extent, all court-ordered ADR processes are voluntary. However, the self-determination of the parties which is a hallmark of mediation is of a different and far more subtle order.

Commentary: *The Georgia Commission on Dispute Resolution accepts the proposition that self-determination of the parties is the most critical principle underlying the mediation process. Control of the outcome by the parties is the source of the power of the mediation process. Further, it is the characteristic which may lead to an outcome superior to an adjudicated outcome.*

⁷⁶ ADR Rule V was amended by the Georgia Supreme Court on December 13, 1995, to provide that the Ethical Standards for Neutrals, established by the Georgia Commission on Dispute Resolution on 9/28/95, be made Appendix C to the ADR Rules.

Self-determination is a difficult goal in our society in which people seem often unwilling to assume responsibility for their own lives, anxious for someone else to make the decisions for them. Mediation is antithetical to this attitude.

A. In order for parties to exercise self-determination they must understand the mediation process and be willing to participate in the process. A principal duty of the mediator is to fully explain the mediation process. This explanation should include:

1. 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 outcome;
2. An explanation of the procedure which will be followed during the mediation session;
3. An explanation of the pledge of confidentiality which binds the mediator and any limitations upon the extent of confidentiality;
4. An explanation of the fact that the mediator will not give legal or financial advice and that if expert advice is needed, parties will be expected to refer to outside experts;
5. An explanation that where participation is mandated by the court, the participation of the parties is all that is required and settlement cannot be mandated;
6. An explanation that the mediation can be terminated at any time by the mediator or the parties;
7. An explanation that parties who participate in mediation are expected to negotiate in an atmosphere of good faith and full disclosure of matters material to any agreement reached;
8. An explanation that the parties are free to consult legal counsel at any time and are encouraged to have any agreement reviewed by independent counsel prior to signing;
9. An explanation that a mediated agreement, once signed, can have a significant effect upon the rights of the parties and upon the status of the case.
10. An explanation that the parties, by their participation, affirm that they have the capacity to conduct good-faith negotiations and to make decisions for themselves, including a decision to terminate the mediation if necessary.⁷⁷

B. The mediator has an obligation to assure that every party has the capacity to participate in the mediation conference. Where an incapacity cannot be redressed, the mediation should be rescheduled or canceled.

Self-determination includes the ability to bargain for oneself alone or with the assistance of an attorney. Although the mediator has a duty to make every effort to address a power imbalance, this may be impossible. At some point the balance of power may be so skewed that the mediation should be terminated.

⁷⁷ Explanation Number 10 was added by the Commission on March 22, 2008.

Commentary: Georgia mediators are confident of their ability to recognize serious incapacity. Situations in which there is a subtle incapacity are more troubling. Several mediators expressed concern about situations in which they questioned capacity to bargain but felt certain that the agreement in question would be in the best interest of the party and that going to court would be very traumatic. Should the mediation be terminated because of suspected incapacity if mediation is the gentler forum for a fragile person and the agreement which the other party is willing to make is favorable? Does the mediator's substituting his or her judgment for the judgment of the party destroy any possibility of self-determination? Is self-determination and the empowerment which it offers a rigid requirement in every mediation? Does it make a difference whether the suspected incapacity is temporary – i.e. a party is intoxicated – so the mediation could be rescheduled?

Example 1: The husband, who is a doctor, is also an alcoholic. The mediator notes, "She could have said anything and he would have said yes. He just wanted to get it over with. It was really hard keeping him here. I had to make two pots of coffee during each session to keep him going. He was just ready to get out and go get a drink or something." The wife is represented, but he is not represented. Both parties are concerned about preserving his assets, and they both agree that she should get a large portion of the assets. There seems to be danger that the assets will disappear because of his alcoholism. The mediator is concerned that the husband is agreeing too readily and is worried about the balance of power. The party is not presently incapacitated -except to the extent that his desire to complete the mediation is interfering with his giving careful thought to the process. It may be that the level of self-determination which he is exhibiting is the highest level that is possible for him. Should this person be deprived of the benefits which he might derive from mediation because he is not able to bargain as effectively as the other party?

Example 2: During the mediation it becomes apparent to the mediator that one party is well-represented and the other party is not being adequately represented. What, if anything, should the mediator do? If the mediator interferes in the attorney-client relationship a number of issues are raised. Would interference infringe upon the self-determination of the party who has retained the attorney? Is neutrality compromised? Is the mediator crossing a line and in effect giving legal advice? If the mediator is compensated, will the mediator's action or inaction be influenced by the desire to maintain good relationships with attorneys for business reasons?

Recommendation: *Where a party is laboring under an incapacity which makes him or her incapable of effective bargaining, the mediator should terminate the mediation. Mediation is not an appropriate forum for the protection of the rights of a person who cannot bargain for him or herself.*

If the incapacity is temporary – i.e. intoxication – the mediation should be rescheduled.

If there is a serious imbalance of power between parties, the mediator should consider whether the presence of an attorney, family member, or friend would give the needed support.

An obvious example of a power imbalance occurs when there is a history of domestic violence. Although the Commission has drawn up guidelines to assist court programs in identifying those cases which are not appropriate for mediation, information

about a history of domestic violence may surface for the first time during the mediation. The questions the mediator faces are whether to terminate the mediation and, if so, how to safely terminate it. Factors which should be considered are whether there was more than one incident, when the incident or incidents occurred, whether the information surfaces during a joint session or during caucus, whether the alleged victim is intimidated. If the mediator has any concern that the safety of any person will be jeopardized by continuing the mediation, the mediation should be terminated.

If one party is simply unable to bargain as effectively as another, it is probably inappropriate to deny those parties the benefits of the mediation process because of that factor.

If the imbalance occurs because of disparity in the ability of the parties' attorneys, the principle of self-determination, in this case in relation to the selection of an attorney, again prevails.

One mediator expressed his view this way: "I am reluctant to withdraw where there is an imbalance in power because I always try to look at the alternative. The alternative usually is that person is going to be no better off in litigation. I understand that there's a judge there that can look after the parties, but still my practical experience in litigation teaches me that most parties are not going to be much better off in litigation rather than mediation if lack of power is their problem."

C. Parties cannot bargain effectively unless they have sufficient information. Informed consent to an agreement implies that parties not only knowingly agree to every term of the agreement but that they have had sufficient information to bargain effectively in reaching that agreement. Self-determination of the parties in a mediation includes not only informed consent to any agreement reached but participation in crafting the agreement as well.

Commentary: *One mediator suggested that the parties who are operating without full information be asked to reconvene with attorneys present. This mediator said, "I have been more and more impressed with how effective a subsequent session can be with the attorneys present and everyone having prepared for it."*

Example 1: *One party says that there are assets which have been hidden and the other party denies the existence of the assets. The mediator faces the question of whether to push them forward on the facts that are established or give any credence to these alleged facts.*

Recommendation: *The question is resolved in favor of terminating or rescheduling the mediation if there has not been sufficient discovery or the party claiming that assets have been hidden feels that she or he cannot bargain effectively. The closer question comes if there is unsubstantiated suspicion – i.e. "He must have made more than he reported on his income taxes in 1992, so where is it?"*

Domestic relations mediators who work in court-annexed or court-referred programs may not have the luxury of several sessions so that parties can be assigned "homework." As long as the information on assets and budgets is available, the actual preparation of lists of assets and liabilities and the preparation of budgets may provide an important opportunity for collaborative work by the parties.

Example 2: *In a divorce mediation the wife is clearly dependent on the lawyer, as she had been on her husband while they were married. The lawyer is not cooperative in the mediation. At each session the lawyer comes in with a totally new agenda and without promised information. The mediator finds that she is spending an inordinate amount of time dealing with the lawyer. The mediator offers to meet with the parties alone, but the lawyers will not allow that.*

Recommendation: *The mediator may caucus with the lawyers alone and confront the lawyer who is obstructing the mediation. The mediator may also raise questions in caucus with the lawyer and the client which may alert the client to the need to control the lawyer. Beyond this, it is difficult to resolve this situation without compromising the self-determination of the client or compromising neutrality.*

Commentary: *Yet another variation on the issue of missing information is the missing issue – should the mediator bring up issues which the parties have not identified? As one mediator expressed this: “What’s our role when people say we want you to mediate this case? Are we to mediate the issues that they bring to us or are we to create issues for them to discuss and decide about? I guess that a lot of the conflict that we’re talking about here is what do we as mediators have to initiate or inform people or educate people about: all the issues that can be and probably ought to be discussed in the context of a divorce mediation? You’re potentially opening up all these cans of worms for people who don’t necessarily want them opened.” On the other hand, have the parties had an opportunity to mediate from a position of full information if they have not considered every relevant issue? Beyond this, will the agreement hold up if it is not made in the context of all issues in the dispute?*

D. The mediator must guard against any coercion of parties in obtaining a settlement.

Commentary: *Many mediators discussed the question of when to declare impasse. One mediator said that she loved the point of impasse because the parties have “gone through the conflict” to get to impasse. She felt that the moment of impasse is a moment of great opportunity. At some point, however, persistence becomes coercion. The question of when to terminate the mediation will be discussed further under the topic of fairness.*

E. It is improper for lawyer/mediator, therapist/mediator, or mediator who has any professional expertise in another area to offer professional advice to a party. If the mediator feels that a party is acting without sufficient information, the mediator should raise the possibility of the party’s consulting an expert to supply that information.

Commentary: *Conversations with Georgia mediators who are trained as lawyers confirmed that this concept is extremely difficult for lawyer/mediators. Lawyers, having been trained to protect others, agonize over the perception that missing information, poor representation, ignorance of a defense, etc. may place a party in danger.*

Recommendation: *The line between information and advice can be very difficult to find. However, failure to honor the maxim that a mediator never offers professional advice can lead to an invasion of the parties’ right to self-determination and a real or perceived breach of neutrality.*

II. CONFIDENTIALITY.

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 a subsequent administrative or judicial proceeding. A written and executed agreement or memorandum of 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.

***Example 1:** A party reveals to the mediator in caucus that he has cancer and that he does not want his ex-wife to know about it. He is not sure how long he will be working because of his illness. This information could be very important to the wife. She may need to make other plans for the time when that money is not coming in. Because of the confidentiality, the mediator feels that she cannot say anything.*

***Recommendation:** This presents the classic dilemma of the collision between the promise of confidentiality and the need of the parties for complete information if they're to enter into an agreement voluntarily. The mediator is placed in the position of keeping a confidence of one party at the expense of the self-determination of the other party. If the mediation is terminated, there is no guarantee that the husband's condition would be revealed at trial, and the parties may lose the opportunity for a more creative agreement than the verdict imposed after a return to court.*

The first tactic of the mediator is to encourage the person keeping the crucial secret to share it with the other party or allow the mediator to reveal the secret. If the secret is central to the creation of a solid agreement, and if the mediator cannot persuade the party with the crucial secret to share it, she may have no alternative but to terminate the mediation.

One mediator discussed the problem of information which, if made part of an agreement, might constitute a fraud upon the court. He felt that the ethical requirement that a lawyer is always an officer of the court would require that the lawyer/mediator not draft an agreement if there were a secret which made the agreement a fraud on the parties or on the court. "In other words, if one party says as soon as we sign this custody agreement I'm going to take my kids across the country, that would put me in an impossible conflict of interest. I would feel that I would be perpetrating a fraud on the other side if I allowed them to enter into an agreement."

***Example 2:** A deceptively simple example of this problem can occur in jurisdictions where a "warrant fee" must be paid even if the warrant is not served or is dropped. As the parties enter into the mediation of this sub-issue after the mediation of the dispute which resulted in the warrant is completed, both parties refuse to pay a penny, saying that it is the responsibility of the other party. In caucus, one party says, "I'll pay half of it but don't tell them that." Or someone will say, "I think I should only have to pay half of it, but I'd pay it all to be*

finished with this, but don't tell them." The mediator has been given a piece of information that would make a difference in the settlement of perhaps the entire case and instructed not to tell.

Recommendation: *When the secret information is something that would foster settlement rather than something that would prevent settlement, the mediator is remiss if he or she does not push the parties toward revelation.*

Commentary: *An interesting problem intersecting self-determination and confidentiality occurs because of the increasing use of guardians ad litem to represent the interest of the child in disputed custody cases. If the guardian is present at the mediation, should he or she be privy to the entire mediation, including caucuses? The interests of the child are not necessarily synonymous with the positions of parties. One solution to the issue would be to caucus separately with each party and with the guardian. Another question is whether the guardian, who has an obligation to report to the court, can be bound by confidentiality.*

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

III. IMPARTIALITY. ⁷⁸

A. A mediator must demonstrate impartiality in word and deed. A mediator must scrupulously avoid any appearance of partiality. Impartiality means freedom from favoritism, bias or prejudice.

Example 1: *As one mediator expressed this problem: "I had a big case once upon a time where I thought the plaintiffs, who were represented by three attorneys, had made a very poor presentation of their case and this was a case that went on for multiple sessions. I don't remember whether it was the opening presentation. I think it may not have been the opening presentation, but a subsequent presentation, and it may have been on just a few issues or something like that. I felt like they did not present their case in as strong a form as they could have. Maybe that they were holding back some evidence. In caucus I just did some coaching. I don't mean to be so presumptuous as to say that I knew how to do it better than they did but I pointed out some things to them that I think they agreed with. They went back and made a more forceful, more cogent presentation and I think were able to move things along better. Because by making a weak presentation of their case, they were not going to be able to get what they knew or believed they were entitled to. So it was a matter of helping the other side see the strengths of the plaintiff's case that they had not been able to see through the original presentation."*

Recommendation: *Several mediators discussed the problem of dealing with a party who is unable to bargain effectively and puzzled over an ethical way to coach that*

⁷⁸ Section III was substantially amended by the Commission on November 29, 2005, to provide more detailed guidance on conflicts of interest. These provisions, set forth in Subsection C, impose a duty upon the mediator to make a reasonable inquiry to check for conflicts of interest and supercede any previous ethics opinions that may be inconsistent with these provisions.

party while retaining neutrality. Helping a party to present his or her needs and interests in a way that can be heard by the other side is not a breach of neutrality but is, rather, an important part of the mediator's role. When the mediator helps each side to communicate effectively, the mediator is assisting the parties in establishing the common ground upon which a solid agreement can be based.

Commentary: Mediators give very few examples of situations in which they felt such antipathy for a party that they were unable to remain neutral. Many mediators discussed the fact that when they began to search for needs and interests of a party they were able to reach a sufficient level of understanding that neutrality was not an issue.

Although the classic dilemma regarding impartiality occurs when the mediator feels great sympathy or antipathy toward one party or another, the problem is more complicated when the loss of impartiality occurs because of behavior of someone other than a party.

Example 1: During a mediation the attorneys begin to fight with each other to the extent that it is difficult to control the mediation. It is also difficult for the mediator to keep an open mind about how to deal with it because, as he expressed his own emotion, his stomach is churning. The mediator is faced not only with controlling the situation but in dealing with his own reaction to it. The mediation did not result in an agreement although the matter was settled before trial. The mediator wondered in hindsight if it might have been better if he had said "Look, because of the way I'm reacting to your fight, I can't be an effective mediator for you. You need a different personality to help you mediate."

B. A mediator may not accept anything of value from a party or attorney for a party before, during, or after the mediation, other than the compensation agreed upon. Mediators should be sensitive to the fact that future business dealings with parties may give the appearance of impropriety. However, it is not improper for a mediator to receive referrals from parties or attorneys.

C. CONFLICTS OF INTEREST / BIAS

- a. 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.
- b. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.
- c. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could

reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

- d. If a mediator learns of any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- e. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.
- f. 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.

Commentary: *How a mediator conducts a conflicts check varies by practice context. For a complex case that comes to a mediator through his or her law firm, best practice consists of making a firm-wide conflicts check at the pre-mediation phase. By contrast, for a mediator of a matter outside the mediator or firm's areas of practice, making an inquiry of the parties and participants at the time of the mediation regarding potential conflicts of interest may be sufficient.*

In performing the mediator's role, an individual displays multiple analytical and interpersonal skills which may well lead a mediation participant to consider employing the mediator again. If a mediation participant, be it a party, party representative, witness or any other participant, wishes to employ the mediator in a subsequent mediation, or in another role (such as personal lawyer, therapist, or consultant), then the mediator must make certain that entering into such a new relationship does not cast doubt on the integrity of the mediation process.

Example 1: *A divorce mediation results in a full agreement. The parties do not want to take the agreement and spend the extra money on an attorney. And they ask the mediator to take the agreement to court and help them obtain an uncontested divorce. As the mediator described the problem, "I told them that technically I could but no I won't because I've been your mediator and must be neutral. I think it would be a conflict for me to go from mediator to attorney in the same case for the purpose of getting you your divorce and making it legal. They said that they really didn't want to go pay anybody else and asked me to prepare the papers. So I charged them an additional fee to prepare the papers, the decree and separation*

agreement, without my name on it and I told them to file it pro se. They were satisfied with that and I could sleep with that decision.”

Recommendation: *The ethical problems that arise in the area of subsequent contact with parties have to do with neutrality and the perception that the mediator might capitalize upon the mediation experience to create a future business relationship with one or the other party. Here the mediator did legal work for both parties so that there was no question of a breach of neutrality. There was no question that the dual representation was clearly explained and understood by the parties. Further, the mediator tried to distance himself by refusing to represent the parties in court, acting more as a scribe than a representative. He acted with great reluctance and only because the parties requested that they not be placed in a position of incurring additional expense. This mediator said that specific rules in this area would be helpful. It is the Commission’s recommendation that a lawyer/mediator never accept any legal work arising out of the mediation. In the context of the example above, this recommendation is more for the protection of the mediator than for the parties.*

IV. FAIRNESS.

The mediator is the guardian of fairness of the process. In that context, the mediator must assure that the conference is characterized by overall fairness and must protect the integrity of the process.

A. A mediator should not be a party to an agreement which is illegal or impossible to execute. The mediator should alert parties to the effect of the agreement upon third parties who are not part of the mediation. The mediator should alert the parties to the problems which may arise if the effectiveness of the agreement depends upon the commitment of persons who are not parties to the agreement. A mediator may refuse to draft or sign an agreement which seems fundamentally unfair to one party.

Commentary: *Georgia mediators expressed two concerns related to the fairness of a mediated agreement: How to handle the situation in which the parties agree to something which the mediator feels is unworkable; how to separate out the mediator’s own bias that a party could have done better from the agreement which seems fundamentally unfair to the party.*

Example 1: *As one mediator expressed the tension, “You know, have you done this or that? Why don’t we come back? ‘No, I just want to get it over with.’ God, you’re paying such a price just to get it over with. But then, maybe they just really need to get it over with. I don’t know how many times I’ve heard that, that I just want to get it over with. I don’t care what it takes, I want it done, nobody’s going to abide by this anyway. Whatever that whole bundle of things may be. That’s my bugaboo. I don’t know what advice to give other people about it. You can create some type of abstract standard [for mediators to handle this situation.]”*

Example 2: *In a juvenile court case the parties are working toward agreement and the mediator realizes that the child is agreeing to anything in order to get out of the room. The mediator also realizes that if the agreement is breached, the child will have to answer for the breach in court. The mediator’s reality testing is to no avail.*

Example 3: *The mediator is concerned about the tax consequences of a property transfer, and the parties are unwilling to consult an outside expert. As one mediator set forth the problem: “So they come in with a house to sell or a business as part of their marital assets and you’re talking about transferring all this property and then what about the taxes. Have you thought about the tax implications? They say no, and you say well you ought to go see a CPA and get this information. And they don’t want to because they don’t want to spend any more money and all of a sudden you’re taking what appeared to be a simple situation and you’re making it more complex and you’re making it more expensive and where does it stop. That’s our question.”*

Example 4: *The parties have been married twenty-two years and have grown children. They come to mediation having settled everything but who is to get the Volvo, which is for them their most prestigious material possession. The husband suggests the solution of just selling the car, a solution which would make it possible to finalize the divorce. The wife, who is not ready for finality begins to cry hysterically and then says, “Just write it up and I’ll sign anything.”*

Recommendation: *The mediator’s tension may result from his or her concern that the agreement is not the best possible agreement. On the other end of the continuum, the mediator feels that the agreement is unconscionable. This is an area in which the mediator’s sense of fairness may collide with the fundamental principle of self-determination of the parties. On the other end of the continuum, the mediator may feel that the agreement is unfair in that one party is not fully informed. In other words, the process by which agreement was reached was unfair because one party was not bargaining from a position of knowledge. An underlying question is whose yardstick should be used in measuring fairness.*

The mediator has an obligation to test the parties’ understanding of the agreement by making sure that they understand all that it involves and the ramifications of the agreement. The mediator has an obligation to make sure that the parties have considered the effect of the agreement upon third parties. If after testing the agreement the mediator is convinced that the agreement is so unfair that he or she cannot participate, the mediator should withdraw without drafting the agreement. Parties should be informed that they are, of course, free to enter into any agreement that they wish notwithstanding the withdrawal of the mediator.

B. A mediator is the guardian of the integrity of the mediation process.

Commentary: *Georgia mediators expressed concern about confusion of parties and neutrals as to the difference between various ADR processes. This confusion may result in the parties’ not knowing what to expect of the mediation process. While there is room for variation in mediation style from the more directive to the more therapeutic, the mediator should recognize the line between mediation and a more evaluative process and be prepared to refer the party to another process if that would be more appropriate.*

Another concern mentioned by many Georgia mediators was how to recognize impasse and, perhaps more difficult, how to recognize when parties come to the table unwilling to bargain in good faith. Another variation on this theme is the attorney who has come to the table merely intending to benefit from free discovery or use mediation as a dilatory tactic. Yet another variation on this theme was the expectation of lawyers that the mediation could be completed in

one session. These problems are experienced differently whether the mediator is being compensated on an hourly basis, per session, or is a volunteer. Many mediators and program directors struggle with the issue of good faith and the question of whether lack of good faith can ever be reported to the court.

Recommendation: When a mediator realizes that a party is not bargaining in good faith, he or she often experiences an understandable frustration and a desire to report the bad faith to the court. The pledge of confidentiality extends to the question of conduct in the mediation, excepting of course threatened or actual violence. The possible damage to the process by reporting more than offsets the benefit in a given case. Further, if the lodestar of mediation is the principle of self-determination, the unwillingness of a party to bargain in good faith is consistent with that party's right to refuse the benefits of mediation.

V. RULES OF FAIR PRACTICE.

REFERRALS

Mediators should observe the same care to be impartial in their business dealings that they observe in the mediation session. In this regard, mediators should not refer parties to any entity in which they have any economic interest. As a corollary to this principle, mediators should avoid referrals to professionals from whom the mediator expects to receive future business. Similarly, mediators should avoid an ongoing referral relationship with an attorney that would interfere with that attorney's independent judgment.

It is not improper to receive referrals from attorneys or parties. However, mediators should be aware that their impartiality or appearance of impartiality may be compromised by referrals from parties or attorneys for whom they act as mediators on more than one occasion.

FEES

Mediators who are compensated by parties must be scrupulous in disclosing all fees and costs at the earliest opportunity. Fees may be based on an hourly rate, a sliding scale, or a set fee for an entire mediation as long as the fee structure has been carefully explained to the parties and they have consented to the arrangement.

Fees may never be contingent upon a specific result. It is imperative that the mediator have no "stake" in the outcome.

Mediators who serve for compensation in court programs are obligated to provide some pro bono hours in order to serve parties who are indigent.

COMPETENCE

Mediators are obligated to disclose their training and background to parties who request such information. Mediators are obligated not to undertake cases for which their training or expertise is inadequate. Mediators shall meet the competency standards of Appendix B. § 1.⁷⁹

Mediators who serve in court programs or receive referrals from courts must be registered with the Georgia Office of Dispute Resolution and must be in compliance with the Alternative Dispute Resolution Rules of the Supreme Court of Georgia. Any mediator who receives a court referral without being in compliance with the Supreme Court Rules is subject to being removed from the registry of the Georgia Office of Dispute Resolution. Further, the

⁷⁹ Appendix C was amended by the Commission February 28, 2002, to provide for a competency requirement.

immunity protection of the Supreme Court Rules is not available to mediators who receive court referrals without being in compliance with said rules.

ADVERTISING

Mediators are permitted to advertise. Mediators have an obligation to the integrity of the mediation process. In that regard, all statements as to qualifications must be truthful. Mediators may never claim that they will guarantee a specific result. It is important to the public perception of mediation that advertisements by mediators are not only accurate, clear, and truthful, but that they are in no way misleading.

DILIGENCE

Mediators will exercise diligence in scheduling the mediation, drafting the agreement if requested to do so, and returning completed necessary paperwork to the court or referring agency.

Mediation may be terminated by either the mediator or the parties at any time. Mediators will be sensitive to the need to terminate the mediation if an impasse has been reached. However, mediators must be courageous in declaring impasse only when there is no possibility of progress.