

MODEL COURT MEDIATION RULES

As Amended by the Georgia Commission on Dispute Resolution, September 11, 1997 and January 18, 2005

GENERAL POLICY:

The court will make information about ADR options available to all litigants.

DEFINITION:

Mediation. Mediation is a process in which a neutral facilitates settlement discussions between parties. The neutral has no authority to make a decision or impose a settlement upon the parties. The neutral attempts to focus the attention of the parties upon their needs and interests rather than upon rights and positions. Although in court-annexed or court-referred mediation programs the parties may be ordered to attend a mediation session, any settlement is entirely voluntary. In the absence of settlement the parties lose none of their rights to a jury trial.

RULE 1. REFERRAL TO MEDIATION.

(a) Except as hereinafter provided, any contested civil or domestic matter case may be referred to mediation. Parties may be ordered to appear for a mediation conference. Compliance does not require that the parties reach a settlement. Cases shall be screened by the judge or the mediation office to determine

- (1) Whether the case is appropriate for mediation;
- (2) Whether the parties are able to compensate the mediator if compensation is required;
- (3) Whether a need for emergency relief makes referral inappropriate until the request for relief is heard by the court.

¹(b) Cases in which there are allegations of domestic violence will be screened to determine whether mediation is appropriate:

- (1) Criminal cases that involve domestic violence will not be referred to mediation from any court.
- (2) All domestic relations cases will be screened for domestic violence allegations through intensive intake. Those domestic relations cases referred to mediation directly from the bench are also subject to the domestic violence screening process. Intake procedures are designed to identify cases in which there are allegations of domestic violence and to provide a process by which a party alleging violence will make a decision based on informed consent whether or not to proceed with mediation.
- (3) The detailed domestic violence screening protocol implementing the Commission on Dispute Resolution's *Guidelines for Mediation in Cases Involving Issues of Domestic Violence* is attached hereto and incorporated in these rules. ***[While different ADR programs may use different initial screening mechanisms, each program should have a screening protocol that is consistent with the Commission's Guidelines. This protocol should be attached to the program's rules as an appendix or should be included within the body of the rules.]***

¹ Section (b) of Rule 1 was amended by the Georgia Commission on Dispute Resolution on January 18, 2005.

- (4) Staff who conduct screening for domestic violence allegations must be trained mediators who have had specialized domestic violence mediation training.
- (5) Only mediators who are registered with the Georgia Office of Dispute Resolution in the category of specialized domestic violence mediation will serve in cases involving domestic violence allegations. If such allegations arise for the first time during a mediation session, a mediator who is not registered in the specialized domestic violence category must conclude the mediation and send the case back to the court. In concluding the mediation, the mediator should take precautions to guard the safety of all individuals involved in the mediation.
- (6) No case involving allegations domestic violence will be sent to mediation without the informed consent of the alleging party given after a thorough explanation of the mediation process and discussion of the circumstances of the case.

(c) Previous Participation in Mediation. If the parties have submitted the dispute to mediation prior to filing suit, the court will not require that the parties submit the case to mediation a second time. Parties who have been through an approved ADR process privately will not be required to participate in a duplicative process. If parties are required by statute to submit a dispute to any ADR process before filing suit, the court will not require submission to mediation.

(d) Request for Mediation. Any party to a dispute may request that the court refer the case to mediation or request that a matter referred to mediation be referred to another ADR process.

(e) Effect of Referral upon Progress of the Case. The scheduling of a case for a mediation conference shall not remove the case from assignment to a judge, interfere with discovery, nor serve to postpone scheduled motions before the court. The court may refer the matter to mediation before any hearings before the court.

(f) Interim or Emergency Relief. A party may apply to the court for interim or emergency relief at any time. Mediation shall continue while such a motion is pending absent a contrary order of the court or a decision of the mediator to adjourn pending disposition of the motion. Time for completing mediation shall be tolled during any periods where mediation is interrupted pending resolution of such a motion.

(g) If court personnel other than judges are involved in ADR referral decisions, these individuals will receive appropriate training and will work within clearly stated written policies, procedures and criteria for referral. The Georgia Office of Dispute Resolution will assist courts in developing guidelines for training court personnel in referral decisions.

(h) In actions brought by state agencies seeking to enjoin activities injurious to the public interest, the agency may within 10 days of service of the action make a showing to the trial court that referral to ADR would adversely affect the public interest. Upon a showing of reasonable probability of such adverse effect, the court will proceed with emergency measures provided by law. Later referral to an ADR process may be appropriate if the emergency measures do not bring the case to conclusion.

(i) The court may impose a users' fee upon any party participating in mediation who has not paid a filing fee surcharge at the time the action was filed.

RULE 2. TIMING OF ADR PROCESSES .

(a) Conference or Hearing Date. Unless otherwise ordered by the court, the first mediation conference shall be held within 60 calendar days after the filing of the last responsive pleading.

(b) Notice. The parties shall select a registered mediator from the list of registered mediators provided by the program in accordance with Rules 4 and 5 herein. Within 10 calendar days after the case is referred to mediation, the parties will inform the mediation coordinator of the name of the mediator and the date and time for mediation. Notice to the mediation coordinator is technically plaintiff's responsibility. However, upon agreement, anyone may schedule the mediation.

RULE 3: EXEMPTION OR EXCLUSION OF CASES FROM MEDIATION.

(a) Any party to a dispute referred to mediation may petition the court to exclude the case from mediation if:

- (1) The issue to be considered has been previously mediated;
- (2) The issue presents a question of law only;
- (3) Other good cause is shown before the judge to whom the case is assigned.
- (4) The issues have been referred by consent order of court to a private provider of mediation services.

(b) The following actions shall not be referred to mediation except upon petition of all parties or upon sua sponte motion of the court:

- (1) Appeals from rulings of administrative agencies;
- (2) Forfeitures of seized property;
- (3) Habeas corpus and extraordinary writs;
- (4) Bond validations;
- (5) Declaratory relief;
- (6) URESA (Uniform Reciprocal Enforcement of Support Act) actions.

RULE 4. APPOINTMENT OF THE MEDIATOR.²

(a) The parties shall agree upon a mediator from the list of mediators registered by the Georgia Office of Dispute Resolution who have been chosen for service in the program. (1) Parties who have been through an approved ADR process privately will not be required to participate in a duplicative process; (2) after a case is filed, parties are free to choose their own neutral and negotiate a fee with that neutral before a case is ordered to an ADR process; however, the confidentiality and immunity protections of the Georgia Supreme Court ADR Rules do not apply in the absence of a court order referring the case to mediation; (3) once the case is ordered to an ADR process, parties are still allowed to choose their own neutral and proceed under that neutral's fee or negotiate a fee with that neutral provided the neutral chosen is registered with the Georgia Office of Dispute Resolution in the appropriate category ; (4) where possible, parties should be allowed input into the choice of process as well as choice of a neutral. (5) Should the parties fail to agree upon a mediator, the court or mediation coordinator will appoint a mediator from the list of mediators qualified for service in the program and may set the fee. The court will not order the parties to mediation with any private individual or entity without consent of the parties.

² After several modifications, this final version of Rule 4 was approved September 11, 1997.

(b) Disqualification of a Mediator. Any party may move to enter an order disqualifying a mediator for good cause. If the court rules that a mediator is disqualified from hearing a case, an order shall be entered setting forth a qualified replacement from the list of certified mediators in the mediation office. The motion disqualifying the mediator shall be presented to the mediation office which shall present the motion to the judge to whom the case is assigned.

RULE 5. MEDIATOR QUALIFICATIONS FOR SERVICE IN THE PROGRAM.

The qualifications for service as a mediator in the program shall be determined by the superior court judges of the circuit. The qualifications shall not be less than the minimum qualifications set out in Appendix B of the Supreme Court Rules for Alternative Dispute Resolution Programs. Appropriate use of non-lawyer mediators is encouraged. The qualifications for service shall be approved by the Georgia Commission on Dispute Resolution and shall be filed with the Georgia Supreme Court as an appendix to this rule. The program will maintain a roster of mediators chosen for service in the program. Mediators serving in the program will be evaluated by the program on an ongoing basis.

RULE 6. COMPENSATION FOR MEDIATORS COMPENSATED BY THE PARTIES.

(a) Parties are encouraged to agree upon compensation of the mediator at or before the first mediation conference. Relevant factors to be considered in determining an appropriate fee include the complexity of the litigation, the degree of skill necessary to mediate the dispute, and the ability of the parties to pay. Mediators are required to list their fee schedules as part of their applications. The court will review the fee schedules for reasonableness. Daily rather than hourly rates are encouraged. When deemed appropriate, the mediator may be compensated a maximum of one hour preparation time per case.

(b) If the parties are unable to agree upon compensation of the mediator, then the assigned judge at the interlocutory hearing or final trial may order either or both parties to pay or share the cost of the mediator. When the compensation is set by the court, the costs will be predicated upon the complexity of the litigation, the degree of skill necessary to mediate the case, and the ability of the parties to pay.

(c) Before being placed on the roster, a mediator must agree to provide pro bono hours and hours at reduced rates to defray mediation costs for parties with limited ability to pay. The number of hours required will be determined by the superior court judges of the circuit.

(d) A mediator who is compensated by the parties may be required to remit an administrative fee of up to \$15.00 per case to the mediation program by the close of the next business day following receipt of payment or partial payment of mediation compensation.

RULE 7. CONFIDENTIALITY AND IMMUNITY.

(a) The Extent of Confidentiality:

Any statement made during a court-annexed or court-referred mediation or as part of intake by program staff in preparation for a mediation is confidential, not subject to disclosure, may not be disclosed by the mediator or program staff, and may not be used as evidence in any subsequent administrative or judicial proceeding. A written and executed agreement or memorandum of agreement resulting from a court-annexed or court-referred mediation is not subject to the confidentiality described above.

Any document or other evidence generated in connection with a court-annexed or court-referred mediation is not subject to discovery. A written and executed agreement or memorandum of agreement resulting from a court-annexed or court-referred mediation is discoverable unless the parties agree otherwise in writing. Otherwise discoverable material is not rendered immune from discovery by use in a mediation.

Neither a neutral or any observer present with permission of the parties in a court-annexed or court-referred mediation may be subpoenaed or otherwise required to testify concerning a mediation in any subsequent administrative or judicial proceeding. A neutral's notes or records are not subject to discovery. Notes and records of a court ADR program are 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 program.

(b) Exceptions to Confidentiality:

Confidentiality on the part of program staff or the neutral does not extend to the issue of appearance. Confidentiality does not extend to a situation in which (a) there are threats of imminent violence to self or others; or (b) the mediator believes that a child is abused or that the safety of any party or third person is in danger. Confidentiality does not extend to documents or communications relevant to legal claims or disciplinary complaints brought against a neutral or an ADR program and arising out of an ADR process. Documents or communications relevant to such claims or complaints may be revealed only to the extent necessary to protect the neutral or ADR program. Nothing in the above rule negates any statutory duty of a neutral to report information. Parties should be informed of limitations on confidentiality at the beginning of the conference. Collection of information necessary to monitor the quality of a program is not considered a breach of confidentiality.

(c) Immunity:

No neutral in a court-annexed or court-referred program shall be held liable for civil damages for any statement, action, omission or decision made in the course of any ADR process unless that statement, action, omission or decision is 1) grossly negligent and made with malice or 2) is in willful disregard of the safety or property of any party to the ADR process.

RULE 8. APPEARANCE.

The presence of parties at all mediation conferences is required unless the court finds that a party is a nonresident or is incapacitated. The requirement that a party appear at a mediation conference is satisfied if the following persons are physically present:

(a) The party and/or

(1) The party's representative who has

(i) full authority to settle without further consultation, and

(ii) a full understanding of the dispute and full knowledge of the facts;

- (2) A representative of the insurance carrier for any insured party if that representative has full authority to settle without further consultation, except that telephone consultations with persons immediately available are permitted.

(b) Attorneys are not required to attend mediation conferences but may not ever be excluded by the court or the mediator.

RULE 9. SANCTIONS FOR FAILURE TO APPEAR.

If a party fails to appear at a duly noticed mediation conference without good cause, the mediation program shall notify the judge to whom the case is assigned. The judge may find the party in contempt and impose appropriate sanctions.

RULE 10. COMMUNICATION WITH PARTIES.

The only ex parte communication between a party and the mediator outside of the mediation conference shall be for the purposes of verifying appointment times and locations or answering questions about the mediation process and procedures. The mediator may meet privately with any party or any attorney during the mediation conference.

RULE 11. COMMUNICATION WITH THE COURT.

(a) In order to preserve the objectivity of the court and the neutrality of the mediator, there should be no communication between the mediator and the court. If any communication between the court and a mediator is necessary, the communication shall be in writing or through the program coordinator. Copies of any written communication with the court should be given to parties and their attorneys.

(b) Once a mediation is underway in a given case, contact between the mediation coordinator and the court concerning that case should be limited to

- (1) Communicating with the court about the failure of a party to attend;
- (2) Communicating with the court with the consent of the parties concerning procedural action on the part of the court which might facilitate the mediation;
- (3) Communicating to the court the neutral's assessment that the case is inappropriate for that process;
- (4) Communicating any request for additional time to complete the mediation;
- (5) Communicating information that the case has settled or has not settled and whether agreement has been reached as to any issues in the case;
- (6) Communicating the contents of an agreement unless the parties agree in writing that the agreement should not be disclosed;
- (7) Communicating with the consent of the parties information concerning any discovery, pending motions or action of any party which, if resolved or completed, would facilitate the possibility of settlement.

RULE 12. COMPLETION OF MEDIATION.

(a) Mediation shall be completed within 30 days of the order referring the matter to mediation unless extended by order of the court. The motion asking for extension of the mediation shall be submitted to the mediation coordinator, who shall present the motion to the judge to whom the case is assigned.

(b) Length of Mediation. The duration of the mediation conference is generally two hours. However, the conference may be shorter or longer depending upon the assessment of progress by the mediator and the parties.

(c) The mediator may adjourn the mediation conference at any time and may set times for reconvening the adjourned conference notwithstanding Rule 2 (a). No further notification is required for parties present at the adjourned conference.

(d) Agreement. If an agreement is reached, it shall be reduced to writing. If possible, the agreement should be reduced to writing at the end of the mediation conference. In the event that the agreement cannot be reduced to writing at the end of the mediation conference, it should be reduced to writing within 3 calendar days after the mediation. It is the mediator's responsibility to draw the agreement unless all parties determine otherwise.

(1) If parties are represented by counsel present at the mediation, the agreement should be reduced to writing by the mediator and signed by the mediator, parties, and attorneys at the end of the mediation conference.

(2) If any party is unrepresented or is represented by an attorney who is not present, the agreement should be reduced to writing by the mediator and signed by the mediator and parties at the end of the mediation conference. The parties will have an opportunity to have the agreement reviewed by an attorney. If there is no objection to the agreement within 3 calendar days following signing, the program coordinator will file the agreement with the court.

(e) If a partial agreement is reached, it shall be reduced to writing and signed by the parties and counsel, if any, in the same manner as the full agreement above.

(f) If the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the mediation coordinator. The mediation coordinator shall notify the judge to whom the case was assigned of the lack of an agreement. With the consent of the parties, the mediator's report may also identify any pending notices or outstanding legal issues, discovery processes, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.

RULE 13. EVALUATION.

The mediation coordinator will provide to the Georgia Office of Dispute Resolution information which will allow an evaluation of the program. This information will be provided on an ongoing basis. The model for this evaluation will be provided by the Georgia Office of Dispute Resolution. Participants will not be contacted for evaluation without their permission. The program should seek permission of the parties for this contact either at the beginning of the mediation or by means of an exit survey.