

MEDIATION

**Tuscaloosa County Bar Association
CLE Seminar
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- “Remember, negotiation is more like walking on a tightrope than competing against an opponent. Focusing so much on the end objective will only distract you from the next step, and that can cause you to fall of the rope. Concentrate on the next step because the rope will lead you to the end as long as all the steps are completed.” Chris Voss, *Never Split the Difference*, (2016).

What Is It?

- “[A] confidential, informal process during which an impartial third party, the mediator, assists disputing parties in reaching a mutually acceptable agreement regarding their dispute.”
Alabama Center for Dispute Resolution, alabamaadr.org.

What It Is Not

- Arbitration
- Forced Settlement

Rules of Civil Mediation

- Definitions: When Applicable
- Initiation: Stay of Proceedings
- Appointment of Mediator
- Qualifications of Mediator
- Vacancies

- Assistance and Authority
- Time and Place of Mediation
- Identification of Issues
- Authority of Mediator
- Privacy
- Confidentiality

- No Record of Proceedings
- Termination of Mediation
- Rule Interpretation and Application
- Expenses, Fees, Deposits

When Applicable

- 1(b) These rules shall apply:
- (1) In mediation ordered by the courts of this State as provided by statute or by the Alabama Rules of Civil Procedure;

- (2) In any other mediations by parties in a pending civil action in an Alabama court, other than the Alabama Supreme Court or Alabama Court of Civil Appeals, unless the parties expressly provide otherwise; and,
- (3) In other mediations if the parties agree that these Rules shall apply.

Initiation

- Rule 2 - Parties to a civil action may engage in mediation by mutual consent at any time. The court in which an action is pending shall order mediation when one or more parties request mediation or it may order mediation upon its own motion.

- In all instances except where the request for mediation is made by only one party, the court may allocate the costs of mediation, except attorney fees, among the parties. In cases in which only one party requests mediation, the party requesting mediation shall pay the costs of mediation, except attorney fees, unless the parties agree otherwise.

See also §6-6-20

- (b) Mediation is mandatory for all parties in the following instances:
- (1) At any time where all parties agree.
- (2) Upon motion by any party. The party asking for mediation shall pay the costs of mediation, except attorney fees, unless otherwise agreed.

- (3) In the event no party requests mediation, the trial court may, on its own motion, order mediation. The trial court may allocate the costs of mediation, except attorney fees, among the parties.
- (c) If any party fails to mediate as required by this section, the court may apply such sanctions as it deems appropriate pursuant to Rule 37 of the Alabama Rules of Civil Procedure.

Appointment

- Rule 3 - Upon an order for mediation, the court, or such authority as the court may designate, shall appoint a qualified mediator. The mediator appointed shall be agreed upon by the parties concerned, subject to the qualifications provisions of Rule 4...

Qualifications

- Rule 4 - If a court designates or appoints a mediator, the mediator must be registered with the Alabama Center for Dispute Resolution, unless the court for good cause finds otherwise. ...

- No person shall serve as a mediator in any dispute in which that person has any financial or personal interest, except by the written consent of all parties. Before accepting an appointment, the prospective mediator shall disclose to the parties any circumstances likely to create an appearance of bias or likely to prevent the mediation from commencing within a reasonable time.

Rule 6

- Any party not represented by an attorney may be assisted by persons of his or her choice in the mediation.
- Each party, or that party's representative, must be prepared to discuss during mediation sessions the issues submitted to mediation and,...

- unless otherwise expressly agreed upon by the parties or ordered by the court before the first mediation session, someone with authority to settle those issues must be present at the mediation session or reasonably available to authorize settlement during the mediation session.

Authority to Settle

- From a plurality opinion (2-1-2) in *Allstate Prop. & Casualty v. Harbin*, 333 So.3d 655, 667 (Ala. 2021) quoting with approval from a federal case:
- "[The phrase] '[f]ull authority to settle' does not mean that the individual must be willing to settle..."

- Nor is it 'a requirement that [the individual] must come to court willing to settle on someone else's terms... It simply means that the individuals at the settlement conference must be authorized by the parties both to explore fully settlement options and to agree at that time to any settlement terms acceptable to the parties."

Confidentiality – Rule 11

- (a) All information disclosed in the course of a mediation, including oral, documentary, or electronic information, shall be deemed confidential and shall not be divulged by anyone in attendance at the mediation except as permitted under this Rule or by statute.

- "Information disclosed" is defined in the Rules.
- Exceptions apply when the parties and the mediator agree; threats or crimes; and if a complaint is filed against the mediator.

Testimony of Mediator Rule 11

- (c) [Unless excepted], a court shall neither inquire into nor receive information about the positions of the parties taken in mediation proceedings; the facts elicited or presented in mediation proceedings; or the cause or responsibility for termination or failure of the mediation process.

- (d) A mediator shall not be compelled in any adversary proceeding or judicial forum, including, but not limited to, a hearing on sanctions brought by one party against another party, to divulge the contents of documents received, viewed, or drafted during mediation or the fact that such documents exist...

- nor shall the mediator be otherwise compelled to testify in regard to statements made, actions taken, or positions stated by a party during the mediation.

See also 6-6-25

- Except as otherwise permitted by the Alabama Civil Court Mediation Rules, a mediator may not be compelled in any adversary proceeding or judicial forum, including, but not limited to, a hearing on sanctions brought by one party against another party, to divulge the contents of documents received...

- ...viewed, or drafted during mediation or the fact that the documents exist, nor may the mediator be otherwise compelled to testify in regard to statements made, actions taken, or positions stated by a party during the mediation.

Other Statutes Include:

- 8-21C-11 Sale of Recreational Vehicles
- 34-23-185 Pharmacy Audits
- 33-18-1 and 33-19-1 River Basin Compacts

Third Parties – Rule 10

- Mediation sessions are private. An alleged victim of domestic or family violence may have in attendance at mediation a supportive person of his or her choice.
- In all other cases, persons other than the parties and their representative may attend mediation sessions only with the permission of the parties and with the consent of the mediator.

Termination Rule 13

- (a) The mediation process may be terminated at any time after the initial mediation session by any party to the mediation. It also may be terminated by the mediator. Court-ordered mediations shall be terminated by filing with the court one of the following:

- (1) Notice that the parties concerned have executed a settlement agreement. Such a notice shall be signed by all parties concerned or by their attorney; or (2) A written declaration signed by the mediator stating that in the mediator's judgment further efforts at mediation will not contribute to a resolution of the dispute among the parties (see Rule 9).

What Cannot Be Court Ordered to Mediation §6-6-20

- (d) A court shall not order parties into mediation for resolution of the issues in a petition for an order for protection pursuant to The Protection from Abuse Act, Sections 30-5-1 through 30-5-10 or in any other petition for an order for protection where domestic violence is alleged.

- (e) In a proceeding concerning the custody or visitation of a child, if an order for protection is in effect or if the court finds that domestic violence has occurred, the court shall not order mediation.
- (f) A mediator who receives a referral or order from a court to conduct mediation shall screen for the occurrence of domestic or family violence between the parties.

- Where evidence of domestic violence exists mediation shall occur only if:
- (1) Mediation is requested by the victim of the alleged domestic or family violence;
- (2) Mediation is provided by a certified mediator who is trained in domestic and family violence in a specialized manner that protects the safety of the victim; and

- (3) The victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate.
- (g) Where a claim of immunity is offered as a defense, the court shall dispose of the immunity issue before any mediation is conducted.

- (h) A court shall not order parties into mediation in any action involving child support, adult protective services or child protective services wherein the Department of Human Resources is a party to said action.

Mediator Code of Ethics Adopted by the Supreme Court

- Scope, Role, Principles
- Integrity, Impartiality, Competence
- Responsibilities to the Court
- Mediation Process Requirements
- Self-Determination

- Impartiality and Conflict of Interest
- Professional Advice
- Fees and Expenses
- Training and Education
- Advertising and Solicitation
- Prohibited Agreements

When Applicable

- Standard 2(a) The Standards set out in this Code shall apply to:
(1) Mediation of cases pending in courts of the State of Alabama; and
(2) Mediation conducted by persons whose names are listed on the roster of mediators maintained by the Alabama Center for Dispute Resolution.

Professional Advice

- Standard 7: Personal or professional opinion. A mediator may discuss possible outcomes of a case, but a mediator may not offer a personal or professional opinion regarding the likelihood of any specific outcome except in the presence of the attorney for the party to whom the opinion is given.

Appellate Mediation

- Appellate Rule 55: An appellate court may direct the attorneys for the parties and the parties to appear before an approved mediator, who may be designated by the court.
- Attendance, Privilege, Confidentiality, Non-binding, Noncompliance.

Rules of Appellate Mediation

- Rule 2(b): All civil matters within the jurisdiction of the Supreme Court of Alabama or the Alabama Court of Civil Appeals, where all parties are represented by counsel, shall be eligible for referral to the appellate mediation program.
- “Time is of the essence.”

- There are other rules on selection of the mediator, qualifications of mediator, conduct of proceedings, numerous forms to complete, reporting requirements, etc.

Some Observations

- It can be too early for a resolution – but may help with discovery.
- Selling out the mediator.
- Overplaying the mediator.
- Underestimating the need to be heard.
- Forgetting there are other rooms.