



## **ALABAMA CENTER FOR DISPUTE RESOLUTION**

### **JUDGES' MEDIATION BENCH BOOK: A Resource for Alabama Trial Judges**

Alabama Supreme Court Commission on Dispute Resolution  
Alabama Center for Dispute Resolution  
[www.alabamaadr.org](http://www.alabamaadr.org)

**JUDGES' MEDIATION BENCH BOOK:  
A Resource for Alabama Trial Judges**

3<sup>rd</sup> Edition  
2021

Alabama Supreme Court Commission on Dispute Resolution  
Alabama Center for Dispute Resolution  
PO Box 680516  
Prattville, AL 36068  
[www.alabamaadr.org](http://www.alabamaadr.org)

“Discourage litigation, persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser ... in fees, expenses, and waste of time.”

Abraham Lincoln

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The Alabama Center for Dispute Resolution is a 501(c)(3) non-profit. It was established by order of the Supreme Court of Alabama in 1994, under the Alabama Supreme Court Commission on Dispute Resolution.



Dear Alabama Trial Judge,

This handy Judges' Mediation Bench Book puts all the law, court rules, code of ethics, forms and information about mediation in one place. For the past twenty-seven plus years, mediation in Alabama has been promoted for its benefits to the court (docket reduction, time savings, jury costs) and to the parties (quicker, less expensive, party controlled), but under the protection of a court order and the Alabama Civil Court Mediation Rules. As a judge, you are at the center of the action. You are authorized to order mediation by statute and court rule: §6-6-20, §6-6-25, ALA. CODE 1975, and the Alabama Civil Court Mediation Rules.

Many cases that arrive in your court involve familial, social, interpersonal and psychological issues. Mediation makes a difference. Almost fifty percent of the cases filed at the Alabama Court of Civil Appeals are family cases. The Court reports that approximately fifty percent of the cases it sends to appellate mediation settle. Similar findings are reported by the Supreme Court of Alabama.

Parties, with their attorneys, should generally have the opportunity to select the mediator unless they are unable to agree on a neutral. Attorneys know if they need a more facilitative or more evaluative mediator, and if subject matter expertise is important to up the chance of settlement. Party/attorney selection of the mediator protects self-determination and control of all aspects of the mediation process, a hallmark trait. If you appoint a mediator, Rule 3 of the Alabama Civil Court Mediation Rules states that "the mediator appointed shall be agreed upon by the parties concerned, subject to the qualifications provision of Rule 4." If they do not agree, you make the designation.

Alabama has mediator qualifications. 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 the 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. Upon receipt of such disclosure, the parties may name a different person as a mediator. If the parties disagree as to whether a prospective mediator should serve, the court shall appoint the mediator. (Rule 4. Qualifications of a Mediator, Alabama Civil Court Mediation Rules). Qualified mediators are listed on the Alabama State Court Mediator Roster at [www.alabamaadr.org](http://www.alabamaadr.org) and judges also receive a hard copy of the Roster annually. Training is required for our mediators: 20 hours (general civil) or 40 hours (for divorce/family mediation) of mediation training approved by the Alabama Center for Dispute

Resolution. Specialized training is required for mediators who handle cases where there is alleged domestic or family violence, for appellate mediation and for the special foreclosure mediation program. No neutral should mediate without appropriate training.

By providing this book, we hope we give you every reason to use mediation more. You may download mediation forms at the website below, under “court ADR,” “mediation forms.” Just style for your court, and use. There is also an exemplar order of referral to mediation. A sample order for the family mediation program where the Center pays the mediator for qualifying parties under the *Parents are Forever Family Mediation Program* may be obtained by contacting the Center.

The Center is a resource for you and we are here to help. Please call the Center at (334) 356-3802 if you have any questions regarding mediation.

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Executive Director  
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## **BEST PRACTICES FOR JUDGES CONSIDERING THE USE OF MEDIATION TO RESOLVE A PENDING CASE**

It is important for judges to use their positions of leadership within the justice system to introduce mediation to their communities for the benefit of all litigants. Mediation should compliment the court system. The following information may make you more confident in ordering parties to mediation.

### ***WHAT ACTUALLY HAPPENS IN MEDIATION?***

The mediator convenes the mediation and reviews confidentiality, the collaborative and forward-looking nature of mediation, and the rules that are part of the negotiation process. All parties then have an opportunity to present a summary of their points of view.

Most often, the mediator will meet privately (a confidential caucus) with each party to explore more fully the facts and issues of each side. The caucus offers participants the opportunity to vent anger or frustrations outside the presence of the opposing side. The mediator usually will continue to caucus alternately with each party, reality checking, and carrying settlement proposals back and forth, facilitating discussion, but not imposing a solution. The mediator will identify pertinent issues, clarify any misunderstandings, and seriously explore areas of agreement between the parties until a complete agreement is reached. The final agreement is then written down, signed by the parties and becomes an enforceable contract. If the mediation deals with divorce or custody, the mediator will focus on goals for parenting and finances.

### ***WHY ORDER A CASE TO MEDIATION?***

#### ***Best Interest of the Court***

- Quicker disposition of cases.
- Reduced motions.
- No trial time. Less jury expense.
- Parties are less likely to return to court. Studies show that parties are likely to adhere to agreements made in mediation.
- Even if mediation resolves only some of the issues, the court will have less to do. See the section “Reasons for Using Mediation Besides Settlement Stories,” *infra*.
- In family cases, the court always reviews the agreement and ultimately retains oversight of the case.

#### ***Best Interest of the Parties***

- Personal Control. Parties keep control over the outcome of their own problem. Parties are free to craft a unique solution that fits their circumstance and satisfies their needs. They are not limited to money judgment.

- **Cost Savings.** Using mediation may avoid some expenses of litigation, including attorney fees, expert witness fees, appellate costs.
- **Time Savings.** Disputes can be settled promptly. A mediation session may be scheduled as soon as both parties agree, or are ordered to use mediation to try to resolve the dispute. Because of the large number of cases filed, court disposition of a civil case may take a year or more, after which, an appeal looms as a possibility. Mediation may be particularly important in time-critical disputes.
- **Voluntary & Non-Binding.** Mediation is not intended to replace the judicial system, but instead to function as an aid to the system. Parties who do not get the results they want in mediation have the right to proceed with traditional trial and appeal procedures.
- **Reduced Emotional Trauma.** Litigation is adversarial, and often litigants are not prepared to deal with emotional strain and pressure of protracted litigation. Mediation affords a means of resolving disputes in an atmosphere which is less hostile or adversarial than a courtroom. This becomes very important in elder law cases, domestic relations cases and probate matters.

### ***Best Interest of the Child: Parenting, Visitation, Divorce, Dependency, Child Support***

- Research shows that children benefit greatly by having both parents and extended family involved in their lives.
- Family mediations are focused mostly on children.
- Parenting schedules are developed with the help of the mediator according to parents' work schedules and children's activities.
- Mediators talk with parents about flexibility with visitation schedules and build in guidelines to accomplish them.
- Mediators find out what is most important to each parent about raising the children (education, sports, healthy eating, etc.) and work to see that those things are incorporated into the agreement.
- Parents can agree to visitation and graduated parenting time appropriate to existing relationships and child development stages.

### ***WHEN SHOULD A CASE BE ORDERED TO MEDIATION?***

One advantage of early mediation is that substantial cost savings may accrue to the parties if they do not have to expend lawyer time and expenses in prolonged discovery. Another advantage of an early mediation is that parties will be less entrenched in positions and may be more open to creative solutions. There is little risk involved in ordering a case to mediation early. That said, a judge should be sensitive to concerns expressed by attorneys about a case not being ready for mediation, while remembering that from the parties' perspective earlier resolution is probably preferred. Unless attorneys can articulate a clear and convincing reason why mediation should be delayed until the case is further developed, a judge should use her or his own judgment about the timing of mediation. Rule 16 of the Alabama Rules of Civil Procedure mentions mediation as a subject to be discussed at pretrial conferences.



ALA. CODE §6-6-20(b) (1975) states that 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 cost of mediation, except attorney's 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.

Recent Alabama case law interpreting ALA.CODE §6-6-20 (b) has made it clear that if a party asks for mediation, the court must order it. Ex Parte Morgan County Commission, 6 So. 3d 1145 (Ala. 2008); Working v. Jefferson County Election Commission, 72 So. 3d 18 (Ala. 2011).

However, the Code acknowledges in sections (d), (e) and (h) that some domestic relation cases should not be mediated: resolution of issues in a petition for an order of protection in domestic abuse cases; in a petition for an order for protection where domestic violence is alleged; in custody and visitation proceedings where an order for protection is in effect or if the court finds domestic violence. The court shall also not order mediation in any action involving child support, adult protective services or child protective services where DHR is a party. These cases can be mediated without court order if parties are in accord and think it would be beneficial, which it has been shown to be. Additionally, a judge may have a personal judgment, based on bench experience or experience with the parties or their advocates, that a particular case is more likely to require adjudication.

Where parties fail to mediate after a court order, the Code states that, "the court may apply such sanctions as it deems appropriate pursuant to Rule 37 of the Alabama Rules of Civil Procedure." ALA. CODE §6-6-20(c) (1975)

### ***WHAT ABOUT THE COST OF MEDIATION FOR PARTIES?***

Don't be afraid to send parties to mediation because they have to pay. Parties pay money for meals out, entertainment, cigarettes and cell phones even when they cannot afford it. Mediation is a one time expense for a long term solution. Parties need to pay something in order to be fully engaged.

- Mediation is always cheaper than litigation.
- Pro bono mediators are available. Those who are registered on the State Court Mediator Roster are required to provide up to 10 hours pro bono mediation each year if requested. Additionally, many mediators reduce their hourly fees at the request of an attorney for a party.
- This is an investment in their family's future for which they are responsible, not the court.
- Parties who agree in mediation come back to court less. Parties may include in their mediated agreement that they will return to mediation if modifications are necessary, thereby saving future court hearing time.

## ***WHO SHOULD SERVE AS A MEDIATOR?***

Rule 4 of the Alabama Civil Court Mediation Rules states: “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. Upon receipt of such disclosure, the parties may name a different person as mediator. If the parties disagree as to whether a prospective mediator should serve, the court shall appoint the mediator.”

Rule 4 applies only in court-ordered mediations; in mediations in which the parties mutually agree to mediate, the parties are free to select the mediator of their choice without regard to the provisions of Rule 4. (See Comment to Rule 4, Qualifications of a Mediator, Amendment Effective June 26, 2002).

It is understood that a court presiding over a particular case is better suited to determine what is best for the particular parties and disputes before it. Therefore, although registered mediators should be the general rule and preferred rule, the trial court presiding over the matter retains the ultimate authority to determine whether particular circumstances might suggest a different alternative. For example, “good cause” might include the appointment of retired judges, highly experienced attorney-mediators, or free or reduced-cost mediators, including pro bono mediation programs. Perhaps the particular unavailability of a registered mediator with qualifications the court desires might be considered “good cause.” Ultimately, the trial court is accorded considerable discretion in determining what is “good cause” for the appointment of a nonregistered mediator. (See Comment to Rule 4, Qualifications of a Mediator, Amendment Effective April 1, 2020).

While Alabama Statute 6-6-20 does not recite mediator qualifications, the Alabama Mediator Roster registration standards are clear about the amount of training, education, and good character requirements mediators in Alabama must have.

It is generally a best practice for parties to pick their mediator. If parties do not agree upon a mediator, then the selection of a trained and qualified mediator may be made by the court. See Alabama Civil Court Mediation Rule 3.

## ***WHAT ABOUT CONFIDENTIALITY IN MEDIATION? MAY PARTIES SUBPOENA THE MEDIATOR TO TESTIFY, OR JUDGES QUIZ THE MEDIATOR ABOUT WHAT HAPPENED IN THE MEDIATION, IF THERE IS A QUESTION ABOUT THE MEDIATED AGREEMENT?***

Confidentiality is a hallmark of mediation, along with self-determination of the parties.

Particularly onerous to mediators is the thought of having to take the side of one party or the other in motions hearings or litigation after mediation is over, thereby ruining the promise of confidentiality and neutrality. According to ALA.CODE §6-6-25 (1975) and its language which exactly tracks *Rule 11(d) of the Alabama Civil Court Mediation Rules*, “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 such 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.” (Acts 2008 No. 387, §1,2,3)

While *Rule 11(a) of the Alabama Civil Court Mediation Rules* is clear about what is deemed confidential in mediation, Rule 11(b) does allow for three confidentiality exceptions as summarized: disclosure of confidential information is permitted when the mediator and all parties agree; information admissible or discoverable does not become inadmissible or protected from discovery solely by reason of its use in mediation; and, confidentially provisions do not apply for threats of personal injury or property damage made in mediation, to a party or mediator who uses or attempts to use mediation to plan or commit a crime, or to the extent necessary for a mediator to defend a claim or complaint filed against the mediator.

Additionally, Part (c) of the Rule, curtails court inquiries into what happened in mediation: “Except as provided in Rule 11(b) above, the 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.”

When a mediator reports back to the court about a mediation, the Report of Mediator (Form 4 in the form section, *infra*) provides that the mediator reports to the court only that the action was settled or not settled in mediation. Mediators are ethically required to preserve confidentiality, and must comply with *Standard 6. Confidentiality, Alabama Code of Ethics for Mediators*. Even with a law and a court rule, mediators may often include a confidentiality clause in the agreement to mediate that parties sign before mediation begins. Some specifically include a provision that the parties agree not to subpoena the mediator to testify, and will pay attorney fees and mediator costs to quash the subpoena if they try.

## APPENDIX

## **ALABAMA MANDATORY MEDIATION ACT**

### **Alabama Code Title 6. Civil Practice § 6-6-20 Mandatory Mediation Prior to Trial**

- (a) For purposes of this section, “mediation” means a process in which a neutral third party assists the parties to a civil action in reaching their own settlement but does not have the authority to force the parties to accept a binding decision.
  - (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.
  - (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.
- (Acts 1996, No. 96-515, page 659, §1.)

## **MEDIATOR CONFIDENTIALITY ACT**

### **Division 3**

#### **Mediator May Not Be Compelled to Testify Or Provide Documents**

Effective date: The act which added this division became effective May 16, 2008.

§6-6-25. Definitions: legislative findings; compelled testimony, etc., of mediators.

- (a) For the purposes of this section, the following words shall have the following meanings:
  - (1) **MEDIATION.** A process in which a mediator acts to encourage and facilitate the resolution of a dispute without imposing a settlement.
  - (2) **MEDIATOR.** A neutral third party conducting a mediation, including any co-mediators, employees, agents, or independent contractors of the mediator or co-mediator, and any person attending or observing the mediation for purposes of training.
- (b) The Legislature finds that it is desirable to encourage public confidence in the use of alternative methods of dispute resolution by preventing a mediator from being compelled to testify or produce documents about a mediation.
- (c) 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.

(Acts 2008-387, p. 730, §§ 1-3.)

**ALABAMA CIVIL COURT MEDIATION RULES**  
**Effective August 1, 1992**  
**Including Amendments Received Through May 15, 2021**

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**INTRODUCTION\***

These rules have been promulgated with the assistance of the American Arbitration Association, whose mediation procedures have been applied in whole or in part in these rules.  
[Adopted effective August 1, 1992]

**RULE 1. DEFINITION OF MEDIATION AND SCOPE OF RULES**

(a) Mediation is an extrajudicial procedure for the resolution of disputes, provided for by statute and by the Alabama Rules of Civil Procedure. A mediator facilitates negotiations between parties to a civil action and assists the parties in trying to reach a settlement, but does not have the authority to impose a settlement upon the parties.

(b) These rules shall apply:

- (1) In mediations 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.

[Adopted effective August 1, 1992. Amended effective February 3, 1998; June 26, 2002.]

**Comment to Amendment, Effective June 26, 2002**

Passage of Act No. 96-515, 1996 Ala. Acts, codified at §6-6-20, Ala. Code 1975, introduced a statutory basis for courts to order mediation that necessitated changes in the first sentence of Rule 1(a). This change will reduce the need to amend these Rules in the event of a new or revised mediation statute or a future change in the Alabama Rules of Civil Procedure.

The new language in the second sentence of Rule 1(a) emphasizes the facilitation role of a mediator. The former language might be seen as suggesting a more decision-making role for the mediator – it used phrases such as “submit their dispute” and “[t]he mediator may suggest ways of resolving the dispute.” The new language does not eliminate the possibility of a mediator’s evaluating a dispute and suggesting solutions (see Rule 9).

The revisions to Rule 1(b) are designed to clarify when the Rules are mandatory as opposed to when they are optional. Clearly, any mediation ordered by a court should be conducted according to these Rules. Because §6-6-20 is not limited to actions in the circuit court, the prohibition against mediation in district courts is abolished. Rule (b)(2) establishes a presumption in favor of the application of these Rules in all pending trial court cases except when the parties agree otherwise. This adds greater uniformity in mediation procedures statewide and eliminates confusion about the applicability of these Rules in non-court-ordered mediation. Similarly, Rule 1(b)(3) was added to plainly state that these Rules may apply in any action, including mediation of a case pending in an appellate court, if the parties agree.

## **RULE 2. INITIATION OF MEDIATION; STAY OF PROCEEDINGS**

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.

Upon the entry of an order for mediation, the proceedings as to the dispute in mediation may be stayed for such time as set by the court in its order of mediation. Upon motion by any concerned party, the court may, for good cause shown, extend the time of the stay for such length of time as the court may deem appropriate.

[Adopted effective August 1, 1992. Amended effective June 26, 2002.]

### **Committee Comment to Rule 2**

Participation in the mediation process is strictly voluntary. Any party wishing to terminate the process may do so at any time pursuant to Rule 13. Pursuant to Rule 13, the mediation process is also terminated by expiration of the period of stay provided for by Rule 2.

### **Comment to Amendment Effective June 26, 2002**

Section 6-6-20, Ala. Code 1975, allows one party to require a court to order mediation of a dispute, irrespective of the position of any other party to the dispute. This change in the law required the amendment of the first paragraph of Rule 2, to make the rule consistent with §6-6-20.



In cases where the court can apportion the costs of mediation, the court may want to balance a number of considerations when deciding whether and how to apportion mediation costs between the parties. It may be helpful for courts to consider the commitment to the mediation process that derives when each party has a financial stake in the process. Courts may find mediations are more successful if each party is required to pay some portion of the mediation costs.

Rules 2 as originally adopted provided in the last paragraph that the underlying proceedings “shall be stayed”; the change to “may be stayed” provides greater flexibility to courts and disputants in staying all or part of a dispute during the course of meditation.

### **RULE 3. APPOINTMENT OF A MEDIATOR**

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, except that if the parties do not agree upon a mediator, then the selection of the mediator shall be in the discretion of the court or its designated authority. A single mediator shall be appointed unless the parties or the court determines otherwise. [Adopted effective August 1, 1992. Amended effective June 26, 2002.]

#### **Comment on Amendment Effective June 26, 2002**

The language added to the second sentence was necessitated by the language added to Rule 4 regarding qualifications of mediators in court-ordered mediations.

### **RULE 4. QUALIFICATIONS OF A MEDIATOR**

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 the 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. Upon receipt of such disclosure, the parties may name a different person as a mediator. If the parties disagree as to whether a prospective mediator should serve, the court shall appoint the mediator. [Adopted effective August 1, 1992. Amended effective June 26, 2002; April 1, 2020.]

#### **Comment to Amendment Effective June 26, 2002**

The first sentence of Rule 4 establishes a minimum standard for qualifications of mediators in court-ordered mediations. Presently, no statutory qualifications exist, so the rule was drafted to allow for the possibility of mediator qualifications by statute at a later date without the necessity of amending Rule 4.

The Alabama Supreme Court has adopted Mediator Registration Standards. The Rule does not require the selected mediator to actually be registered with the Alabama Center for Dispute Resolution, but the mediator must possess the training and skill sufficient to be registered.

Rule 4 applies only in court-ordered mediations; in mediations in which the parties mutually agree to mediate, the parties are free to select the mediator of their choice without regard to the provisions of Rule 4.

Any disclosures of possible bias, conflict of interest, or scheduling difficulty should be made to the parties, not the court. The parties are best situated to determine whether any of those items rises to such a level as to disqualify the mediator from serving. This should save time for judges, eliminate the possibility of the court's rejection of a mediator the parties would have found acceptable, and gives the parties the greatest possible control over the process. If the disclosure causes a rejection of the proposed mediator by a party, the parties should have the first option to select a successor. The court would have the final say in the event the parties could not agree upon a successor mediator.

#### **Comment to Amendment to Rule 4 Effective April 1, 2020**

It is understood that a court presiding over a particular case is better suited to determine what is best for the particular parties and disputes before it. Therefore, although registered mediators should be the general rule and preferred rule, the trial court presiding over the matter retains the ultimate authority to determine whether particular circumstances might suggest a different alternative. For example, "good cause" might include the appointment of retired judges, highly experienced attorney-mediators, or free or reduced-cost mediators, including pro bono mediation programs. Perhaps the particular unavailability of a registered mediator with qualifications the court desires might be considered "good cause." Ultimately, the trial court is accorded considerable discretion in determining what is "good cause" for the appointment of a nonregistered mediator.

### **RULE 5. VACANCIES**

If any mediator becomes unwilling or unable to serve, the court shall appoint another mediator. The appointment of a successor mediator shall be by the same procedures and upon the same terms as an initial appointment.

[Adopted effective August 1, 1992. Amended effective June 26, 2002.]

### **RULE 6. ASSISTANCE AND SETTLEMENT AUTHORITY**

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. [Adopted effective August 1, 1992. Amended effective June 26, 2002.]

#### **Comment to Amendment Effective June 26, 2002**

The first obligation imposed by the second sentence is that a party make reasonable efforts to participate in mediation by appearing at the mediation prepared to discuss the issues being

submitted to mediation. This entails the party's possessing a sufficient knowledge of the facts of the dispute and the law governing the dispute.

Lawyers representing clients in mediation since the adoption of these Rules in 1992 have identified a problem of some parties appearing at mediations without full or realistic settlement authority. Such a practice unnecessarily prolongs the mediation and can be used improperly as a discovery or negotiating tactic. The ultimate aim of mediation is the resolution of the dispute; therefore, each party has an obligation to ensure, before agreeing to a date and time for the mediation, that a person with settlement authority for all issues being mediated will be readily available throughout the mediation to approve a settlement negotiated during the mediation.

The rule attempts to strike the proper balance between having a person with full settlement authority physically present at the mediation session and allowing such person to be within reasonable contact, such as by telephone. Mediation of disputes with small amounts in controversy or where the person with settlement authority would incur substantial costs to travel to the site of the mediation might best be accommodated by using a telephone conference or similar long-distance communication. On the other hand, one value of mediation is having the decision-makers, such as a corporation's chief financial officer or chief executive officer, present to hear the discussions during mediation to personally assess the pros and cons of pursuing litigation versus settling the controversy for a particular amount. The default standard is that someone with full authority must be available, such as by telephone, fax, or other means that can provide input on the settlement within a reasonable time. The parties may negotiate or the court may require the parties to have a person with full settlement authority present throughout the mediation. Presumably this would occur only in cases in which the cost of having such a person present would be reasonable in light of the amount in controversy in the underlying dispute.

There are a number of different ways a party could communicate with a person with full authority to settle the dispute. This Rule presumes that a party will make every reasonable effort to ensure the person with settlement authority remains continuously available throughout the mediation to consult and provide input on a potential settlement proposal. Because the length and types of mediations may vary greatly, and because the decision-maker may be in a different time zone from the time zone of the location of the mediation, the Rule does not attempt to define what is reasonable. If one party has a concern over the extent of the settlement authority the representative of a party present at the mediation has, an effort to identify the person with adequate authority and the availability of that person during the mediation should be undertaken at the beginning of the mediation. This can be done through private sessions with the mediator at the beginning of the mediation to protect a party's interest in not disclosing the extent of its settlement authority.

## **RULE 7. TIME AND PLACE OF MEDIATION**

The mediator shall fix the time of each mediation session. The mediation sessions shall be held at any convenient location agreeable to the mediator and the parties or as otherwise designated by the court. [Adopted effective August 1, 1992. Amended effective June 26, 2002.]

## **RULE 8. IDENTIFICATION OF MATTERS IN DISPUTE**

A mediator may require each party concerned, within a reasonable time before the first scheduled mediation session, to provide the mediator with a brief memorandum setting forth the party's position with regard to the issues that need to be resolved. The mediator shall not distribute the memoranda to the parties without their consent.

At the first session, the parties shall produce all information reasonably required for the mediator to understand the issues presented. The mediator may require either party to supplement this information.

[Adopted effective August 1, 1992. Amended effective June 26, 2002.]

### **Comment to Amendment Effective June 26, 2002**

The former requirement that each party in every type of mediation provide the mediator with a brief memorandum at least 10 days before the first mediation session was unnecessarily inflexible. Parties and mediators alike frequently ignored that requirement. The better practice is to allow a mediator to require such a memorandum if, in the mediator's judgment, a memorandum would be helpful or necessary. Therefore, "shall" is changed to "may" and the 10-day requirement is removed. In some cases, sharing the memoranda with the parties might facilitate the mediation, but the mediator should not allow the contents of any memorandum submitted by a party to be viewed by another party without the consent of the party who prepared the memorandum.

## **RULE 9. AUTHORITY OF MEDIATOR**

The mediator does not have authority to impose a settlement upon the parties, but the mediator shall attempt to help the parties reach a satisfactory resolution of their dispute. The mediator is authorized to conduct joint and separate meetings with the parties, to communicate offers between the parties as the parties authorize, and, at the request of the parties, to make oral and written recommendations for settlement. Whenever necessary, the mediator may also obtain expert advice concerning technical aspects of the dispute, provided the parties agree to the mediator's obtaining such advice and assume the expenses of obtaining it. Arrangements for obtaining such advice shall be made by the mediator or by the parties. The mediator is authorized to end the mediation whenever, in the judgment of the mediator, further efforts at mediation would not contribute to a resolution of the dispute between the parties (see Rule 13(a)(2)).

[Adopted effective August 1, 1992. Amended effective June 26, 2002.]

### **Comment to Amendment Effective June 26, 2002**

The amendment added the phrase "to communicate offers between the parties as the parties authorize" to the second sentence to emphasize that the parties control what offers are shared with another party and when those offers are shared. A mediator may, in a private session, suggest a possible solution; however, the mediator must have the consent of the party with whom the proposed solution is first shared in order to communicate this proposed solution to the other party. Nothing in this section would prohibit the parties from mutually requesting a mediator to propose a solution to the dispute or an amount to settle a dispute. Indeed, the revision is not

intended to reduce a mediator's role in helping parties in joint or private sessions to find creative solutions.

The fourth sentence was revised to remove the phrase "as the mediator shall determine," because the mediator does not have the power to compel any party to pay the costs of obtaining experts.

## **RULE 10.     PRIVACY**

Mediation sessions are private. An alleged victim of domestic or family violence may have in attendance at mediations a supporting person of his or her choice. In all other cases, persons other than the parties and their representatives may attend mediation sessions only with the permission of the parties and with the consent of the mediator. [Adopted effective August 1, 1992. Amended effective June 26, 2002.]

### **Comment to Amendment Effective June 26, 2002**

The second sentence has been added to comply with §6-6-20(f)(3), Ala Code 1975. This permits a person who is the alleged victim of abuse to bring a person, in addition to the party's attorney, with him or her to the mediation, irrespective of whether the accompanying person is an attorney, without receiving permission from the mediator or other party. The changes to the last sentence simplified the language of the original Rule in an attempt to make clear who could attend and under what circumstances.

## **RULE 11.     CONFIDENTIALITY**

(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. The term "information disclosed in the course of a mediation" shall include, but not be limited to:

- (1) views expressed or suggestions made by another party with respect to a possible settlement of the dispute;
- (2) admissions made by another party in the course of the mediation proceedings;
- (3) proposals made or views expressed by the mediator;
- (4) the fact that another party had or had not indicated a willingness to accept a proposal for settlement made by the mediator; and
- (5) all records, reports, or other documents received by a mediator while serving as mediator.

(b) The following are exceptions to the general rule stated in Rule 11(a):

- (1) A mediator or a party to a mediation may disclose information otherwise prohibited from disclosure under this section when the mediator and the parties to the mediation all agree to the disclosure.
- (2) Information otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its use in mediation.
- (3) The confidentiality provisions of this Rule shall not apply:
  - (i) to a communication made during a mediation that constitutes a threat to cause physical injury or unlawful property damage;

- (ii) to a party or mediator who uses or attempts to use the mediation to plan or to commit a crime; or
- (iii) to the extent necessary if a party to the mediation files a claim or complaint against a mediator or mediation program alleging professional misconduct by the mediator arising from the mediation.

(c) Except as provided in Rule 11(b) above, 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.

[Adopted effective August 1, 1992. Amended effective June 26, 2002; September 15, 2003.]

#### **Comment to Amendment Effective June 26, 2002**

Confidentiality is the backbone of mediation. The freedom to discuss issues privately with a mediator and in joint session with another party, without fear of disclosure outside the mediation, allows parties to safely explore potential alternative solutions to the dispute. Rule 11 is also designed to protect the mediator from later becoming embroiled in the parties' dispute by being called as a witness in later proceedings between the parties.

Several changes were made in Rule 11 to help clarify the intent of the Rule and to provide some exceptions to better facilitate the intentions of parties and to conform to public-policy norms. First, Rule 11(b)(1) was added to permit disclosure when the parties to the mediation and the mediator all agree that disclosure is appropriate. Second, the use of information during a mediation was never intended to shield that information from future discovery during litigation if that information was otherwise subject to discovery. Paragraph 11(b)(2) was added to explicitly so state.

The exceptions in Rule 11(b)(3) are consistent with confidentiality provisions in other states and similar to the requirements of the Alabama Rules of Professional Conduct for lawyers. Rule 11 is not intended to shield a party or a mediator from threats to cause injury to a person or to the property of another nor to shield evidence of an intent to commit a crime. Mediators may wish to advise parties to a mediation about this Rule before beginning a mediation. The exception in Rule 11(b)(3)(iii) also is similar to provisions in other states. In the event a claim of professional misconduct is levied against a mediator, the mediator should not be barred from a reasonable defense to such allegations, including the use of statements made during a mediation. Any review of mediation proceedings as allowed under Rule 11(b)(3) should be conducted in an in camera hearing or by an in camera inspection.

Rule 11(d) is designed to explicitly state that courts cannot compel a mediator to disclose confidential information obtained during a mediation. In a situation where one party brings an action for sanctions against another party, as authorized by §6-6-20, it is possible that the only way for the court to determine a factual basis upon which to decide whether sanctions should be

imposed would be through the testimony of the mediator. The value of preserving confidentiality was deemed to be more vital to the mediation process than aiding in determining the outcome of a sanctions hearing. Thus, mediators cannot, and should not, testify unless all parties to the mediation and the mediator consent to the testimony.

#### **Comment to Amendment to Rule 11(c) Effective Sept. 15, 2003**

The amendment removes any confusion about whether a court could ever receive or hear information regarding a matter being mediated. The pre-amendment language of Rule 11(c) seemed to conflict with Rule 11(b), which provides exceptions to the general rule, while subparagraph (c) expressed, in what appeared absolute terms, the rule that a court could *never* receive information about what occurred during a mediation. This amendment does not intend to fully “open the door” to inquiries by judges, but opens the door only so much as necessary to give effect to the limited exceptions provided in Rule 11(b).

#### **RULE 12. NO RECORD**

There shall be no record made of the mediation proceedings. [Adopted effective August 1, 1992. Amended effective June 26, 2002.]

#### **RULE 13. TERMINATION OF MEDIATION**

(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 attorneys; 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).

(b) Mediation also shall be terminated by the expiration of the period of any court-ordered stay provided by Rule 2.

(c) The fact that mediation has once been terminated as to a particular dispute shall not bar the entry of a later order to mediate that dispute.

[Adopted effective August 1, 1992. Amended effective June 26, 2002.]

#### **Committee Comment to Rule 13**

(1) Notification through subsection (2) assures confidentiality as to the party requesting termination.

(2) Notification through subsection (3) will allow either party to terminate the mediation process before a mediator is appointed, or, once a mediator has been appointed, will allow a party to terminate the process without further communicating with the mediator.

### **Comment to Amendment, Effective June 26, 2002**

Notification through subsection (a)(2) assures confidentiality as to the party requesting termination.

The adoption of §6-6-20, Ala. Code 1975, removed the possibility of parties' terminating the mediation process before at least one mediation session as subsection (a)(3) of the former Rule 13 envisioned. Because the statute provides for the imposition of sanctions against a party failing to comply with a mediation order, parties are presumed to have the responsibility to appear at at least one mediation session. The first sentence of Rule 13(a) has been revised to include the language requiring at least one mediation session before the process is terminated. Subsection (a)(2) has been revised to clearly permit the parties to terminate the mediation after one session while maintaining anonymity as to which party terminated the process. Former subsection (a)(3) has been deleted.

### **RULE 14. INTERPRETATION AND APPLICATION OF RULES**

The mediator shall interpret and apply these rules insofar as they relate to the mediator's duties and responsibilities. In other respects, they shall be interpreted and applied by the Court.

[Adopted effective August 1, 1992. Amended effective June 26, 2002.]

### **RULE 15. EXPENSES, MEDIATOR'S FEE, AND DEPOSITS**

(a) **Expenses.** The expenses of a witness for a party shall be paid by the party producing the witness. All other expenses of the mediation, including necessary travel and other expenses of the mediator, the expenses of any witnesses called by the mediator and the cost of any evidence or expert advice produced at the direct request of the mediator, shall be borne equally by the parties unless the parties agree otherwise, or unless the court directs otherwise.

(b) **Mediator's Fee.** A mediator shall be compensated at a reasonable rate, agreed to by the parties, or as set by the court. The mediator's fee shall be borne equally by the parties, unless they agree otherwise, or unless the court directs otherwise pursuant to Rule 2.

(c) **Deposits.** Before the mediation process begins, each party to the process shall deposit with the mediator such an amount of the anticipated expenses and fees as the court shall direct or the mediator reasonably requires. When the mediation process has been terminated, the mediator shall render an accounting, requiring payment of additional expenses and fees by the appropriate parties, or returning any unexpended balance to the appropriate parties.

[Adopted effective August 1, 1992. Amended effective June 26, 2002.]

### **Comment to Amendment, Effective June 26, 2002**

Most mediators deal directly with parties on matters of fees and expenses. The added language specifically provides for the mediator to make financial arrangements directly with the parties rather than depending upon the court. This promotes efficient use of judicial time as well as the time of the parties and mediator.



## **ALABAMA CODE OF ETHICS FOR MEDIATORS**

(Adopted by Order of the Supreme Court of Alabama, December 14, 1995 and effective on March 1, 1996, including amendments received through May 15, 2021)

### **I. INTRODUCTION**

This Code of Ethics for Mediators sets forth Standards to guide mediators in their mediation practices. These Standards are intended as rules of reason and should be interpreted with reference to the purposes of mediation. This Code does not exhaust the moral and ethical considerations that should guide a mediator. Rather, this Code provides a framework for the ethical practice of mediation.

Failure to comply with a Standard set out in this Code may be the basis for the removal from the roster of mediators maintained by the Alabama Center for Dispute Resolution and for such other action as may be taken by the Alabama Supreme Court Commission on Dispute Resolution.

This Code is designed to provide guidance to mediators. Violation of a Standard shall not give rise to a cause of action nor shall it create any presumption that a legal duty has been breached. Nothing in this Code should be deemed to establish or augment any substantive legal duty on the part of mediators.

### **II. SCOPE, DEFINITION, MEDIATOR'S ROLE, GENERAL PRINCIPLES, AND EFFECTIVE DATE**

(a) **Scope.** 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.

(b) **Definition of Mediation.** Mediation is a process whereby a neutral third party encourages and facilitates the resolution of a dispute without deciding what the resolution should be. It is an informal and nonadversarial process whose objective is helping the disputing parties reach a mutually acceptable agreement.

(c) **Mediator's Role.** In mediation, decision-making authority rests with the disputing parties. The role of the mediator includes, but is not limited to, assisting the disputing parties in identifying issues, facilitating communication, focusing the disputing parties on their interests, maximizing the exploration of alternatives, and helping the disputing parties reach voluntary agreements.

(d) **General Principles.** Mediation is based on communication, negotiation, facilitation, and the technique or method of solving problems. It emphasizes:

- (1) The needs and interests of the disputing parties;
- (2) Fairness;
- (3) Procedural flexibility;
- (4) Privacy and confidentiality;
- (5) Full disclosure; and
- (6) Self-determination.

(e) **Effective Date.** This Code shall govern all mediation proceedings commenced on or after March 1, 1996.

### **III. STANDARDS**

#### **STANDARD 1. GENERAL**

(a) **Integrity, Impartiality, and Professional Competence.** Integrity, impartiality, and professional competence are essential qualifications of any mediator. Professional competence means the knowledge, skill, and thoroughness reasonably necessary for the mediation.

(1) A mediator shall not accept any engagement, perform any service, or under take any act that would compromise the mediator's integrity.

(2) A mediator shall maintain professional competence in mediation skills. This includes, but is not limited to:

(A) Staying informed of, and abiding by, all statutes, rules, and administrative orders relevant to the practice of mediation; and

(B) Regularly engaging in educational activities promoting professional growth.

(3) If the mediator decides that a case is beyond the mediator's competence, the mediator shall decline appointment, withdraw, or request technical assistance.

(b) **Concurrent Standards.** Nothing contained herein shall replace, eliminate, or render inapplicable relevant ethical standards not in conflict with these rules that may be imposed upon any mediator by virtue of the mediator's profession.

#### **STANDARD 2. RESPONSIBILITIES TO COURT**

A mediator shall be candid, accurate, and fully responsive to a court concerning the mediator's qualifications, availability, and other matters pertinent to his or her being selected to mediate. A mediator shall observe all administrative policies, procedural rules, and statutes that apply to mediation. A mediator shall refrain from any activity that has the appearance of improperly influencing a court to secure placement on a roster of mediators or appointment to a case.

#### **STANDARD 3. THE MEDIATION PROCESS**

(a) **Orientation Session.** In order for parties to exercise self-determination they must understand the mediation process. At the beginning of the mediation session, the mediator should explain the mediation process. This explanation should include:

- (1) The role of the mediator as a neutral party who will facilitate the discussion between the disputing parties but who will not decide the outcome of the dispute;
- (2) The procedures that will be followed during the mediation session or sessions;
- (3) The pledge of confidentiality that applies to the mediation process;
- (4) The fact that the mediator does not represent either party and will not give professional advice in the absence of a party's attorney and that, if expert advice is needed, the parties will be expected to consult with experts other than the mediator; and
- (5) The fact that the mediation can be terminated at any time by the mediator or by any of the parties.

Further, in the event a party is not represented by an attorney, the mediator should explain:

- (1) That the parties are free to consult legal counsel at any time and are encouraged to have any settlement agreement resulting from the mediation process reviewed by counsel before they sign it; and
- (2) That a mediated agreement, once signed, is binding and can have a significant effect upon the rights of the parties and upon the status of the case.

**(b) Continuing Mediation.** A mediator shall withdraw from a mediation if the mediator believes the mediation is being used to further illegal conduct. A mediator may withdraw if the mediator believes any agreement reached would be the result of fraud, duress, overreaching, the absence of bargaining ability, or unconscionability. A mediator shall not prolong a mediation session if it becomes apparent that the case is unsuitable for mediation or if one or more of the parties is unable or unwilling to participate in the mediation process in a meaningful manner.

**(c) Avoidance of Delay.** A mediator shall perform mediation services in a timely and expeditious fashion, avoiding delays whenever reasonably possible. A mediator shall refrain from accepting additional appointments when it becomes apparent that completion of mediation assignments already accepted cannot be accomplished in a timely fashion.

#### **STANDARD 4. SELF-DETERMINATION**

**(a) Parties' Right to Decide.** A mediator shall assist the parties in reaching an informed and voluntary agreement. Substantive decisions made during mediation are to be made voluntarily by the parties.

**(b) Prohibition of Coercion.** A mediator shall not coerce or unfairly influence a party into entering into a settlement agreement.

**(c) Misrepresentation Prohibited.** A mediator shall not intentionally misrepresent material facts or circumstances in the course of a mediation.

**(d) Balanced Process.** A mediator shall promote a balanced process and shall encourage the parties to participate in the mediation proceedings in a non-adversarial manner.

**(e) Responsibility to Nonparticipating Parties.** A mediator may promote consideration of the interests of persons who may be affected by an agreement resulting from the mediation process and who are not represented in the mediation process.

## **STANDARD 5. IMPARTIALITY AND CONFLICTS OF INTEREST**

**(a) Impartiality.** A mediator shall be impartial and shall advise all parties of any circumstances that may result in possible bias, prejudice, or impartiality on the part of the mediator. Impartiality means freedom from favoritism or bias in work, action, and appearance. Impartiality implies a commitment to aid all parties, as opposed to one or more specific parties, in moving toward an agreement.

(1) A mediator shall maintain impartiality while raising questions for the parties to consider concerning the fairness, equity, and feasibility of proposed settlement options.

(2) A mediator shall withdraw from mediation, if the mediator believes the mediator can no longer remain impartial.

### **(b) Required Disclosures and Conflicts of Interest.**

(1) A mediator must disclose to the disputing parties the following:

(A) Any current or past representation of or consulting relationship with any party or the attorney of any party involved in the mediation.

(B) Any pecuniary interest the mediator may have in common with any of the parties or that may be affected by the outcome of the mediation process.

(C) Known potential conflicts, including membership on a board of directors, full- or part-time service as a representative or advocate, consultation work performed for a fee, current stock or bond ownership other than mutual fund shares or appropriate trust arrangements, or any other form of managerial, financial, or immediate family interest with respect to a party involved. A mediator who is a member of a law firm is obliged to disclose any representation of any of the disputing parties by the mediator's firm or a member of that firm of which the mediator is aware.

(D) Any close personal relationship or other circumstance, in addition to those specifically mentioned in this Standard, that might reasonably raise a question as to the mediator's impartiality.

(2) Mediators establish personal relationships with many representatives, attorneys, other mediators, and members of various other professional associations. Mediators should not be secretive about such friendships or acquaintances, but disclosure of these relationships is not necessary unless that relationship is one of those mentioned in this Standard or some feature of a particular relationship might reasonably appear to impair impartiality.

(3) Prior service as a mediator in a mediation involving a party or an attorney for a party does not constitute representation of the party or consultation work for the party. However, mediators are strongly encouraged to disclose such prior relationships. Mediators must disclose any ongoing relationship with a party or an attorney for a party involved in a mediation, including membership on a panel of persons providing mediation, arbitration, or other alternative dispute resolution services to that party or attorney.

(4) A mediator shall not provide counseling or therapy to any party during the mediation process, and a mediator who is a lawyer shall not represent a party in any matter during the mediation.

(5) All disclosures required by this Standard shall be made as soon as practicable after the mediator becomes aware of the interest or the relationship.

(6) The burden of disclosure rests on the mediator and continues throughout the mediation process. After appropriate disclosure, the mediator may mediate the dispute if all parties to the

mediation agree to the mediator's participation and that agreement is reduced to writing. If the mediator believes that the relationship or interest would affect the mediator's impartiality, he or she should withdraw, irrespective of the expressed desire of the parties.

(7) A mediator shall not use the mediation process to solicit any party to mediation concerning future professional services.

(8) A mediator must avoid the appearance of a conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a substantially related matter.

## **STANDARD 6. CONFIDENTIALITY**

**(a) Confidentiality.** A mediator shall preserve and maintain the confidentiality of all mediation proceedings except where required by law to disclose information gathered during the mediation.

**(b) Records and Research Data.** A mediator shall store and dispose of records relating to mediation proceedings in a confidential manner and shall ensure that all identifying information is removed and the anonymity of the parties is protected when materials included in those records are used for research, training, or statistical compilations.

## **STANDARD 7. PROFESSIONAL ADVICE**

**(a) Generally.** A mediator shall not provide information the mediator is not qualified by training or experience to provide.

**(b) Independent Legal Advice.** When a mediator believes a party does not understand or appreciate how a potential agreement reached through the mediation process may adversely affect the party's legal rights or obligations, the mediator should advise the participants to seek independent legal advice.

**(c) Absent Party.** If one of the parties is unable to participate in the mediation process for psychological or physical reasons, a mediator should postpone or cancel mediation until such time as all parties are able to participate.

**(d) 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.

## **STANDARD 8. FEES AND EXPENSES; PRO BONO SERVICE**

**(a) General Requirements.** A mediator occupies a position of trust with respect to the parties and the court system. In charging for services and expenses, the mediator must be governed by the same high standards of honor and integrity that apply to all other phases of the mediator's work. A mediator shall be scrupulous and honest in billing and must avoid charging excessive fees and expenses for mediation services.

**(b) Records.** A mediator shall maintain adequate records to support charges for services and expenses and shall make an accounting to the parties or to the court upon request.

**(c) Referrals.** No commissions, rebates, or similar remuneration shall be given to or received by a mediator for referral of persons for mediation or related services.

**(d) Contingent Fees.** A mediator shall not charge or accept a contingent fee or base a fee in any manner on the outcome of the mediation process.

**(e) Minimum Fees.** A mediator may specify in advance minimum charges for scheduling or conducting a mediation session without violating this Standard.

**(f) Disclosure of Fees.** When a mediator is contacted directly by the parties for mediation services, the mediator has a professional responsibility to respond to questions regarding fees by providing a copy of the basis for charges for fees and expenses.

**(g) Pro Bono Service.** Mediators have a professional responsibility to provide competent service to persons seeking their assistance, including those unable to pay for their services. As a means of meeting the needs of those who are unable to pay, a mediator should provide mediation services pro bono or at a reduced rate of compensation whenever appropriate.

## **STANDARD 9. TRAINING AND EDUCATION**

**(a) Training.** A mediator is obligated to acquire knowledge and training in the mediation process, including an understanding of appropriate professional ethics, standards and responsibilities. Upon request, a mediator is required to disclose the extent and nature of the mediator's education, training, and experience.

**(b) Continuing Education.** It is important that mediators continue their professional education as long as they are actively serving as mediators. A mediator shall be personally responsible for ongoing professional growth, including participation in such continuing education as may be required by law or rule of an appropriate authority.

**(c) New Mediator Training.** An experienced mediator should cooperate in the training of new mediators, including serving as a mentor.

## **STANDARD 10. ADVERTISING AND SOLICITATION**

**(a) Advertising.** Advertising or any other communication with the public concerning mediation services offered by the mediator or regarding the education, training, and expertise of the mediator shall be truthful. Mediators shall refrain from making promises and guarantees of results.

**(b) Solicitation.** A mediator shall not solicit business from a party to a dispute if the mediator knows the party is represented by a lawyer.

## **STANDARD 11. PROHIBITED AGREEMENTS**

A mediator shall not enter into a partnership or employment agreement that restricts the rights of the mediator to mediate after the relationship forming the basis of the agreement is terminated, except that a mediator may enter into an agreement concerning benefits upon retirement.

## **STANDARD 12. ADVANCEMENT OF MEDIATION**

A mediator should support the advancement of mediation by encouraging and participating in research, evaluation, or other forms of professional development and public education.

IN THE CIRCUIT COURT OF ANY COUNTY, ALABAMA

\_\_\_\_\_,  
PLAINTIFF,

v.

CIVIL ACTION NO. \_\_\_\_\_

\_\_\_\_\_,  
DEFENDANT.

**ORDER FOR MEDIATION**

The Court is of the opinion that the use of alternative dispute resolution is appropriate in this case and could result in the speedy and just resolution of the above-styled matter. Accordingly, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The parties to this action are to select a mediator within fourteen (14) days of the date of this Order. If the parties are unable to do so, then the Court shall appoint a mediator.

2. The mediator shall set the initial mediation session and may continue or adjourn the mediation session at his or her discretion. The mediation may be conducted in person, via Zoom or other web-based platform or by teleconferencing, as agreed by the parties and the mediator.

3. The fees and expenses of the mediator shall be paid equally by the parties unless agreed otherwise or mandated otherwise pursuant to Section 6-6-20(b)(2) of the Code of Alabama.

4. A representative of each party having full authority to settle the case must be present at the mediation session or reasonably available to authorize settlement throughout the mediation session. In the event a party wishes to ensure that the opposing party or a representative of the opposing party's insurance company is personally in attendance at the mediation and if the parties cannot reach agreement with regard to attendance, a party may file a motion with the Court to require personal attendance at the mediation.

5. The mediation shall be conducted in accordance with the Alabama Civil Court Mediation Rules and the provisions of Sections 6-6-20 and 6-6-25 of the Code of Alabama. All communications with the mediator regarding this matter will be considered confidential in accordance with Rule 11 of the Alabama Civil Court Mediation Rules and Section 6-6-25 of the Code of Alabama. All discussions, representations and statements made in the course of mediation shall be confidential and deemed privileged by both the mediator and all parties as settlement negotiations and, thus, inadmissible in a court of law. The mediator shall not be called as a witness nor shall the mediator's records be subpoenaed or used as evidence in any court proceeding.

DONE on this the \_\_\_\_ day of \_\_\_\_\_, 2020.

\_\_\_\_\_  
CIRCUIT JUDGE

[This sample mediation order was adopted by the Alabama Supreme Court Commission on Dispute Resolution on December 11, 2020]

Example – Form 1 Order for Mediation

IN THE CIRCUIT COURT OF ANY COUNTY, ALABAMA

\_\_\_\_\_,  
PLAINTIFF(S),

v.

CIVIL ACTION NO. \_\_\_\_\_

\_\_\_\_\_,  
DEFENDANT(S).

**JOINT REQUEST FOR REFERRAL TO MEDIATION**

Pursuant to Rule 16(c)(7) of the Ala. R. Civil Proc., and Ala. Code 6-6-20 (1975) plaintiff(s) and defendant(s) jointly request the Court to enter an order referring this civil action to mediation pursuant to the Alabama Civil Court Mediation Rules.

1. This civil action is not presently set for trial. [or This civil action is set for trial on (date)].
2. The parties are prepared to commence mediation on or before (date).
3. The parties agree the fees and expenses of the Mediation shall be paid [equally by the parties] [by the plaintiff(s)] [by the defendant(s)], and in the manner required by the Mediator.
4. The parties request that (name of mediator with address and telephone number) be appointed the Mediator in this case, and that the mediation proceedings be conducted at (location).
5. The attorneys agree to have present during the mediation proceedings a representative of each party involved in the mediation process who shall have full settlement authority for the claims in this civil action.

\_\_\_\_\_  
Attorney for Defendant(s)

(Name of Attorney )

(Address )

(Telephone Number )

\_\_\_\_\_  
Attorney for Plaintiff(s)

(Name of Attorney )

(Address )

(Telephone Number )

[CERTIFICATE OF SERVICE]



IN THE CIRCUIT COURT OF ANY COUNTY, ALABAMA

\_\_\_\_\_,  
PLAINTIFF(S),

v.

CIVIL ACTION NO. \_\_\_\_\_

\_\_\_\_\_,  
DEFENDANT(S).

**REQUEST FOR REFERRAL TO MEDIATION BY  
PLAINTIFF(S) [OR DEFENDANT(S)]**

Pursuant to Rule 16(c)(7) of the Ala. R. Civil Proc., and Ala. Code 6-6-20 (1975) plaintiff(s) [or defendant(s)] request(s) the Court to enter an order referring this civil action to mediation pursuant to the Alabama Civil Court Mediation Rules.

1. This civil action is not presently set for trial. [or This civil action is set for trial on (date)].
2. The dispute in this civil action is appropriate for the mediation process.

\_\_\_\_\_  
Attorney for Plaintiff(s) or Defendant(s)  
(Name of Attorney)  
(Address)  
(Telephone Number)

[CERTIFICATE OF SERVICE]

Example – Form 3 Request for Referral to Mediation by Plaintiff(s) [or Defendant(s)]
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IN THE CIRCUIT COURT OF ANY COUNTY, ALABAMA

\_\_\_\_\_,  
PLAINTIFF(S),

v.

CIVIL ACTION NO. \_\_\_\_\_

\_\_\_\_\_,  
DEFENDANT(S).

**REPORT OF MEDIATOR**

TO: Judge \_\_\_\_\_. Circuit Court for the \_\_\_\_ Judicial Circuit

1. The above civil action was mediated by the undersigned, commencing on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.
2. This civil action was settled by mediation.
3. (IF applicable) Attorneys for the parties will file with the Court within the next ten (10) days appropriate settlement documents for the Court's approval and appropriate order, with a request that the civil action be dismissed.

**or, alternatively**

1. This civil action was not settled by mediation.

\_\_\_\_\_  
Name of Mediator \_\_\_\_\_)  
(Address \_\_\_\_\_)  
(Telephone Number \_\_\_\_\_)

[CERTIFICATE OF SERVICE]

I hereby certify that a true and correct copy of the foregoing Report of Mediation was served by U.S. Mail, First Class postage prepaid, upon the attorneys for the parties to the mediation proceedings, on this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Name of Mediator

Example – Form 4 Report of Mediator



## **THINGS WE KNOW ABOUT MEDIATION IN ALABAMA FROM CASES THAT HAVE ENDED UP IN THE APPELLATE COURTS**

*Please refer to the digest of cases that accompanies this for complete citations. Page numbers for digest are provided. \* Denotes divorce/family cases*

1. \*An order to mediation is not a final appealable judgment. Matters have not been adjudicated. McNeill v. McNeill Pg. 37
2. There is a firewall between the appellate mediation office and the appellate courts. The court only knows that the case has gone to mediation (not about the mediation) when it is returned to the court from the mediation docket if the case does not settle. Confidentiality is a top priority. Southland Bank Pg. 33
3. If one party requests mediation the court must order it pursuant to §6-6-20 (b) Code of Alabama 1975. Ex Parte Morgan County Commission; Working v. Jefferson County Election Commission Both Pg. 33-34; \* Mackey v. Mackey Pg. 38
4. You may abandon a request for mediation under §6-6-20 by how you proceed in the run up to trial. Waddell v. Colbert County-Northwest Alabama Healthcare Authority Pg. 43
5. Releases are important, as is their content. Lawyers should bring them. Mediators should remind them to bring them. Walton v. Beverly Enterprises-Alabama, Inc. Pg. 35
6. Negotiate to specific, measurable standards. Leave nothing to guess work. James v. City of Russellville Pg. 35
7. \*Visitation plans in mediated agreements are subject to the court finding, after a hearing, that they are in the best interest of the child. S.A.N. v. S.E.N. Pg. 36
8. Rule 11 of the Alabama Civil Court Mediation Rules, Confidentiality, is not intended to prevent the injured party from proving fraud or mistake. *Dissent in* Cain v. Saunders Pg. 39
9. If there is fraud in procuring a mediated agreement (in this case, by not complying with a court-ordered discovery order) the injured party may be entitled to rescind the agreement. Elements necessary to establish that a mediated agreement is procured by fraud are set forth by the court. Billy Barnes Enterprises v. Williams Pg. 37

10. The party who seeks to set aside a mediated agreement on grounds of fraud has the burden of proof. In this case, proof that the other party had made some representation of material fact that reasonably induced the movant to enter into the mediated agreement was not present. Berry v. H.M. Michael, Inc. Pg. 36
11. Fraud is a defense to specific performance of the mediated agreement. Harlan Home Builders, Inc. v. Hayslip Pg. 39-40
12. If you accuse a party of breaching a mediated agreement, you need evidence that they have done so. Here, you can read what is not sufficient enough for a breach. Williams v. Jackson Pg. 42
13. \*When filing a motion to set aside a mediated agreement, a party may allege that he or she was not physically or mentally well on the day of mediation. Daniels v. Daniels p. 37
14. Don't forget liens when drafting a mediated agreement. Board of Trustees of the University of Alabama v. American Resources Insurance Company, Inc. Pg. 36
15. Documents prepared for use in mediation should be labeled as such so they remain confidential under Rule 11 of the Alabama Civil Court Mediation Rules. Alabama Department of Transportation v. Land Energy, Ltd. Pg. 38
16. A mediated agreement that violates a statute may not be upheld. Purdue v. Green Pg. 40-41
17. When a nursing home resident is *not competent* when he or she is admitted, and the signature on the dispute resolution agreement (DRA) is a family member or next friend, then the resident and signer are not bound by the med/arb clause (apparent authority to the contrary), and neither is a third party legal representative, when asserting a malpractice claim against the nursing home. An incompetent is unable to empower an agent. The Court said that while the holder of a durable power of attorney may have been able to bind the resident to a DRA at time of admission, a family member or next of friend could not. SSC Montgomery Cedar Crest v. Bolding Pg. 42
18. \*A court cannot rewrite the parties' mediation agreement to craft relief if the mediated - for remedy is not available after the mediation. The court can vacate the prior judgment and allow parties to remediate, set the case for trial, or other appropriate relief. Leverett v. Leverett Pg. 41
19. The fine for sanctions for not complying with a court's order to mediate may not take the form of workers' compensation benefits, but should be a separate award altogether. Dollar Tree Stores, Inc. v. Ates Pg. 43

20. \*On mandamus, parties were prohibited from compelling mediator testimony regarding any aspect of the mediation when self-represented wife in divorce action sought to set aside a mediated agreement accusing mediator of giving legal advice and of coercion. Ex parte Sheila Stone Schoen September 5, 2013, Alabama Court of Civil Appeals. Pg. 43

21. \*If you don't object to a judge questioning you regarding what went on in mediation you will be agreeing to the disclosure, and this is an exception to confidentiality under Rule 11(b)(1) of the Alabama Civil Court Mediation Rules, and not a violation of 11(c). If you want pendent lite alimony arrearages (interlocutory) to be paid post final divorce, get them in the mediation agreement or file a motion for contempt before the mediation. Johnson v. Johnson Pg. 32

22. \**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 otherwise agree.* Ex Parte Culverhouse, 295 So.3d 114 (Ala. Civ. App. 2019). Pg. 44

23. Trial court abused its discretion in sanctioning Allstate for not participating in mediation when the record showed Allstate's counsel of record had full settlement authority. Allstate Property and Casualty Insurance Company v. Doyle Harbin, Appeal from Madison Circuit Court, CV-17-901688. Pg. 44



## SELECT ALABAMA MEDIATION CASES

*Alabama has developed a body of case law where an issue on appeal arises from a mediation, or from not ordering a mediation. Comments following case summaries are the authors, not necessarily the holdings of the courts.*

### *Divorce/Family Cases Noted by Asterisk\**

\*Johnson v. Johnson, 191 So. 3d 164 (Ala. Civ. App. 2015). In the circuit court after a complaint of divorce was filed by the wife, a mediation occurred and a settlement agreement was signed by the parties. It included child support and alimony in gross weekly, among other things, but did not include alleged pendente lite child support arrearages and pendente lite alimony arrearages that were awarded at earlier pendente lite hearing. Wife, wanting to avoid this agreement, filed a hand written motion seeking a hearing because she said the settlement agreement did not include all the terms that had been mediated and the mediator had pressured her into signing the agreement despite the fact that payment of the arrearages were not included. Husband filed to enforce the agreement. At the hearing, the court questioned parties and their attorneys and the mediator. Judge noted in the record that everyone had nodded their heads in agreement that the alleged arrearages had been a subject in mediation. Mediator denied pressuring wife and wife conceded she had read and signed the agreement. The court indicated that the wife should have addressed the arrearages in the settlement agreement or filed a motion seeking a finding of contempt for non-payment before the mediation. The circuit court enforced the settlement agreement and entered a judgment concluding that the settlement was voluntary, with no duress or coercion nor was there fraud or collusion. The court divorced the parties with no payment of arrearages. Wife appealed.

The issues on appeal are three: (1) Whether the circuit court violated confidentiality requirements under Rule 11c of the Alabama Civil Court Mediation Rules (court can't inquire into or receive information about the mediation) by inquiring into events that took place during mediation and having discussion with parties, their attorneys and the mediator; (2) Whether the circuit court erroneously failed to award pendent lite child support arrearages in the final judgment; (3) Whether the circuit court erroneously failed to award pendente lite alimony arrearages in the final judgment. The Court affirmed in part and reversed in part, and sent the case back with instructions for the court to determine and award the pendente child support arrearages.

- (1) The discussion with the parties, attorneys and mediator did not violate confidentiality but was one of the exceptions under 11(b)(1): "a mediator or a party to mediation may disclose information otherwise prohibited from disclosure under this section when the mediator and the parties to the mediation all agree to the disclosure." The court found that no one objected to the questioning, so there was no violation of confidentiality.

- (2) It is well settled that pendent lite child support becomes a final monetary judgment on the dates they accrued, and are immune from change, the court can't forgive them or set aside arrearages. The circuit court erred by failing to determine the amount of arrearages and award them.
- (3) Pendente lite alimony is interlocutory and does not become a final judgment on the date it accrues. Held: "If a final judgment is entered while a pendent lite alimony arrearage remains unpaid, the final judgment relieves the payor spouse from paying the pendent lite alimony arrearages, unless payment of the pendente lite alimony arrearages is ordered in the final judgment." The final judgment abrogates a former interlocutory order. The Court overruled various cases and emphasized that the holding is only for pendente lite alimony arrearages, not installments of periodic alimony. Applying this to the case, the court found that the silence of the settlement agreement regarding the pendente lite alimony arrearages could be the basis to conclude that the parties mediated the issue or the wife abandoned her claim to the arrearages. The court was not in error by enforcing the settlement agreement, or by declining to order the payment of the pendente lite arrearages.

Southland Bank and Jimmy Adkinson v. A & A Drywall Supply Company,

21 So. 3d 1196 (Ala. 2009). In its application for rehearing in the Supreme Court of Alabama, A & A Drywall requested that members of the Court recuse themselves from the case and that a special court be appointed to hear the appeal de novo because the court must have been "aware of the confidential facts regarding the parties' appellate mediation." This was their conclusion because in the original opinion, the court, concerned about the lapse of time between the filing of the notice of appeal and the release of an opinion, was motivated to include an explanatory statement that the case was referred to appellate mediation which was ineffective. In overruling the application for rehearing, the Court cites to Rule 8, Ala. R. App. Med. about confidentiality, and says that the court is not prohibited from knowing that a case was sent to mediation because the record will show that the case has been returned to the court from the mediation docket. The Court went on to say that, "no member of this Court had access to any confidential information concerning the mediation, such as who took what position, what settlement offers, if any, were made, or who was responsible for the mediation not resulting in a settlement." The Court also stated the necessity for mediation confidentiality, and that, "members of the Court, as a matter of internal procedure, do not have any access whatsoever to any information regarding the mediation of a particular case other than whether the case was referred to appellate mediation and whether it was subsequently reinstated on the appellate docket." (*My note: The Supreme Court of Alabama has said they do not have access to confidential mediation information. Rule 8, Ala. R. App. Med.*)

Ex Parte Morgan County Commission, 6 So. 3d 1145 (Ala. 2008).

The Commission, a third-party in a life-insurance beneficiary case, moved for mediation pursuant to 6-6-20 (b) (2), Ala. Code 1975, and the Morgan County Circuit Court denied the motion. The Commission then petitioned the Alabama Supreme Court for a writ of mandamus directing the circuit court to vacate its order denying the Commission's motion for mediation and to enter an order ordering mediation and appointing a mediator. The Supreme Court of Alabama granted the petition and issued the writ. The Court, citing §6-6-20 Ala. Code 1975, and Rule 2 of the Alabama Civil Court Mediation Rules found that the court had exceeded the scope of its

discretion because, “Although a trial court has discretion as to whether to stay the proceedings during mediation, the trial court has to order mediation upon request of a party.” *(My note: If one party requests mediation the court must order it. §6-6-20 Ala. Code 1975)*

Working v. Jefferson County Election Commission, 152 So. 3d 1230 (Ala. 2013).

In the first appellate effort in this case, the Supreme Court of Alabama found that the election to fill a vacancy on the Commission was invalid, and that Governor’s Riley’s appointment to fill the vacancy on the Commission was lawful, reversing the trial court. On remand, The Working plaintiffs, as the prevailing parties, requested attorney fees and then requested mediation of attorney fees and expenses. The trial court denied their request for mediation.

At 72 So. 3d 18 (Ala. 2011), the Supreme Court reversed the denial of the request to mediation, and again remanded the case to the trial court, citing the holding of Ex Parte Morgan County Commission, with directions to enter an order ordering mediation of the Working plaintiffs’ claim for attorney fees pursuant to §6-6-20(b), Ala. Code 1975. The court reiterated that a trial court is *required* (emphasis by court to this term) to order mediation of a dispute upon the motion of any party. Additionally, JCEC raised the issue of state immunity for the first time on appeal, and the Court said this was an issue for the trial court to look at before ordering mediation pursuant to §6-6-20(g). Back below, the trial court looked at the immunity issue with respect to §6-6-20(g) and denied mediation, finding defendants immune from liability for state-law claims, and not addressing at all the federal law claims.

Now in 2013, the Supreme Court of Alabama affirmed the trial court with respect to immunity and state-law claims, but stated that the trial court, “has not complied with this Court’s mandate in Working II. Therefore, we are again compelled to remand this cause with instructions that the trial court enter a new order addressing the Working plaintiffs’ federal-law claims in compliance with §6-6-20 and this Court’s mandate in Working II.” *(My note: If one party requests mediation the court must order it. §6-6-20 Ala. Code 1975; where an issue of immunity is offered as a defense (state or federal) it is to be disposed of before any mediation is conducted. §6-6-20(g))*

\*K.D.H. v. T.L.H., 3 So.3d 894, (Ala. Civ. App. 2008).

In this case, a husband brought action for divorce and wife counterclaimed, with each party seeking custody of their three children. A guardian ad litem was appointed to represent the three children as well as the mother’s infant child with another father. At the time the husband originally filed his complaint, the mother was pregnant with another man’s child. The parties went to court-ordered mediation but did not come to agreement. Trial began, and on the third day, parties announced that they had reached a settlement. Counsel read the terms into the record, and parties affirmed the terms were, in fact, their agreement. Guardian ad litem approved terms as well. Parties were ordered to file settlement papers with the court w/in 30 days, and a compliance review hearing was scheduled.

At the compliance review hearing, mother informed the court that she had fired her previous counsel and that she did not agree to the terms of the agreement. She made an oral motion to set aside the settlement and proceed with trial. The court granted the motion and set a trial date. After that, things went down hill. The Elmore County Court awarded the father primary custody, mother had visitation (less than in the agreement of the parties), was to pay child support, to pay attorney fees to father, and to pay part of guardian ad litem fees.



The mother moved for a new trial which was denied, and she appealed. At the appellate court the mother argued for custody, for more visitation, for no payment by her of child support, and no payment for guardian or father's attorney, and stated that, "by imposing a total of \$15,340 in fees upon her, the trial court punished her for asking that the settlement agreement be set aside so that she could continue with the trial."

The Court of Civil Appeals left everything below alone except that it found that the trial court exceeded its discretion in ordering the mother to pay father's attorney-fees, and did not award the father attorney fees on appeal. *(My note: The ABA Journal reported on a study, August 11, 2008, which showed that most plaintiffs who reject settlement offers do worse at trial; it also showed that when defendants make such a mistake, their costs are higher.)*

Walton v. Beverly Enterprises-Alabama, Inc., 4 So.3d 537 (Ala. Civ. App. 2008).

Walton, the employee, was injured in an automobile accident within the scope of her employment. Ms. Walton sued seeking workers' compensation benefits & tort of outrage for failure to be paid such benefits. After parties went to mediation, Ms. Walton executed a release agreement, then another release agreement to protect her third-party suit against the driver of the other car. She released them from, "all claims resulting from or arising out of the alleged incidents forming the basis of the lawsuit...." Subsequently, she brought action against employer asserting among other things, retaliatory discharge as a result of her workers' compensation claims. In her appeal after a summary judgment in favor of Beverly, the employee argued that the two releases, considered together with other documents concerning the mediation of the workers' compensation action, created a latent ambiguity that required the consideration of parole evidence to determine the true intent of the parties in executing the second release. She argued that in signing the second release she did not intend to release the retaliatory-discharge and intentional-interference claims which arose after the settlement of the workers' compensation action. The second release however, was signed after employer had dismissed Walton from her employment. In affirming the summary judgment, the court held that the second release agreement between employer and former employee was supported by valid consideration so as to be enforceable, and parole evidence was not admissible to determine whether release agreements were intended to include employee's tort claims. *(My note: Advocates and parties need to watch out for language in releases. A mediator may want to suggest parties bring release provisions that they may want to use; parties should always draft releases and read any release closely.)*

James v. City of Russellville, 57 So. 3d 111 (Ala. Civ. App. 2010).

Contractor of a subdivision brought action against the City for breach of mediated agreement and promissory fraud. Contractor alleged that the City induced the contractor to enter into a mediated agreement then breached the agreement by failing to pave certain subdivision streets at a width of 20 feet. City had agreed to pave streets in the residential subdivision, "in accordance with normal city standards," and paved to a width of 18 feet. Appellant thought it should be 20 feet. The City won its motion for summary judgment below, and James appealed. James stated in his affidavit, that based upon his belief about subdivision street width for manufactured homes, he did not bargain for twenty-foot streets because he thought that was a given. As a result, he did not extract any express statement from the City that it would pave the streets in his subdivision to a width of 20 feet. The Court affirmed the lower court's summary judgment. *(My note: Don't assume anything in a mediated agreement. If standards are involved, define them.)*

\*Hull v. Hull, 41 So. 3d 815 (Ala. Civ. App. 2010). This is the 3<sup>rd</sup> time the parties have been before this court. (The case began in 2003 when husband was 73, and now he is 80.) In this third round, the wife filed to find husband in contempt for failing to comply with the mediation agreement that parties had signed at appellate mediation during the second time they were before the court (along with a few more issues). The court affirmed the trial court's contempt finding. Of course they looked at the mediation agreement to check compliance. *(My note: Even in appellate mediation parties sometimes do not comply with the mediated agreement.)*

\*S.A.N. v. S.E.N., 995 So. 2d 175, (Ala. Civ. App. 2008).

Parties settled the case in mediation by agreeing they would submit a stipulation of facts to the trial court for its ruling on the sole issue of whether a section of the AL Code prohibits the father (a sex offender, not with his children, but with the wife's minor sister) from visiting with his children. Parties stipulated that the father had not sexually abused or committed a crime against the parties' children. Parties also agreed on a visitation plan to be implemented if the court found that the father was permitted visitation. The lower court found the father would be able to have visitation and awarded him visitation according to the schedule outlined in the mediation agreement. Mother appealed. The court of appeals found that a trial court was required to conduct a hearing to determine that such visitation is in the best interests of the child. The Court is not bound by the agreement of the parties, and it will only be given effect to the extent that it is in the best interests of the child. The case was remanded so the trial court could conduct a hearing for the purpose of establishing a visitation plan that serves the best interest of the children. *(My note: Visitation plans are subject to the court finding, after a hearing, that they are in the best interest of the child.)*

Berry v. H.M. Michael, Inc., 993 So. 2d 1 (Ala. Civ. App. 2008).

Parties mediated the case under the workers' comp mediation "Ombuds Program" (worker was bitten by a dog in the line of duty). Worker then moved to set aside the settlement agreement on grounds of fraud and newly discovered evidence, and the trial court denied the employee's motion. Actually, the employee did not even attempt to prove that the employer or its agent had made any misrepresentation of material fact that had induced her to agree to the settlement. The Appellate court found both grounds without merit, holding that the employee failed to meet burden of proof in moving to set aside the agreement on fraud grounds, and the employee's allegation that she did not learn her injury was "chronic" in nature until a post-settlement examination did not support setting aside the agreement on basis of newly discovered evidence. The Court said that the movant must satisfy the trial court that the other party made some representation of material fact that reasonably induced the movant to enter into the mediated settlement agreement. *(My note: The party seeking to set aside a settlement agreement has the burden of proof.)*

Board of Trustees of the University of Alabama v. American Resources Insurance Company, Inc., 5 So. 3d 521 (Ala. 2008). In Etowah County, a mediated settlement agreement between estate of car passenger who died after being treated at defendant hospitals following car accident, the tortfeasor, and others, in underlying tort suit, impaired the hospitals' respective statutory hospital liens for all reasonable charges the hospitals incurred. At time of settlement all parties

were aware of the hospitals' liens which had been perfected within allotted time. *(My note: Don't ignore liens if you are drafting a settlement agreement.)*

\*Daniels v. Daniels, 4 So. 3d 497 (Ala. Civ. App. 2007).

The father filed a motion to set aside a mediated agreement and a motion to continue the final hearing alleging that he had not been physically or mentally well on the day of the mediation. Parties had been ordered to mediation by the Court, and entered into a settlement agreement whereby wife would have primary physical custody of the child, husband would receive supervised visitation, and pay child support. The trial court denied the father's motion. Appeals court affirmed. Father presented no evidence at the ore tenus proceeding about his mental health in support of his motion to set aside the mediated agreement. The trial court did not exceed its discretion. *(My note: Self-determination is an important part of mediation. Is the party able to participate in mediation in a meaningful way? The validity of a mediated agreement may be attacked later, on the same grounds as any contract: fraud, duress, unconscionability, the absence of bargaining ability.)*

\*McNeill v. McNeill, 981 So. 2d 1158 (Ala. Civ. App. 2007).

In a post divorce action commenced by the mother, the court ordered parties to resolve the disputes through mediation. Father appealed this order to the Court of Civil Appeals. The Court held that the order directing parties to attempt to resolve their disputes through mediation is not a final appealable judgment that can be appealed because it did not completely adjudicate all matters in controversy between the parties. The Court dismissed the appeal because it lacked jurisdiction. *(My note: If parties are ordered to go to mediation, this is not an order that can be appealed.)*

Billy Barnes Enterprises v. Williams, 982 So. 2d 494 (Ala. 2007).

The defendant filed a motion to set aside a mediated agreement. Before signing the agreement, the defendant took every measure to ensure that plaintiff had produced all discovery documents upon which to base his settlement decision. In reality, plaintiff did not comply with the court's discovery orders. However, defendant believed the plaintiff's representation that no recorded statement existed regarding the personal injury action. This recorded statement would have helped defendant in mediation negotiations. Plaintiff actually possessed the recording, but did not turn it over in discovery. After defendant discovered this, he appealed the judgment of the trial court enforcing the settlement agreement. The Supreme Court of Alabama reversed, holding that the defendant was entitled to rescind the agreement procured by fraud. It noted that a settlement agreement is as binding as any other contract and that a settlement agreement may be reopened for reasons of fraud, accident or mistake. *(My note: This case sets forth the 4 elements necessary to establish that a mediated agreement is procured by fraud: a false representation, of a material existing fact, that the party relied on, and the party was damaged as a proximate result of the reliance.)*

Cincinnati Insurance Companies v. Barber Insulation, Inc., 946 So. 2d 441 (Ala. 2006).

Settlements at trial level are governed by Ala. Code 1975, §34-3-21, "An attorney has authority to bind his client in any action or proceeding by any agreement in relation to such case, made in writing, or by an entry to be made on the minutes of the court." The parties disputed whether their attorneys actually reached a settlement in mediation, but the technical requirements never

occurred because the mediated agreement was not made in writing nor made on the minutes of the trial court. (*My note: Attorneys who negotiate for clients put it in writing or read it into the court record.*)

Alabama Department of Transportation v. Land Energy, Ltd., 886 So. 2d 787 (Ala. 2004). Land Energy (LE) brought an inverse condemnation action against ADOT. After mediation was unsuccessful, the case went to a jury trial. Tables were introduced that ADOT said were prepared by its witness, Dr. McCarl, solely for use in the mediation between it and the mineral rights owner, LE. The trial court was not convinced. There was a jury verdict for LE, and the court denied ADOT'S motion for judgment as a matter of law. ADOT appealed, and one of the issues on appeal was that tables prepared for mediation were wrongfully admitted into evidence at trial contravening Rule 11, Confidentiality of the Civil Court Mediation Rules. It appears from the court record below that ADOT brought the tables to mediation to facilitate a compromise and settlement of the case through mediation. From LE's side, counsel said he had an outstanding request for production of documents and that counsel for ADOT never said the documents were the subject of mediation. According to counsel for LE they were given to him at the conclusion of the mediation. During trial there was an objection and sidebar about the admission of the charts, and a discussion of the same with objection the next morning. It appears the court's main concern was that it did not want Dr. McCarl to testify as to the mediation proceedings. During the trial Dr. McCarl had begun to state in the presence of the jury that he had prepared one of the tables for mediation, but counsel for ADOT cut him off with an objection before he could answer. When he attempted to broach the subject again, the trial judge cut him off, advising, "Your attorney, he's spoken." The Supreme Court could not find that the lower court had exceeded its discretion in the decision to admit the charts given the exclusion of Dr. McCarl's attempt to speak to the issue. (*My note: Documents prepared for use in mediation should be stamped with language that shows they were prepared for mediation and are confidential under Rule 11(a) and (a)5.*)

\*Mackey v. Mackey, 799 So. 2d 203 (Al. Civ. App. 2001). Upon ex-wife's motion for mediation (re increasing child support), mediation was mandatory. (*My note: If one party requests mediation, mediation is mandatory.*)

\*Littlepage v. Littlepage, 796 So. 2d 298 (Ala. 2001). After a divorce, former wife submitted seven credit card bills to the husband for payment. He refused to pay all of them because some were not stipulated in the mediated agreement incorporated into the divorce (two Visa accounts were stipulated to be paid in the agreement, the wife's and a joint account, along with a Discover, a McRaes and a Gayfers card, but not five Visa accounts). The wife filed a rule nisi alleging that the husband did not pay. Mediator was called to testify. He was not on the Alabama State Court Mediator Roster, nor was he trained. He testified (not using Rule 11 to avoid testifying). His testimony pretty much corroborated what the husband's attorney had presented, but the trial court ordered the husband to pay anyway an additional \$14,399.78. He appealed. The Court of Civil Appeals affirmed, but the Supreme Court reversed. "A court cannot modify property provisions in divorce judgments except to correct clerical errors, after 30 days from the final judgment." Hamilton v. Hamilton, 647 So. 2d 756, 759 (Ala. Civ. App. 1987). The Court continued that a property settlement incorporated into a divorce decree is final and not modifiable, except where fraud or duress. The Court also pointed out that there was no

ambiguity in the agreement, because the wife's Visa was singular, and the other Visa was a joint account. *(My note: Parties need to make sure they include everything in the agreement, specifically and clearly, or the agreement may show up back in court)*

Cain v. Saunders, 813 So. 2d 891(Ala. Civ. App. 2001). Guarantor, Saunders, filed motion to have mediated agreement enforced and trial court entered judgment incorporating terms of parties' agreement. Debtor appealed, alleging that the settlement agreement should be set aside on the ground of mutual mistake. The Court of Civil Appeals held that the settlement agreement was unambiguous and that parol evidence was not admissible to alter the terms of the agreement. The dissents (by Yates and Murdock) make the case that this was mutual mistake of fact as to the underlying value of the assets to be transferred and that parol evidence should have been allowed. They cite Section 8-1-40, Ala. Code 1975, "specific performance cannot be enforced against a party to a contract...[i]f his assent was given under the influence of mistake, misapprehension or surprise." Additionally, the dissent by Murdock looks at Rule 11 and states that the Rules, "were not intended to prevent the injured party from proving such fraud or mistake." *(My note: Looks like using mediation testimony to prove fraud or mutual mistake may be allowed under Rule 11.)*

Harlan Home Builders v. Hayslip -- Was on appeal from the Circuit Court of Tuscaloosa County, CV-2008-900045 to the Alabama Supreme Court. A summary of what happened in the lower court:

Parties in this case went to pre-litigation mediation with their dispute. A handwritten purported "agreement" emerged from the mediation, but the parties' dispute continued. So, the plaintiffs below, and now appellants, Harlan Home Builders (and Chris Dobbs, Teresa Dobbs, and Dobbs Reality, LLC) filed for breach of fiduciary duty, interference with business relationship, breach of contract and more. Defendants below, and appellees, Chris Hayslip (and the Townes of North River Development Co.), argued that the claims were barred by the mediation agreement, or that alternatively they were required to be submitted back to the mediator as now an arbitrator. Hayslip also filed a counterclaim in which he asserted plaintiff had breached the mediation agreement and he was entitled to damages, and specific performance.

Harlan Home Builders then filed for summary judgment arguing that the mediation agreement should be ignored, rescinded or reformed because it was induced by fraud or mistake which occurred during the mediation, and other reasons. Purportedly, during the mediation, Hayslip misrepresented the value of the project as being in excess of \$14,500,000 when in fact the value was substantially less. This induced Harlan Home Builders to sign the mediated agreement. Hayslip denies any misrepresentation of a third-party's appraisal report.

The Tuscaloosa Court ordered post hearing briefs regarding the admissibility of fraud and/or mistake occurring in mediation. Appellants, Harlan Home Builders argued that evidence of fraud or mistake that occurred in mediation is and should be admissible to vitiate a mediated agreement just like any other settlement agreement. Appellee, Hayslip, argued that Rule 11 of the Alabama Civil Court Mediation Rules operates as an absolute bar to admission of such evidence.

The lower court ruled that Rule 11c prevented the court from considering any evidence of alleged fraudulent misrepresentations allegedly made by defendants/appellees during mediation. The court dismissed the fraud claims based upon alleged misrepresentations made during mediation. It then, at Harlan Home Builder's request, entered a final judgment pursuant to Ala. R. Civ. P. 54(b), and the case went up on appeal. The Supreme Court of Alabama sent the parties to appellate mediation, to have another go of it! It did not settle, and a summary of the opinion follows.

Harlan Home Builders, Inc. v. Hayslip, 58 So. 3d 102 (Ala. 2010). The Court found that the trial court erred in certifying as a final judgment its order of dismissal of Harlan Home Builders' fraud claim stemming from the mediation because the Hayslip counterclaim was "so closely intertwined (with the Harlan Home Builders fraud claim) that separate adjudication would pose an unreasonable risk of inconsistent results." The Court said that Harlan Home Builders' fraud claim was a defense to specific performance of the mediation agreement. Thus, both claims have to hang in the lower court until resolved. Then one party may appeal. Meanwhile, this appeal was dismissed as being from a non-final judgment.

*(My note: Fraud is a defense to specific performance of a mediated agreement.)*

\*Faellaci v. Faellaci, 98 So. 3d 521 (Ala. Civ. App. 2012). This post-divorce child support case had been to mediation, and the husband had attached the agreement to his motion to enforce the mediation agreement. After post judgment motions, wife appealed. Ct. of Civil Appeals dismissed the appeal. Circuit Court declined to award interest in husband's child support arrearage. Wife appealed. One of the issues was whether the trial court considered inadmissible evidence relating to a mediation agreement when rendering its judgment of child support. The wife argued that the child support award must be reversed because the record shows that the trial court considered the parties' mediation agreement in determining the husband's child support obligation. The agreement said \$4,000 and the trial court set the support at that amount. As part of their decision, the Court determined that to the extent that the trial court relied on the parties' mediation agreement to determine husband's child support obligations, that was in error--but harmless. Court cited Rule 11(c) of the Alabama Civil Court Mediation Rules that a court cannot inquire into nor receive information about the positions of the parties taken in mediation.

*(My note: I am still trying to understand the court on this one because the court did not receive information from the mediation, just a copy of the final agreement, a contract that was not confidential but part of the record. Only discussions, documents, etc. in and part of the mediation are confidential, not the final agreement, unless parties make the agreement confidential.)*

Purdue v. Green, 127 So. 3d 343 (Ala. 2012). This case deals with the Alabama Prepaid Affordable College Tuition Plan. Buyers and beneficiaries of the PACT program contracts brought a class action against the PACT Board asserting contract and Section 1983 claims, and seeking declaratory judgment. The Board counterclaimed for declaratory relief. Parties went to mediation, negotiated an agreement, and the Circuit Court of Montgomery County approved the proposed class action settlement agreement after a fairness hearing which was attended by the objectors. However, the objectors appealed, stating the settlement agreement impermissibly contravened Act No. 2010-725, specifically the part that explicitly forbid the PACT board from violating the contractual relationship existing between a PACT contract holder and the PACT

board. The appeals were consolidated. The Supreme Court of Alabama reversed the circuit court, holding that the mediated settlement agreement contravened the plain language of the statute which placed certain limits on the PACT board's authority to craft solutions that would violate the contractual rights provided to the contract holders. (*My Note: I think this is the first case in Alabama where it was alleged that a mediated agreement violated the law.*)

Purdue v. Green, 127 So. 3d 343 (Ala. 2012). On application for rehearing. Soon after the release of the Supreme Court's decision, above, the legislature enacted Act No. 2012-198 repealing the section of the act that caused the problem in the settlement agreement, above. The PACT board applied for this rehearing since the statutory language that impeded the agreement had been removed. It requested that the new law be applied retroactively. The Alabama Supreme Court remanded the case to the trial court for a determination as to the constitutionality of the retroactive application of the act—an issue that the Court said should be first addressed by the trial court.

Green v. Ivy, Circuit Court of Montgomery County, Alabama. CV-2010-900013.00. "This matter is before the Court for a return to remand from the Alabama Supreme Court. The mandate to this Court requires, 'a determination as to the constitutionality of retroactive application of Act No. 2012-198 under the facts of the case.'" The Court, after oral argument, found and ordered as follows: "1. That Objectors Perdue, Motlow, and Sears have failed to present this Court with any factual or legal basis to support a finding that Act 2012-198 impaired any vested rights. 2. That the retroactive repeal of portions of Act 2010-725 (specifically the provision embodied in the Alabama Code, 1975, as Section 16-33C-19) by Act No. 2012-198 is not unconstitutional. 3. That all changes effectuated by Act 2012-198 are hereby declared valid and effective. 4. That all other motions or requests made to or of this Court are hereby denied. 5. That the Clerk of this Court shall forthwith transmit a copy of this Order to the Clerk of the Supreme Court of Alabama as a return to remand."

Perdue v. Green, 127 So. 3d 343 (Ala. 2012). Buyers and beneficiaries of the Prepaid Affordable College Tuition (PACT) program appealed the Montgomery County Circuit Court decision that the retroactivity provision in the amended PACT statute was constitutional. On return to remand, the Supreme Court affirmed the lower court and held that: The legislature's repeal of provision in the statutes creating PACT program, which repeal allowed PACT board to negotiate class action settlement, retroactively applied to class action; that the class action settlement was reasonable; that settlement notice was sufficient; and that the settlement agreement was not overly broad.

\*Leverett v. Leverett, 123 So. 3d 962 (Ala. Civ. App. 2013). Parties went to mediation to negotiate terms of a divorce. The court adopted the mediated agreement. Later, former wife filed a motion to alter, amend or vacate the divorce judgment, seeking a legal separation, rather than a divorce, so that she could retain health insurance through former husband's military benefits. The wife (who is currently disabled) alleged that after the entry of judgment the husband had notified the provider of the divorce and her healthcare benefits were terminated contrary to the mediated agreement. The husband responded to the motion that he had made arrangements for wife to contact the appropriate military agency, and that he had attempted to contact her to communicate that she would have to cooperate with the agency, but the wife failed

to take steps to continue her benefits. The husband was being deployed so he filed a motion for the court to proceed to rule on the wife's motion in his absence. In that motion the husband averred that wife was ineligible for benefits because the length of their marriage failed to meet Defense Department requirements. He also attached exhibits showing that the military office had tried to contact her, and that they were unsuccessful. At a hearing on the motion the lower court changed the decree to a legal separation, and said it did so to accomplish the original intent of the parties to have medical for the wife. The husband appealed. The Court of Civil Appeals found that the parties did not enter into mediation for a separation, but for divorce, and had filed for divorce. The trial court therefore lacked a legal basis on which to justify its alteration of divorce judgment to grant a legal separation absent a complaint from either party seeking a legal separation. The Court acknowledged the trial courts broad discretion with respect to post judgment matters but said that it did not, "extend to rewriting the parties' mediated agreement to craft relief that neither party properly requested in a complaint..." The trial court, upon finding that something was unavailable, could have vacated the prior judgment to allow parties to remediate, set the matter for trial, or fashion other appropriate relief. *(My Note: We should all think about the possibility that a remedy agreed upon in mediation might become unavailable.)*

Williams v. Jackson, 122 So. 3d 205 (Ala. Civ. App. 2013). Siblings of the deceased brought an action against their nephew, who was the son of the deceased and administrator of his mother's estate. Parties had come to a settlement in mediation, and then siblings accused him of breaching the mediated agreement with respect to distribution of personal property. The nephew/son had designated on the inventory those items that had belonged to his mother during her lifetime and now belonged to him a sole heir and removed them from the house. Siblings alleged that everything in the house should have stayed with the house. The lower court entered a judgment in favor of the nephew/son. The Court of Civil Appeals held that evidence was sufficient to support finding that nephew did not breach mediation agreement. Even if some items had been purchased for his mother by family members, those items were gifts. There were no receipts to show that the items belonged to any of the siblings.

SSC Montgomery Cedar Crest v. Bolding, 130 So. 3d 1194 (Ala. 2013).

A nursing home resident by his attorney in fact daughter, Linda Boling, brought a medical malpractice action against the nursing home. The Court denied the nursing home's motion to compel arbitration. The nursing home appealed. The Supreme Court affirmed. The nursing home's dispute resolution agreement (DRA) required mediation and binding arbitration. It was signed by Michelle, one of the daughters of the admittee, who was with him when he was admitted, but did not have power of attorney. Normally, an arbitration agreement that binds the nursing home resident also binds the resident's representative. But in this case, the patient was mentally incompetent at the time he was admitted. An incompetent is unable to empower an agent. Therefore, the patient was not bound, daughter signing was not bound, and Linda Boling was not bound by the DRA. The Court said that while daughter Linda Bolding as holder of a durable power of attorney granted by her father may have been able to bind him to an arbitration agreement if she had been with him and signed, Michelle who signed as family member or next friend while her father was incompetent, could not. The fact that daughter Michelle, who may have purported to be the resident's legal representative when she signed the DRA, was insufficient basis upon which to apply the doctrine of apparent authority to render the DRA binding on the resident. *(My note: An incompetent cannot empower an agent to sign a valid*



*med/arb agreement binding the incompetent and representative. But if the person who signs has power of attorney...)*

Waddell v. Colbert County-Northwest Alabama Healthcare Authority, 97 So. 3d 178 (Ala. Civ. App. 2012). A hospital visitor sued the hospital when he was injured in an elevator accident. He requested mediation after several years (32 months) of litigation, at the time the trial court set the hospital's summary-judgment motion for a hearing. After the hospital won its motion for summary judgment, the visitor appealed, because he said the court never ruled on his motion for mediation in violation of §6-6-20 Ala. Code 1975. The appellate court in its review said that for 7 months Waddell chose to defend against the hospital's motion for summary judgment without mentioning the issue of mediation. The court said that Waddell had abandoned his right to mediation in favor of defending against the hospital's motion, and would not be heard to argue on appeal that the trial court erred in denying his request for mandatory mediation sub silentio. It appeared to the court to be an attempt to buy more time to respond to that motion. (My note: You can abandon your request for mediation under §6-6-20 by how you proceed during the run up to trial.)

\*Ex parte Sheila Stone Schoen. Petition for writ of mandamus 2120920  
(In re: Kasandra Larrivee, f/k/a Kasandra Tolbert v. Nicholas Tolbert)  
(Baldwin Circuit Court: DR-11-900031.02).

September 5, 2013: The Alabama Court of Civil Appeals granted the mandamus petition of the mediator, directed the trial court to grant the mediator's motion to quash subpoenas and motion for protective order, thus prohibiting the parties from seeking to compel testimony from the mediator regarding any aspect of the mediation.

In the lower court, plaintiff wife had sought to set aside the mediated agreement. She was self-represented at time of mediation, and she later asserted that the mediator gave legal advice and coerced her to enter the agreement under duress. The Circuit Court of Baldwin County found the issue to be whether or not a mediator can be compelled to testify in a hearing, when the testimony being sought does not involve the substance of the case or negotiations of the parties, but the alleged improper conduct of the mediator. It found that this type of testimony of the mediator is not protected by Rule 11 or falls within an exception. In fact, Rule 11 exceptions include (3)(iii): to the extent necessary if a party to the mediation files a claim or complaint against a mediator or mediation program alleging professional misconduct by the mediator arising from the mediation. (My note: The Alabama Court of Civil Appeals order prohibits parties from seeking to compel testimony from the mediator regarding any aspect of the mediation.)

Dollar Tree Stores, Inc. v. Ates, 160 So. 3d 296 (Ala. Civ. App. 2014). Plaintiff, Ates, filed in the Mobile Circuit Court for workers' compensation benefits which were denied by employer Dollar Tree. The Court ordered parties to mediation. Employer was to have insurance representative there in person, but knew before the mediation that the individual would not be able to come. The employer had someone on the phone with settlement authority, but did not seek permission from the court to do so. There was no settlement. A trial was held. The court awarded permanent total disability, for which plaintiff was entitled to benefits outside the schedule of benefits from the Act. The court also said that they imposed these findings in part as a sanction for failure of employer to comply with the mediation order. The trial court did not

order any separate monetary sanction with respect to the violation of the mediation order. The Alabama Court of Civil Appeals found that the trial court considered the contempt in determining the factual issues relating to the employee's claim, and that only injury-based considerations are permissible under the Act §25-5-51. Ala. Code 1975. In reversing the trial court, the court stated, "The trial court committed reversible error in allowing its contempt findings to influence its determination of the employer's liability and the amount of benefits due the employee." The fine for sanctions, "may not take the form of workers' compensation benefits, but should be a separate award altogether." (*My note: The trial court may sanction a party for failure to abide by an order to mediate. However, sanctions must be separate from the finding/holding of the case.*)

\*Ex Parte Culverhouse, 295 So.3d 114 (Ala. Civ. App. 2019). Husband requested mediation in a divorce action. The trial court granted that motion; the trial court ordered the husband and the wife to mediate and specified that the husband and the wife equally share the costs of the mediation. The wife filed a motion asking the trial court to amend the mediation order. She argued she did not agree to mediation and that, because husband moved for mediation, the husband was required to pay the costs of the mediation citing §6-6-20(b), Ala. Code 1975, and *Mackey v. Mackey*, 799 So.2d 203 (Ala. Civ. App. 2001). The trial court denied her motion. Wife filed another motion seeking relief from the requirement to share the costs of mediation. The trial court denied her motion. Wife timely filed a writ of mandamus. The Alabama Court of Civil Appeals directed to the trial court to vacate the portion of its order requiring the wife to share in paying the costs of the mediation.

Allstate Property and Casualty Insurance Company v. Doyle Harbin, Appeal from Madison Circuit Court, CV-17-901688. Trial court abused its discretion in imposing sanctions against Allstate for amounts exceeding plaintiff's request for costs and fees for allegedly violating the trial court's mediation order. The trial court sanctioned Allstate for, among other conduct, "not participating in the [court-ordered] mediation in good faith" by failing to provide a representative with authority to settle the case. The order stated that Allstate could be fully and adequately represented by counsel of record possessing settlement authority. The record did not show Allstate's counsel lacked full settlement authority. Under In re Novak, 932 F. 2d 1397 (11<sup>th</sup> Cir. 1991), "full authority to settle" does not mean that the individual must be willing to settle.



## **REASONS FOR USING MEDIATION BESIDES SETTLEMENT**

1. Most trial lawyers think the art of persuasion is their most important job skill. Why pass up a chance to make a potent mediation opening statement that will (unfiltered by the other side's lawyer) persuade the other side of the strengths of your case, and perhaps the weakness of theirs? The tone is different from trial, compelling but non incendiary, and offering some conciliatory remarks. Some of the issues addressed may be nonlegal ones. The form should set out a story or narrative, with visual aids as necessary.
2. Resolve part, if not all of the case. Sometimes during mediation parties understand that the plaintiff will be able to establish liability, but they disagree strongly on the amount of damages or which defendant will pay what damages. This opens the door to negotiation.
3. You cannot lose. Mediations produce no verdicts, but you win if you resolve it, you win if you close the gap, and you win if you attempt to address your client's case and concerns quickly to try to save costs (you can promote this) even if there is no agreement.
4. Use your creative talents. Find out what your client really wants and focus on those goals. It might mean they want the money fast, or an apology; it may mean they do not want a trial, or they are too fragile to handle one.
5. Avoid bad stuff. That would be bad precedent, bad results, bad judges, bad disclosures, bad hair day.
6. Insulate yourself from bad faith claims. If you engage in mediation without a settlement and a bad verdict appears down the road, you have documentary proof that you attempted to resolve the case in the best interest of your client.
7. Get to the heart of it. Litigation can bog everyone down in procedure. Mediation gets things moving. Here you can narrow or focus issues in the case with the other side that has proposed every theory of recovery imaginable. Filing motions for more definite statement, etc. are time consuming for everyone.
8. You can "discover" in mediation, especially helpful for small cases so they settle early. You will learn information that will assist in the proper assessment of the relative merit of the parties' positions and the settlement value of the case. Most of the favorable and unfavorable information will surface in discovery and at trial anyway, so there is no real advantage to delay. And in many cases, there is too little money at stake to warrant the expense of full discovery. You will see how the other party would impress the jury, and

with the mediator, you can get an independent assessment of your own client as a convincing witness.

9. Resolve discovery disputes. Motions and memoranda can be expensive to research and produce, and may sit for months before a ruling. Plus, the rules say cooperate, and it makes you look competent to the court if you can resolve these issues.
10. Work out a procedural schedule in complex cases. Experts, depositions, timing.
11. Use the mediator. This neutral can help communicate creative proposals, disclose bombshells, filter information.
12. Determine who the parties in interest are in multiple party cases. Mediation is helpful in order to determine additional parties and how to bring them in.
13. Parties can tell their stories. To some this is the most important thing! This helps parties get out a lot of what might have settled in, including anger, revenge, and/or sadness. It can help them move toward the future instead of staying stuck in the past.
14. Nobody has to give in first. With mediation the give and take can be smooth, simultaneous, and presented at the same time. It saves face.
15. There is no doubt that mediation in the early stages of litigation, or before litigation is initiated, can save all sides money (in experts, document preparation, accident reconstruction, research, trial time) time and stress.



## **Stories from Alabama Mediators**

The value of mediation is often not in statistics or docket management success, though these are important, but in the way it impacts the lives of parties caught up in conflict that consumes their time, money, energy, and emotions.

When conflicts arise, we in the legal profession set our sights in the law, the rules, the precedent. But, at the center of every conflict there is a place for man's better nature to break through and for grace to abound. That place may just be a seat at the mediation table. To borrow a phrase and sentiment that our second president and able barrister John Adams used regarding the drafters of the Constitution: these are settlements facilitated by "good heads prompted by good hearts." Thank you, mediators.

### **Families Matter**

- I mediated a conflict involving a family business in which the family members had not spoken to each other for over two years! After about five hours of mediation we resolved the dispute, but more importantly, the parties were reconciled as a family. This is the way it is supposed to work!
- I mediated a business dispute involving a brother and sister. Though their attorneys were great lawyers, there was a great deal of animosity between the siblings. There is no doubt that their animosity would have been permanent and destructive for the rest of the family (and their own relationship) had the case tried. By mediating, one could see that the bargained-for resolution resulted in no loser at trial, and could sense that the healing process had begun when they settled.
- I have had couples refer their friends to me and tell their friends that "the children will be better" if the parents can agree and not go to court.
- In domestic cases, "most" of the time the lawyers tell me the case will not settle and they are there because the judge ordered them. "Most" of the time those cases settle. The proof is in the pudding.
- Both lawyers provided statements as to why their client should get custody. I asked the father why, and he provided a good list. I then asked the wife, not the lawyer, why she should get custody. She said she should not. Without mediation, the lawyer would have forced an unnecessary and bitter custody fight. Mediation lasted 15 minutes.

### **Mental Health and Relief**

- I settled a case and one of the parties called me to tell me that he was on the verge of a nervous breakdown because of the stress of litigation, and mediation saved his life.

- Without reference to a specific mediation, the most rewarding aspect of mediation to me is the looks of relief and the words of kindness from parties and lawyers alike when a case is resolved. You see the value of mediation on their faces and hear it in their voices.

### **A Chance for Change, Transformation, Empowerment, Accomplishment**

- I have had attorneys telephone me in advance of mediation and tell me there is no realistic possibility the case will settle. Usually, these calls are accompanied by a request to cancel the mediation session. I ask the attorneys to give the mediation process a chance, and I have found that the majority of these cases settle at mediation, often to the surprise of the attorneys and their clients. This experience suggests to me that clients frequently have an interest in settlement which they do not recognize until mediation, or which they do not communicate to their attorneys.
- Typically, my mediations start off with one party or the other stating that they know we are not going to be successful. After a while, it is gratifying to see how the opinions change and how everyone works toward resolving the disputed issues for the betterment of all parties.
- My most memorable mediations are the ones where I can tell from the outset that I am the only one in the room who doesn't think the mediation is going to be a waste of time (you can see it in their eyes!). The trick then is to present a constant positive outlook, to mention prior successful mediations which no one thought would settle, and to convert the persons present, beginning with the attorneys, to be open to the possibility of success. When these mediations work it feels good to me of course, but the transformation of the parties is a wonder to behold.
- The parties were having thoughts of taking the law into their own hands if they had lost in court. By settling the case, they both left with a feeling of empowerment and accomplishment.

### **More than Money**

- A life insurance company allegedly wrongfully paid insurance proceeds to the deceased's father instead of the deceased's widow and two children. A mediation settlement agreement appeared likely. Finally, the widow said she would accept the terms of the company's last offer provided the company would pay for and arrange delivery of a large (and expensive) flower arrangement, which the mediator had to bless, in honor of the two children. The case settled on those terms. Juries can only award money—mediation can explore other special needs of the parties, especially when emotions run high.
- I am reminded of a case brought for the death of a teenager. The mother of the decedent was distraught and reluctant to enter the mediation. During the course of mediation, the tortfeasor, another teenager, expressed to the mother his sorrow and regret for the tragic results of his negligence. There was an instant change in the mother's demeanor, and she indicated that a terrible burden had been lifted from her shoulders. The case was quickly settled, and the money received by the mother funded a scholarship program for other students. The mother wrote to the judge commending her for referring the case to mediation as the "civilized way" to resolve what once were hard feelings. It is said that there are no winners in mediation -- not so in this case.
- The dispute was between an owner of several manufacturing facilities and a contractor hired to conduct a major overhaul. It was not over the quality of work, but other issues. Parties reached resolution by agreeing that the contractor would conduct similar work at owner's second facility with new control of the administration of the work, and at a discounted price.

### **After a final offer ...**

- This was a breach of contract case where the parties had been partners. The partnership had been dissolved, and later, one contracted some work from the other who was not paid appropriately. There was really bad blood on both sides. After mediating all morning, breaking for lunch, and going into the afternoon, I told the parties and their attorneys that I believed we were at an impasse. However, I said that if both sides wished to proceed with good faith negotiations, I would continue. At around 3:00 pm the plaintiff said, "I'm going to make him a final offer, take it or leave it." I took the offer to the defendant who said, "I'll counter with my drop dead offer, that's it." The plaintiff considered the drop dead offer and said, "I'll make one final, final offer." The defendant liked it and said, "I'll make him my drop dead, drop dead offer." They reached settlement on the final, final, final offer modified by the drop dead and go-to-hell offer. They left by separate doors.

### **Amazing Settlements, Amazing Lawyers**

- The plaintiff's opening demand was several million dollars. The defendant's first response was a few thousand dollars. Amazingly, we settled the case about 3 hours later.
- I mediated a case several years ago that stands out. What occurred would not have happened in a courtroom. A truck belonging to a family-owned company from Illinois hit a vehicle driven by a young pregnant woman in a county close to Mobile County. The young woman received a serious, permanent brain injury. She soon thereafter delivered her child, who also had a brain injury of a degree that was not yet fully known. The accident was caused by an act of carelessness, but not wantonness. The trucking company did not have insurance coverage for the accident due to an oversight in the procurement of coverage following a change in insurers. The company was successful and profitable, but relatively small. The plaintiffs were represented by a highly successful, prominent lawyer from Birmingham. The defendant was represented by an equally successful and prominent lawyer in Mobile. The company was owned and run by a man in his late sixties who had formed the company and watched it gradually expand and prosper. His son was in line to take over the operation of the company from him in the near future.

The parties came to my office to attempt to resolve the case. I remember vividly, however, how stricken the devastated family of the young woman was, as were the owner of the company and his son. Before the mediation, the company made all of its financial records available to the plaintiffs and the plaintiffs' accountant. There were no secrets. There were a number of obstacles to compromise. The family, who had substantial medical needs, had tremendous resentment against the company because it had failed to obtain insurance. There was of course terrible anxiety on the part of the company owner and his family about the future of their business. The mediation lasted all day and into the evening. One of the primary subjects of discussion was the amount that the company could afford to pay. Hanging over the plaintiffs was the prospect of the company declaring bankruptcy. The company had creditors, and bankruptcy presented dangerous risks for the plaintiffs. On the other hand, the owner of the company was a proud, conscientious man and considered bankruptcy a mark of failure and humiliation. The owner also felt responsibility for both the accident and the absence of insurance.

The lawyers for both parties were interested in one thing, and one thing only: doing their best to help their respective clients make the best out of an impossible situation. The lawyers kept the conversation on a high plane, which resulted in an atmosphere of relative goodwill. The opening remarks of the lawyers were careful and restrained, and from the beginning I sensed that what was happening was special. Rather than attack the other side or, in the case of the

defendant, trumpet the specter of bankruptcy, the two seasoned lawyers talked at length about the concerns and point of view of the opposing party.

Late in the evening, a deal was reached. It was put in writing, and signed by the parties. Everyone was physically exhausted and emotionally drained. As I was preparing to say goodbye to the departing parties, the lawyer for the defendant told me that I had to keep everyone there – the defendant had to talk to me. I worried that the defendant had decided that he could not afford the settlement after all, and was going to ask to undo what had just been done. I could not have been more wrong. I went into the conference room with the defendant. He had tears in his eyes. He told me that he had been thinking hard about the settlement number, and it was not truly the most that he could afford to pay. He said he could do more and survive. With a shaking voice, he told me the amount that he felt he could afford to pay. This amount was a significantly higher (although not hugely so) than what the plaintiff had just agreed to. Our conversation was so emotional that I had to gather myself before I reported to the plaintiff. When I told the plaintiffs, they got emotional. The documents were amended with the higher number replacing the original number. At the conclusion of the mediation, the two families came together, with handshakes, hugs, and tears. The lawyers and I stood off to the side. This mediation produced something good and worthwhile that could not have been accomplished in further litigation and trial.

### **Pre-Suit Success**

- A nationally known business suggested mediation prior to the filing of a suit by an injured customer. The adjuster came in from out of town and the case was settled to the satisfaction of all parties prior to suit being filed.

### **Separation of Church and State, or Maybe Not**

- I spent 40 hours doing a pro bono mediation of a church dispute involving a church with over 1,000 members. There were judges, lawyers and prominent citizens on both sides of the dispute. Church disputes are generally very emotional, and either way the circuit judge decided the case would have angered many prominent, influential citizens. No decision by the court would have been able to accomplish the result that was reached in mediation. The mediation agreement even included a joint press release that the two groups would encourage and support each other in their respective ministry after the church split.
- In a multiparty rear end collision case, at about 6:00 P.M. after an all-day mediation, the “holdout” plaintiff said, “You don’t have to talk about the number (of dollars) it will take for me to settle the case; God knows the number.” Apparently, God communicated “the number” to the insurance adjuster and the case was settled at 6:15 P.M.
- I mediated an emotional high dollar separation of a church from its denomination. Extremely intense. We settled, and afterwards the two sides said a prayer together and then had a group photo taken.

### **Timing**

- Baseball players speak of the sweet spot on the bat that produces the power hits. Golfers talk about the sweet spot on the head of the driver. Tennis players know that every racquet has a sweet spot. Similarly, there is a “sweet spot,” an ideal time in every litigation when the insertion of mediation into it is most likely to lead to a negotiated, pretrial settlement; and the ideal time varies from case to case.

That time for mediating must be early enough in the life of a particular lawsuit for the value of a mediated settlement to offer not only risk reduction, but also substantial litigation cost



reductions for both parties. However, it must be far enough along in the process for the parties to appreciate the substance of the position of the party opponent. If mediation is undertaken too early in the process, it is likely that neither party can effectively and accurately evaluate the strengths and weakness of their own position. If, however, mediation is undertaken too late in the process, that is, too close to the trial date, it is likely that either party may find less advantage to settling prior to trial. Mediation cannot be used as an additional discovery tool – the case must be sufficiently developed that such is not the case. Mediation cannot be perceived by either party to be a delaying tactic – it must be sufficiently early in the process that such perception may be avoided.

I have found this issue of proper timing of mediation to exist in both settled cases and in cases which failed to settle. In a recent case which was scheduled for trial within two weeks of the mediation, after well over a year in run-up to that point, the parties could not be brought to a mediated agreement. After deductions for costs and contingency fees against an offer from the defendant, the plaintiff could not find sufficient reason (value) to settle for what defendant offered. Conversely, the defendant, who had to consider his own costs up to the date of the mediation as part of his settlement cost, could not justify an offer that could provide sufficient net value to the plaintiff. While neither party found the value of a mediated agreement would offset the risk of trial, the potential for success in this mediation was compromised by the late timing of the mediation.

The court must consider this timing issue when scheduling mediation. Awareness of the “sweet spot” issue will allow mediation to become a more valuable tool of the court and will significantly increase the success rate for mediation.

### **Mediation Manner**

- The most telling and rewarding comment is that I have had several parties indicate that they appreciate the manner in which the mediation was conducted.

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