

IN THE SUPREME COURT OF ALABAMA
January 6, 2004

ORDER

WHEREAS, this Court on November 17, 2003, adopted the Alabama Appellate Mediation Rules, effective January 1, 2004, and

WHEREAS, the subcommittee on appellate mediation approved by the Standing Committee on the Alabama Rules of Appellate Procedure has suggested further revision to those rules,

IT IS THEREFORE ORDERED that the Alabama Rules of Appellate Mediation be amended to read in accordance with the appendix attached to this order;

IT IS FURTHER ORDERED that the amendment of these rules be effective immediately;

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to follow the Alabama Rules of Appellate Mediation:

"Note from the reporter of decisions: The order amending the Alabama Rules of Appellate Mediation, effective January 6, 2004, is published in that volume of the Alabama Reporter that contains Alabama cases from ____ So. 2d."

Houston, See, Lyons, Brown, Johnstone, Harwood, Woodall, and Stuart, JJ., concur.

APPENDIX

ALABAMA APPELLATE MEDIATION RULES

Rule 1. Overview and Scope of Appellate Mediation Program

(a) **Scope.** The appellate mediation program, established in the Supreme Court of Alabama and the Alabama Court of Civil Appeals pursuant to Rule 55 of the Alabama Rules of Appellate Procedure, provides an alternative means for resolving appeals in civil cases. The program is coordinated by an executive director, and operates, in each court, under the direct supervision of an appellate mediation administrator, an employee of the respective court. The appellate mediation office shall be located in the judicial building in Montgomery, Alabama.

(b) **Goals.** To the extent resources are available, this program will provide the parties with a forum and process by which they can: (1) realistically consider the possibility of settlement of the entire case or issues in the case; (2) discuss limiting and simplifying the issues on appeal; (3) take actions that may reduce costs; and (4) aid the speedy and just resolution of any case.

Court Comment

Time is of the essence to the program, and early scheduling is intended to give the parties the opportunity to settle a case before they incur the major expenses of having the clerk's record and the reporter's transcript prepared and of filing briefs.

Rule 2. Screening for Mediation

(a) Confidentiality. No forms or notices filed with the appellate mediation office shall contain information relating to the parties' positions regarding settlement, or any substantive matter that is the subject of the mediation; the exclusive and sole purposes of forms and notices to be filed in conjunction with the appellate mediation program are to maintain status records and statistics, to ensure orderly compliance with Rule 55, Ala. R. App. P., and to provide a mechanism for returning the case to the ordinary appeal process where mediation has not resolved the case.

(b) Eligible Cases. All civil matters within the jurisdiction of the Supreme Court of Alabama or the Alabama Court of Civil Appeals, where all parties are represented by counsel, shall be eligible for referral to the appellate mediation program.

(c) Pre-screening of Cases. Upon receipt of the docketing statement (Form 24 or 25, Appendix I, Alabama Rules of Appellate Procedure; see Rule 3(e), Alabama Rules of Appellate Procedure), the appellate mediation administrator shall determine whether a case should be sent to appellate mediation. If a case is chosen for mediation, the administrator will promptly furnish a Mediation Case-Screening Form and a Confidential Statement to Enter Mediation (Forms 2 and 3 to these Rules) to the parties.

(1) Mediation Case-Screening Form. The appellant and the appellee shall file a Mediation Case-Screening Form (Form 2 to these Rules), which provides information to supplement the docketing statement, in the court in which the case is pending within 14 days of the date shown on the Mediation Case-Screening Form. The appellant shall attach to the Mediation Case-Screening Form the following: (1) a copy of the docketing statement; (2) a copy of the complaint and any amendments to the complaint; (3) a copy of the order or judgment to be reviewed by the appellate court; (4) a copy of the order on any postjudgment motion, if applicable; and (5) a copy of the postjudgment motion if it will assist the administrator in determining the nature of the dispute.

(2) Confidential Statement. The appellant and the appellee shall return the Confidential Statement (Form 3 to these Rules) to the appellate mediation office within 14 days of the date shown on the Confidential Statement. The Confidential Statement, which gives a party the opportunity

to request mediation, shall not be served on opposing counsel.

(d) Notice to Clerk (and Court Reporter) to Stay Proceedings on Appeal. When the Mediation Case-Screening Form and the Confidential Statement are sent to the parties, a Notice to Clerk (and Court Reporter) to Stay Proceedings on Appeal (Form 4 to these Rules), shall be sent to the trial court clerk and, if appropriate, the court reporter, staying the record preparation pending further orders of the court. The court reporter shall, however, notify the appellant of the estimated cost of the transcript within two weeks of the date on the Notice of Stay.

The appellate process, including the times for preparing the clerk's record and the reporter's transcript and for briefing, will be stayed until mediation is completed or terminated. If the mediation reaches an impasse, the case shall be ordered reinstated to the appellate docket and the stay of proceedings lifted.

Rule 3. Referral to Mediation

(a) Referral to Mediation. The appellate mediation administrator will review the Mediation Case-Screening Forms and the Confidential Statements completed by the parties. Selection of cases for mediation is based on the administrator's determination that the case should be referred to mediation after reviewing the facts, the order appealed from, and the standard of review the appellate court will employ.

(1) Order of Referral to Mediation. The Order of Referral to Mediation (Form 5 to these Rules) notifies the parties that the case shall be mediated and instructs them to attempt to agree on a mediator.

(2) Report on Status of Selection of Mediator. The appellant shall file with the appellate mediation office the Report on Status of Selection of Mediator (Form 6 to these Rules), within 14 days of the date of the issuance of the Order of Referral to Mediation. The Report on the Status of Selection of Mediator advises the appellate mediation office of the result of efforts between parties to agree on the designation of a mediator. Before the parties submit the name of a mutually satisfactory mediator, the parties shall obtain the mediator's commitment to serve and make arrangements with regard to mediation fees. In the event the parties cannot agree on a mediator, the appellant shall promptly notify the appellate mediation office by

filing the Report on Status of Selection of Mediator, and a mediator shall be selected by the appellate mediation administrator of the court in which the appeal is pending. (See Rule 4 for qualifications of a mediator.)

(b) Appointment of Mediator.

(1) Order Appointing Mediator Pursuant to Stipulation of the Parties. If parties agree on a mediator, the appellate mediation administrator will issue an Order Appointing Mediator Pursuant to Stipulation of the Parties (Form 7 to these Rules), which will be sent to the parties and the mediator.

(2) Order Appointing Mediator Absent Stipulation of the Parties. If the parties cannot agree upon a mediator within 14 days of the Report on Status of Selection of Mediator, the appellate mediation administrator shall appoint and serve upon the parties to the appeal and mediator an Order Appointing Mediator Absent Stipulation of the Parties (Form 8 to these Rules).

(c) Referral by the Court. If, in the opinion of the appellate court, a case is appropriate for mediation, the court may refer cases to the program at any time during the appellate process.

(d) Mediation Time Frame. Upon issuance of the Order of Referral to Mediation, the parties and the mediator shall have 63 days within which to complete the mediation. Within seven days of the completion of the mediation, the mediator shall file with the appellate mediation office a Mediator's Report (Form 13 to these Rules) and evaluations (Forms 14, 15, and 16 to these Rules).

Rule 4. Appellate Mediator

(a) Qualifications of Mediator. Before a person can be accepted as an appellate mediator, he or she must submit a Mediator Application (Form 1) to the appellate mediation office and meet the following criteria.

(1) Appellate Mediator Roster. The appellate mediation office shall maintain a roster of approved appellate mediators. An approved appellate mediator is someone who:

- A. Is an attorney in good standing with the Alabama State Bar;

- B. Has indicated his or her desire to be appointed as a mediator for purposes of these Rules by completing and submitting to the appellate mediation office an application (Form 1 to these Rules) to serve as mediator for the appellate mediation program;
- C. Has successfully completed the six-hour appellate mediation course approved by the appellate mediation office;
- D. Is on the Alabama State Court Mediation Roster;
- E. Has agreed to serve as a mediator pro bono pursuant to Rule 4(h);
- F. Has agreed to adhere to the Alabama Code of Ethics for Mediators;
- G. Has agreed to be bound by these Alabama Appellate Mediation Rules; and
- H. Has agreed to waive any and all claims against the appellate court in connection with his or her mediation of any court-referred dispute.

(2) Nonroster Mediator. Nothing in these Rules prevents the parties from choosing their own mediator, so long as the proposed mediator:

- A. Is in good standing with the licensing board for the profession in which the person practices or, if the profession is not licensed, has three written recommendations. The appellant shall attach documentation showing these qualifications to the Report on Status of Selection of Mediator Form within 14 days from the date of the issuance of the Order of Referral to Mediation;
- B. Has agreed to adhere to the Alabama Code of Ethics for Mediators;
- C. Has agreed to be bound by these Alabama Appellate Mediation Rules; and
- D. Has agreed to waive any and all claims against the appellate court in connection with his or her mediation of any court-referred dispute.

(b) Duty of Mediator Before Accepting Appointment.

Before accepting an appellate case for mediation, a mediator must make all disclosures to the parties required by the Alabama Code of Ethics for Mediators, Standard 5, subsection (b). If, upon receipt of such disclosure, it is determined that the mediator is unable to serve, the parties may, within seven days, name a different person, who has the requisite qualifications as a mediator (see Rule 4(a)). If the parties cannot agree on a mediator within the seven-day period, the appellate mediation administrator shall appoint a mediator.

(c) Inability of Mediator to Serve. If, once a mediator has accepted an appellate case for mediation, the mediator becomes unwilling or unable to serve, the mediator shall immediately notify the appellate mediation office. Within seven days of such notice, the parties may name a different person, who has the requisite qualifications, as an appellate mediator (see Rule 4(a)). If, within that seven-day period, the parties cannot agree on a mediator, the appellate mediation administrator shall appoint a mediator.

(d) Authority of Mediator. The mediator shall attempt to help the parties reach a satisfactory resolution of their dispute; the mediator does not have the authority to impose a settlement upon the parties. The mediator is authorized to conduct joint and separate meetings with the parties and to communicate offers between the parties as the parties authorize. The mediator is authorized to end the mediation when, in the judgment of the mediator, further efforts at mediation would not contribute to a resolution of the dispute between the parties.

(e) Ethics. Mediators shall adhere to the rules of conduct for mediators as stated in the Alabama Code of Ethics for Mediators.

(f) Fees and Expenses. The parties shall mutually agree on the fees of the mediator selected by them. If a mediator is appointed, the mediator's fee and incidental expenses shall be shared equally between the parties, unless otherwise determined by the final mediation agreement. The mediator may require an advance deposit covering the estimated cost of mediation, but in any event, arrangements for payment of the cost of mediation and incidental expenses must be coordinated directly with the mediator. Attorneys for each party shall see to prompt payment of the fees and expenses. If satisfactory arrangements for compensation cannot be made, then the parties shall so advise the

appellate mediation office, and the appellate mediation administrator will name another mediator.

(g) Billings to Parties. The mediator shall bill the parties based upon the rates and terms agreed to by the mediator and parties. It is not necessary to send copies of fee agreements or billings to the appellate mediation office. The parties are solely responsible for any billings by the mediator.

It is highly recommended that the private mediator fully disclose and explain to the parties the basis of compensation, fees, and charges to the parties in advance of the mediation and that the fee arrangement be memorialized in a written contract. Such disclosures and explanations usually include:

(1) The basis for and amount of any charges for services to be rendered, including minimum fees and travel time;

(2) The amount charged for the postponement or cancellation of mediation sessions and the circumstances under which such charges will be assessed or waived;

(3) The basis and amount of charges for any other items; and

(4) The parties' pro rata share of mediation fees and costs if the parties have previously agreed to share those fees and costs.

Neither the appellate court nor the appellate mediation office will aid in the enforcement of the terms and conditions of the contract, including the collection of any outstanding fees, costs, and expenses.

(h) Pro Bono Mediators. Upon request from the court, all appellate mediators must mediate two cases each year for which they will not be paid.

(1) Motion for Waiver of Mediator Fees. Any party may file a motion for a waiver of mediator fees (Form 9 to these Rules) before a mediator is appointed to mediate their case. Only valid reasons for the waiver of mediation fees, such as undue financial hardship, will be considered.

(2) Order Appointing Pro Bono Mediator. All pro bono appointments shall be so indicated in the Order Appointing Pro Bono Mediator (Form 10 to these Rules).

(i) Disqualification of an Appellate Mediator.

An appellate mediator may be disqualified from mediating appellate cases pending in the Supreme Court of Alabama and the Alabama Court of Civil Appeals for:

- (1) Violating Rule 55, Ala. R. App. P., the Alabama Appellate Mediation Rules, or the Alabama Code of Ethics for Mediators;
- (2) Failure to remain in good standing and abide by the standards of practice established by the Alabama State Bar or the Alabama Center for Dispute Resolution, or, if the mediator is a nonroster mediator, failure to remain in good standing with the licensing board for the profession in which the person practices; or
- (3) At the discretion of the Court.

Rule 5. Mediation Procedures

(a) Time and Place of Mediation. The mediator shall fix the time and place of any mediation session at a location that is conducive to discussion and that provides security so as to maintain confidentiality. The mediation should be conducted in a manner appropriate to the dignity of the court.

(b) Rescheduling Mediation. Any requests to reschedule the mediation within the 63-day time frame are to be made directly to the mediator, not to the appellate mediation office.

(c) Additional Mediation Sessions. If a settlement is not reached at the initial mediation session, but the mediator believes further mediation sessions or discussion would be productive, the mediator may conduct additional mediation sessions in person or telephonically within the 63 days allowed by these Rules for mediation. If the mediation is not completed within 63 days of the Order of Referral to Mediation, mediation shall be deemed to be at an impasse, unless an extension has been granted pursuant to subsection (e) of this rule.

(d) No Record.

There shall be no record made of the mediation proceeding.

(e) Extensions. A mediator may request an extension of time beyond the 63-day period allowed by Rule 3(d) if he or she is of the opinion that the additional time for mediation would be productive. The request for an extension must be made in writing or telephonically to the appellate mediation administrator within the time allowed for mediation. The mediator must send a confirmation letter to the appellate mediation office, copied to all counsel. That letter shall read as follows:

"Re: [Appeal number and style]. This confirms that to facilitate settlement the appellate mediation administrator has granted my request to extend the time to mediate this appeal from the current due date of [date] to the new due date of [date]."

(f) Attendance at Mediation Session. Mediation by telephone conferencing may be used if permitted by the mediator. A party is deemed to appear at a mediation session if the following persons are physically present or, if the mediator so authorizes, are reasonably available to authorize settlement during the mediation session:

(1) The party or its representative having full authority to settle without further consultation.

(2) The party's counsel of record, if any.

(3) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.

As to a governmental or other entity for which settlement decisions must be made collectively, the availability or presence requirement may be satisfied by a representative authorized to negotiate on behalf of that entity and to make recommendations to it concerning settlement.

The failure of a party, and/or the party's counsel, to attend the mediation session may be grounds for sanctions against the party, the party's counsel, or both, to be imposed by the appellate court in which the case is pending. (See subsection (i) of this Rule.)

(g) Submission of Mediation Statement and Documents. The mediator may require the parties to prepare and submit a

Mediation Statement. If a Mediation Statement is required, the Mediation Statement should include:

(1) a brief recitation of the facts established to the satisfaction of the fact-finder;

(2) the history of any efforts to settle the case, including any offers or demands and previous mediations;

(3) a statement of the issue or issues on appeal and the manner in which each issue was preserved;

(4) a statement of the standard of review applicable to each issue;

(5) a summary of the parties' legal positions and a candid assessment of the respective strengths and weaknesses of those positions;

(6) the present posture of the appeal, including any matters pending in the trial court or in any related litigation;

(7) any recent developments that may impact the resolution of the appeal;

(8) identification of the individual or individuals and counsel the parties believe should be directly involved in the settlement discussions;

(9) a description of any sensitive issues that may not be apparent from the court records, but that may or will influence the settlement negotiations;

(10) the nature and extent of the relationship between the parties or their counsel;

(11) the parties' priority of interests;

(12) any suggested approach for the mediator to take in an attempt to settle the appeal (e.g., "problem" to be settled, sequence of issues);

(13) any suggested creative solutions;

(14) necessary terms in any settlement;

(15) any particular concerns about confidentiality;

(16) any limitations in counsel's authority to make commitments on behalf of the client; and

(17) any additional information that the counsel's client or the other party needs to settle the case and whether it should be provided before the mediation.

Mediation Statements are confidential. (See Rule 8 to these Rules.) Copies of the Mediation Statements submitted by the parties should go directly to the mediator and should not be served upon opposing counsel. Documents prepared for mediation sessions are not to be filed with the appellate mediation office or with the clerk's office of the appellate court in which the case is pending and are not to be part of the record on appeal.

(h) Conduct of Mediation. Although the mediation sessions are relatively informal, they are proceedings of the court and shall be conducted with that spirit in mind. The mediation process is nonbinding, so no settlement is reached unless all parties agree.

The mediator should begin the mediation by describing the mediation process, discussing confidentiality, and inquiring whether any procedural questions or problems can be resolved by agreement. The parties and the mediator may then discuss, either jointly or separately, and in no particular order, the following topics:

- (1) The legal issues and the appellate court's decision-making process regarding these issues (e.g., preservation of error, waiver, standards of review, etc.);
- (2) The history of any efforts to settle the case;
- (3) the parties' underlying interests, preferences, motivations, assumptions, and new information or other changes that may have occurred;
- (4) future events based upon the various outcome alternatives of the appeal;
- (5) how resolution of the appeal impacts the underlying problem;
- (6) cost-benefit and time considerations; and
- (7) any procedural alternatives possibly applicable to the appeal (e.g., vacatur, remand, etc.).

The discussion is not limited to these topics and, because each appeal has its own circumstances, will vary considerably. The mediator will also attempt to generate offers and counteroffers and may have several follow-up mediation sessions by telephone or in person until the appeal is settled or it is determined that it will not settle.

Because appellate mediation is based on the principles of self-determination by the parties and the impartiality of the mediator, the mediator may apply the facilitative model of mediation.

(i) Sanctions. Neither the appellate mediation office nor the appellate mediation administrator has the authority to impose sanctions. If, however, a party refuses to attend a mediation session or sessions, unreasonably delays the scheduling of mediation, or otherwise unreasonably impedes the conduct of the program, the court may reinstate the case to the appellate docket and the court may impose sanctions. Sanctions may include, but are not limited to, assessing reasonable expenses caused by the failure of the mediation, including an award of mediator and/or attorney fees; assessing all or a portion of the appellate costs; dismissal of the appeal; or taking such other appropriate action as the circumstances may warrant.

Court Comment

One of the goals of the appellate mediation program is to help the parties save costs in preparing the record and briefs. It is not the aim of the appellate mediation program to have parties submit a brief as a Mediation Statement.

Rule 6. Completion of Mediation Process

(a) Mediator's Report. Within seven days of the completion of the mediation, the mediator shall file with the appellate mediation office a Mediator's Report (Form 13 to these Rules). Upon the filing of the Mediator's Report or the expiration of the time allowed for mediation, whichever occurs first, all appellate time requirements shall resume.

(1) No Agreement. If the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall so indicate in the Mediator's Report, without comment or recommendation.

(2) Agreement. If a partial or final agreement is reached, the mediator shall indicate the fact in the Mediator's Report. Such report shall be signed by all parties and their attorneys.

A. In those cases where a partial agreement is reached, the case will be reinstated on the appellate docket for appellate determination of the remaining issues and the stay of proceedings lifted. All appellate time requirements shall resume.

B. Where the mediation results in resolution of the appeal, dismissal of the appeal will be governed by Rule 42, Alabama Rules of Appellate Procedure. (See Rule 7 of these Rules.)

(b) Evaluations. At the conclusion of all mediation proceedings, the mediator shall distribute evaluations to the counsel and parties of record inviting their candid responses about the effectiveness of the appellate mediation program in assisting the parties to resolve their issues on appeal.

The mediator shall distribute evaluations (Forms 14, 15, and 16 to these Rules) at the mediation session and the attorney and parties shall be informed that completion of the evaluations is essential to the program. Evaluations are to be completed by the mediator, the attorneys, and the parties. Counsel and parties are to return evaluations in a sealed envelope to the mediator. The mediator shall return the completed evaluations with the Mediator's Report to the appellate mediation office within seven days of completion of mediation.

Rule 7. Post-Settlement Dismissal Procedures

(a) Joint Stipulation for Dismissal of Case After Mediation (Form 11 to these Rules). If the parties reach an agreement as a result of the mediation, they may file a joint (or agreed) motion to dismiss the case pursuant to Rule 42, Alabama Rules of Appellate Procedure, in the clerk's office of the appellate court in which the case is pending. A copy of the order to dismiss the case shall be served on the mediator. The motion to dismiss should address the following:

(1) Whether the dismissal pertains to all parties and claims on appeal;

(2) Whether the case should be remanded to the trial court for further proceedings in conformance with the parties' settlement agreement; and

(3) Whether the parties are to bear their own costs or whether, pursuant to the parties' agreement, the costs are to be otherwise apportioned.

(b) Termination of Mediation and Notice to Reinstate Appeal (Form 12 to these Rules). The mediator may terminate the mediation process at any time, if, in the opinion of the mediator, further attempts at mediation will serve no useful purpose.

(1) Once mediation has been terminated without the parties' reaching an agreement, the appeal will be reinstated on the appellate docket and the stay of proceedings lifted to reinstate the appeal and the clerk of the appellate court shall send the Notice to Reinstate Appeal (Form 12 to these Rules) to the parties.

(2) ALL APPELLATE TIME REQUIREMENTS SHALL RESUME. The appellant shall make satisfactory arrangements with trial court clerk and court reporter for preparation of the record on appeal within seven days of the date of the Notice to Reinstate Appeal.

Rule 8. Confidentiality

Except as otherwise required by law, the appellate mediation program operates under the rules of confidentiality as provided below.

All information disclosed in the course of 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, by statute, or by the Alabama Rules of Appellate Procedure. There shall be no reference, whatsoever, in any appellate motions, briefs, or argument to the appellate mediation program or to the fact that the appeal was mediated or that mediation reached an impasse, except in those cases where mediation was partially successful and disclosure is necessary to explain the statement of the case.

The mediator shall not be compelled in any adversary proceeding or judicial forum to divulge the contents of any documents revealed during mediation or the fact that such documents exist or to testify in regard to the mediation.

The mediator's notes and the parties' Mediation Statements do not become part of the court's file.

The phrase, "information disclosed in the course of mediation," as used in this Rule, 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.

The confidentiality rule applies in all mediated cases conducted by an appellate mediator. The court strictly enforces this rule.

Rule 9. General

(a) Service. All documents filed with the appellate mediation office shall be served on opposing counsel, except as otherwise indicated by these Rules.

(b) Questions or Complaints. A party's or counsel's complaints or concerns regarding the appellate mediator or the conduct of the mediation should be addressed to the appellate mediation administrator of the court in which the appeal is pending. Questions and complaints shall not be addressed to the Supreme Court of Alabama, the Alabama Court of Civil Appeals, or the clerk's staff of the respective courts, unless the party, counsel, or appellate mediator is directed to do so by the appellate mediation office.

(c) These Rules govern the procedure for all matters in appellate mediation. If no procedure is specifically provided in these Rules or by statute, the Alabama Court Civil Mediation Rules shall be applicable to the extent not inconsistent herewith.