

ALABAMA RULES OF APPELLATE MEDIATION

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 should 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.

(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 or the party's counsel 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; or taking such other appropriate action as the circumstances may warrant. No motion for sanctions by litigants or recommendation for sanction by the mediation office will be presented to the appellate court until after the court has decided the case on the merits.

[Adopted effective January 1, 2004; amended effective January 6, 2004; October 31, 2005; September 15, 2008; November 19, 2012.

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.

Court Comment to Amendment to Rule 5(i) Effective November 19, 2012

Because this rule prohibits a motion for sanctions or a recommendation for sanctions from being presented to the appellate court until after the court has decided the case on the merits, the sanction of "dismissal of the appeal" will not be considered as an option for a sanction under this rule.

Note from the reporter of decisions: The order adopting the Alabama Appellate Mediation Rules, effective January 1, 2004, is published in that volume of the *Alabama Reporter* that contains Alabama cases from 858 So.2d.

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 862 So.2d.

Note from the reporter of decisions: The order amending Rule 2(a), Rule 5(e), Rule 5(i), and Rule 8 and adopting Rule 2(e) and Rule 2(f) of the Alabama Rules of Appellate Mediation, effective October 31, 2005, is published in that volume of the *Alabama Reporter* that contains Alabama cases from 912 So.2d.

Note from the reporter of decisions: The order amending Rule 1(a), Rule 2(f), Rule 4(h), Rules 5(f) (2), and Rule 6(b) and adopting the Court Comment to Amendment to Rule 6(b) Effective September 15, 2008, effective September 15, 2008, is published in that volume of *Alabama Reporter* that contains Alabama cases from 994 So.2d.

Note from the reporter of decisions: The order amending Rule 5(i) effective November 19, 2012, and adopting the Court Comment to Amendment to Rule 5(i) Effective November 19, 2012, is published in that volume of *Alabama Reporter* that contains Alabama cases from ____ So. 3d.