

MARKS & WEINBERG, P.C.

MEDIATION: AN ALTERNATIVE TO COSTLY LITIGATION (1994)

Mediation is a cost-effective, prompt means of resolving commercial disputes which is rapidly gaining favor nationwide. It is not widely known that as of August 1, 1992, the Alabama Civil Court Mediation Rules became a tool for attorneys involved in civil disputes in Alabama. The rules are easy to follow and set out a simple process. The following is a synopsis of the Alabama Rules, which are similar to rules adopted in other jurisdictions in many respects.

Mediation is not a court procedure. It is a process by which the parties submit their dispute to a neutral or impartial person. An attorney is not required for a party to participate in the mediation process, and the party may be assisted by any person of his or her choice at any such proceedings.

The mediator may suggest ways of resolving the dispute but cannot impose a settlement on the parties. The process can be initiated either by the parties or at the suggestion of the court. It is a strictly voluntary process, and either side may terminate the proceedings at any time. If mediation takes place during litigation, while the parties are in mediation, the case pending before the court is typically stayed.

The parties can either agree on a mediator or the court can select a mediator. The mediator can have no interest in the dispute. If there is an apparent conflict, the mediator cannot serve, except with written consent of all parties. If the parties disagree as to whether the prospective mediator should serve, the court should appoint another person as mediator.



The mediator selects the time and location of the meetings. These should be scheduled at the convenience of all parties. Ten day prior to the first scheduled mediation session, each party should provide the mediator with a position statement identifying the issues to be resolved. The mediator may require additional information if he or she deems it necessary.

The mediator can conduct joint and/or separate meetings with the parties and make oral and written communications. The mediator can also obtain expert advice concerning technical aspects of the issues in dispute, provided the parties agree and assume the expenses of such experts.

Mediation sessions are private. There is no public record of the mediation proceedings. Only the parties and their representatives may attend mediation sessions, unless additional persons are permitted to be present by express permission of the parties and with the consent of the mediator.

Information obtained by the mediator remains confidential, as are all records, reports or other documents received by the mediator while serving as such. The Alabama Rules provide that the mediator cannot be compelled in any adversary proceeding or judicial form to divulge the contents of such documents or the fact that such documents exist or to testify in regard to the mediation.

The parties are likewise barred from using any such information obtained through the confidential mediation process. This includes any suggestions made, admissions made, or proposals made during the course of the mediation. Nor is the court permitted to inquire as to the nature of the information introduced at the mediation proceedings.

As stated, the mediation process may be terminated at any time by any party to the mediation, and it may also be terminated by the mediator when in his or her opinion further efforts at mediation would not contribute to a resolution.



The mediation process is terminated by filing with the court one of the following: (i) a notice signed by all parties concerned or by their attorneys that the parties concerned have executed a settlement agreement; (ii) a written declaration signed by the mediator saying that in the mediator's judgment, further efforts at mediation will not contribute to a resolution of the dispute between the parties or (iii) a written declaration signed by a party or parties or by their attorneys stating that the mediation process is terminated.

Mediation should also be terminated by the expiration of the period of stay allowed by the Court. The fact that a mediation is terminated shall not bar the entry of a later order to mediate that dispute.

The expenses of a witness for a party must be paid by the party producing the witness. All other expenses of mediation, including necessary travel and the expenses of the mediator, the expenses of any witnesses called by the mediator and the costs of any evidence or expert advice produced at the direct request of the mediator are borne equally by the parties unless the parties agree otherwise and/or unless the Court directs otherwise. The mediator is to be compensated at a reasonable rate to be agreed to by the parties or as set by the Court. This fee is borne equally by the parties unless they agree otherwise or unless the Court otherwise directs.

Before the mediation process begins, each party to the process is to deposit such an amount of the anticipated expenses and fees that the Court shall direct. When the mediation process is terminated, the Court renders an accounting requiring payment of additional expenses or fees by the appropriate parties or by returning any unexpended balance to the appropriate parties.



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