

Supreme Court of Kentucky

2005- 02

ORDER

**IN RE: AMENDMENT TO THE RULES OF ADMINISTRATIVE PROCEDURE
AP PART XII. MEDIATION GUIDELINES FOR COURT OF JUSTICE
MEDIATORS**

It is HEREBY ORDERED that a new Part XII of the Rules of Administrative Procedure is created to contain the following:

Section 1. Statement of Purpose

The following Guidelines concern suggested minimum standards for training, experience, education, and ethical conduct for mediators practicing in courts of the Commonwealth of Kentucky. They are intended to promote public confidence in the mediation process. Judges and the public are encouraged to refer to the Administrative Office of the Court's (AOC) website for the roster of mediators who voluntarily agree to comply with these Guidelines. Additional information and related forms are available at *Guidelines for Basic Mediation Training* at www.kycourts.net.

Section 2. Training and Experience

- (1) **General civil mediator.** A mediator who offers to provide general civil mediation services should have the following minimum training and experience:
 - (a) Forty hours of training by a mediation training provider covering communication skills; conflict resolution theory and practice; mediation theory, practice, and techniques; the court process; and
 - (b) Fifteen hours of mediation experience with parties in actual disputes, representing at least three cases, where the mediator is a participating mediator under the guidance of a mediator qualified under these Guidelines or a mediation training center.
- (2) **Family Mediator.** A mediator who offers to provide family mediation services should have the following minimum training and experience:
 - (a) Forty hours of training by a mediation training provider including conflict resolution, the mediation process, communication skills, the psychological aspects of divorce on families, domestic violence, substance abuse, financial and property issues, paternity, family law, and family or circuit court procedures. Family mediators are strongly encouraged to take general mediation training prior to this training.

- (b) Fifteen hours of mediation experience with parties in actual family disputes, representing at least three cases, where the mediator is a participating mediator under the guidance of a family mediator qualified under these Guidelines, or a mediation training center.
- (3) **Special Provision for Mediators in Practice Prior to Adoption of the Guidelines.** Any mediator may be deemed qualified under these Guidelines if the mediator has engaged in a mediation practice prior to the adoption of these Guidelines and submits to the Mediation Division of the Administrative Office of the Courts a written statement describing equivalent training and experience. A form is available at www.kycourts.net.

Section 3. Ethical Guidelines

- (1) **Mediation Defined.** Mediation is an informal process in which a neutral third person, called a mediator, facilitates the resolution of a dispute between two or more parties. The process is designed to help disputing parties reach an agreement on all or part of the issues in dispute. Decision-making authority remains with the parties, not the mediator. The mediator assists the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives. Parties should comply with orders of the court requiring participants in mediation to have settlement authority. See Kentucky Farm Bureau Mut. Ins. Co. v. Wright, 136 S.W.3d 455 (Ky. 2004).
Comment. A mediator's obligation is to assist the parties in reaching a voluntary outcome. The mediator should not coerce a party in any way. A mediator may make suggestions, but the parties make all settlement decisions voluntarily.
- (2) **Mediator Conduct.** A mediator's duty to protect the integrity and confidentiality of the mediation process commences with the first communication with a party, is continuous in nature, and does not terminate upon the conclusion of the mediation.
Comment (a). A mediator should not use information obtained during the mediation for personal gain or advantage.
Comment (b). The interests of the parties should always be placed above the personal interest of the mediator.
Comment (c). A mediator should not accept mediations that cannot be completed in a timely manner, or as directed by the court.
Comment (d). Although a mediator may advertise the mediator's qualifications and availability to mediate, the mediator should not solicit a specific case to mediate.
Comment (e). A mediator should not mediate a dispute when the mediator has knowledge that another mediator was appointed or selected without first consulting with the other mediator or the parties. If the previous mediation has been concluded, consultation is not necessary.
- (3) **Mediation Costs.** As early as practicable, and before the mediation session begins, a mediator should explain all fees and other expenses to be charged for the mediation. A mediator should not charge a contingent fee or base a fee upon the outcome of the mediation. In appropriate cases, a mediator should perform mediation services on a sliding scale, at a reduced fee, or without compensation, based on the parties' ability to pay.

Comment (a). In court mediations, a mediator should avoid the appearance of impropriety regarding the amount of the mediator's fee. The fee should be reasonable and no greater than the mediator's standard rate as a mediator.

Comment (b). If a party and the mediator have a dispute that cannot be resolved before commencement of the mediation as to the mediator's fee, the mediator should decline to serve so that the parties may obtain another mediator.

- (4) **Disclosure of Possible Conflicts.** Prior to commencing the mediation, the mediator should make full disclosure of any known relationships with the parties or their counsel that may affect, or give the appearance of affecting, the mediator's neutrality. A mediator should not serve in the matter if a party makes an objection to the mediator based upon a conflict or perceived conflict.

Comment (a). A mediator should withdraw from mediation if it is inappropriate to serve.

Comment (b). If, after commencement of the mediation, the mediator discovers that such a relationship exists, the mediator should make full disclosure as soon as practicable.

- (5) **Mediator Qualifications.** A mediator should inform the participants of the mediator's qualifications and experience.

Comment. A mediator's qualifications and experience constitute the foundation upon which the mediation process depends; therefore, if there is any objection to the mediator's qualifications to mediate the dispute, the mediator should withdraw from the mediation. Likewise, the mediator should decline to serve if the mediator feels unqualified to do so.

- (6) **The Mediation Process.** The mediator should inform and discuss with the participants the rules and procedures pertaining to the mediation process.

Comment (a). A mediator should inform the parties about the mediation process no later than the opening session.

Comment (b). At a minimum, the mediator should inform the parties of the following:

- (i) The mediation is private. Unless otherwise agreed by the participants, only the mediator, the parties and their representatives are allowed to attend;
- (ii) The mediation is informal. There are no court reporters present; no record is made of the proceedings; no subpoena or other service of process is allowed; and no rulings are made on the issues or the merits of the case;
- (iii) The mediation is confidential;
- (iv) Any outcome rests with the parties; and
- (v) The mediator does not render legal advice or represent any party.

- (7) **Convening the Mediation.** Unless the parties agree otherwise, the mediator should not convene a mediation session unless all parties and their representatives ordered by the court are present, corporate parties are represented by officers or agents who have demonstrated to the mediator that

they possess adequate authority to negotiate a settlement, and an adequate amount of time has been reserved by all parties to the mediation to allow the mediation process to be productive.

(8) **Confidentiality.**

(a) Mediation sessions should be closed to all persons other than the parties, their legal representatives, and other persons invited by the mediator with the consent of the parties.

(b) Mediation should be regarded as settlement negotiations for purposes of Kentucky Rule of Evidence 408.

(c) Mediators should not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matters are considered confidential and privileged in nature except on order of the Court for good cause shown. This privilege and immunity reside in the mediator and may not be waived by the parties.

(d) Nothing in this rule prohibits the mediator from reporting abuse according to K.R.S. 209.030, K.R.S. 620.030, or other applicable law.

Comment. A mediator should not permit recordings or transcripts to be made of mediation proceedings. A mediator should maintain confidentiality in the storage and disposal of records and render anonymous all identifying information when materials are used for research, educational or other informational purposes.

(9) **Report to Court.** The mediator reports to the court that the mediation has not occurred, has not been completed, or that the mediation has been completed with or without an agreement on any or all issues. With the consent of the parties, the mediator may also identify those matters, which, if resolved or completed, would facilitate the possibility of a settlement.

(10) **Impartiality.** A mediator should be impartial toward all parties.

Comment. If a mediator or the parties find that the mediator's impartiality has been compromised, the mediator should offer to withdraw from the mediation process. Impartiality means freedom from favoritism or bias in word, action, and appearance; it implies a commitment to aid all parties in reaching a settlement.

(11) **Disclosure and Exchange of Information.** A mediator should encourage the disclosure of information and should assist the parties in considering the benefits, risks, and the alternatives available to them.

(12) **Professional Advice.** A mediator should not give legal or other professional advice to the parties except as provided in Section 3(17)(b) *infra* re: Evaluative Mediation.

Comment (a). In appropriate circumstances, a mediator should encourage the parties to seek legal, financial, tax or other professional advice before, during, or after the mediation process.

Comment (b). A mediator should not convene the mediation if the mediator has reason to believe that a pro se party fails to understand that the mediator is not providing legal representation for the pro se party.

- (13) **No Judicial Action Taken.** A person serving as a mediator should not subsequently serve as a judge, master commissioner, guardian ad litem, or in any other judicial or quasi-judicial capacity in matters that are the subject of the mediation, unless the parties otherwise agree.
Comment. It is generally inappropriate for a mediator to serve in a judicial or quasi-judicial capacity in a matter in which the mediator had communications with one or more parties without all other parties present. For example, an attorney-mediator who has served as a mediator in a pending litigation should not subsequently serve in the same case as a special master, guardian ad litem, or in any other judicial or quasi-judicial capacity with binding decision-making authority. Notwithstanding the foregoing, where an impasse has been declared at the conclusion of a mediation, the mediator, if requested and agreed to by all parties, may serve as the arbitrator in a binding arbitration of the dispute, or as a third-party neutral in any other alternative dispute proceeding, so long as the mediator believed nothing learned during private conferences with any party to the mediation will bias the mediator or will unfairly influence the mediator's decisions while acting in the mediator's subsequent capacity.
- (14) **Termination of Mediation Session.** A mediator should postpone, recess, or terminate the mediation process if it is apparent to the mediator that continuation of the process is unproductive.
- (15) **Agreement in Writing.** If an agreement is reached during the mediation conference, it is reduced to writing and signed by the parties. The parties are responsible for the drafting of the agreement, although the mediator may assist in the drafting of the agreement with the consent of the parties.
- (16) **Mediator's Relationship with the Judiciary.** A mediator should avoid the appearance of impropriety in the mediator's relationship with a member of the judiciary or the court staff with regard to appointments or referrals to mediation.
- (17) **Mediation Styles**
- (a) **Facilitative Mediation.** The facilitative mediator structures a process to assist the parties in reaching a mutually agreeable outcome. The mediator asks questions; validates and normalizes parties' points of view; searches for interests underneath the positions taken by parties; and assists the parties in finding and analyzing options for resolution. The facilitative mediator does not make recommendations to the parties, give his or her own advice or opinion as to the outcomes of the case, or predict what a court would do in the case. The mediator is in charge of the process, while the parties are in charge of the outcome. Facilitative mediators want to ensure that parties come to agreements based on information and understanding. They hold joint sessions with all parties present so that the parties can hear each other's points of view, and hold confidential sessions with individual parties. They want the parties to have the major influence on decisions made.

- (b) **Evaluative Mediation.** Evaluative mediation is modeled after settlement conferences held by judges. The evaluative mediator assists the parties in reaching resolution by pointing out the weaknesses of their case. An evaluative mediator might make formal or informal recommendation to the parties as to the outcome of the issues. The evaluative mediator is more concerned with the legal rights of the parties, rather than the parties' needs and interests, and evaluation is based on legal concepts of fairness. The evaluative mediator meets most often in separate meetings with the parties and their attorneys, practicing "shuttle diplomacy." He/she helps the parties and their attorneys evaluate their legal position and the costs versus the benefits of settling in mediation rather than pursuing litigation. The evaluative mediator structures the process and directly influences the outcome of mediation.

Comment (a). Providing Information. Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that he/she is qualified to provide by virtue of training or experience.

Comment (b). Independent Legal Advice. When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator should advise the party of the right to seek independent legal counsel.

Comment (c). Personal or Professional Opinions. A mediator should not offer a personal or professional opinion intended to coerce the parties, decide the dispute, or direct a resolution of any issue. Consistent with standards of impartiality and preserving party self-determination, however, a mediator may point out possible outcomes of the case and discuss merits of a claim or defense. A mediator should not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.

- (c) **Transformative Mediation.** Transformative mediation is based on the values of "empowerment" and "recognition." The potential for transformative mediation is that any or all parties, or their relationships, may be transformed during the mediation. In these ways, the values of transformative mediation mirror those of facilitative mediation. In transformative mediation, the parties structure the process, with the mediator following their lead, and individual caucus sessions are rarely used.

(18) **Responsibilities to the Profession and the Public**

- (a) **Community Service.** A mediator is encouraged to provide at least twenty hours per year of mediation services in the community for nominal or no fee.
- (b) **Training.** A mediator should acquire substantive knowledge and procedural skills in her/his specialized area of practice.
- (c) **Continuing Education.** A mediator should participate in continuing mediation education and be personally responsible for ongoing professional growth. A mediator is encouraged to join with other mediators and members of related professions to promote mutual professional development. A mediator should obtain at least four hours of continuing education every two years.

The following are *some* ways to obtain continuing education:

- (i) Attending, lecturing, or teaching at a live lecture or seminar on a topic related to the practice of mediation;
 - (ii) Listening or viewing audio, video, or web based presentations on a topic related to mediation;
 - (iii) Co-mediating or supervising trainees as part of the trainee's mentorship requirements;
 - (iv) Participating as a trainer or coach in general or family mediation trainings;
 - (v) Authoring or editing written materials submitted for publication that have significant intellectual or practical content directly related to the practice of mediation.
- (d) **Promotion of Mediation.** A mediator should promote the advancement of mediation by providing and supporting efforts to educate the public and members of other professions, and by encouraging and participating in research and publication of accurate information about mediation.
- (e) **Advertising.** A mediator should make only accurate statements about the mediation process, its cost and benefits, and about the mediator's qualifications.

Section 4. Roster of Mediators

AOC will maintain a Roster of Mediators who agree to comply with these guidelines. Any mediator who wishes to be included on this roster should make application to the AOC. See form on www.kycourts.net.

This Order shall be effective April 15, 2005 and until further Order.

Entered this the 12th day of April 2005.


CHIEF JUSTICE