

Supreme Court of Kentucky

2022-04

ORDER

In Re: Adoption of Section XIII, Rule 99 and Rule 100 of the Kentucky Rules of Civil Procedure

Under Section 116 of the Kentucky Constitution and Supreme Court Rule 1.010, the Supreme Court hereby adopts Section XIII, Rule 99 and Rule 100 of the Rules of Civil Procedure (CR) and replaces in their entirety the Model Mediation Rules (Administrative Order 1999-01) and Administrative Procedure Part XII, Mediation Guidelines for Court of Justice Mediators (Administrative Order 2005-02), effective February 1, 2022.

XIII MEDIATION RULES

CR 99 Mediation

Rule 99.01 Authority, preamble and scope

New Rule 99.01 shall read:

1. These rules are adopted pursuant to the constitutional authority granted to the Supreme Court and consistent with Kentucky Revised Statutes (KRS) 454.011 and 446.010.
2. The Supreme Court finds that under some circumstances the process known as mediation may provide an efficient and cost-effective alternative to traditional litigation, and, further, that the wise and judicious use of mediation may benefit litigants.
3. Mediation allows parties an opportunity to resolve their issues through an informal process independent of, and outside of, the court process. A mediator serves as a neutral third person who encourages and assists settlement by facilitating communication between the parties.
4. These Rules shall be followed in any mediation ordered by the trial court. Parties are encouraged to follow these Rules in mediations not ordered by the trial court. However, nothing in these Rules shall prohibit parties from resolving disputes through other methods.

5. Mediation shall not be ordered in any case where one party may pose a risk of harm to other participants, and, in no event, shall mediation be ordered in conflict with KRS 403.036.
6. While the Supreme Court intends that the mediation process remain fully independent of, and outside of, the court process, a trial court retains its discretion to enforce its order to mediate; provided, however, a trial court shall not reallocate the cost of mediation after the mediation is completed and shall not fine, sanction, or penalize any party, or reallocate the cost of mediation because a case is settled after the court-ordered mediation.
7. No local rule, practice, procedure, standard order, or other policies of any trial court may conflict with or controvert these Rules.

Rule 99.02 Mediation defined

New Rule 99.02 shall read:

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.

Rule 99.03 Referral of cases to mediation

New Rule 99.03 shall read:

At any time on its own motion or on motion of any party, the court may refer a case or portion of a case for mediation. Courts shall not, however, follow any blanket policy or practice of referring all cases, or any particular type of case, to mediation, nor any blanket policy or practice requiring completion of mediation as a pre-condition to assigning a trial date. In each case, the court shall take the following factors into consideration:

1. The stage of the litigation, including the need for discovery, and the extent to which it has been conducted.
2. The nature of the issues to be resolved.
3. The value to the parties of confidentiality, rapid resolution, or the promotion or maintenance of on-going relationships.
4. The willingness of the parties to mutually resolve their dispute.

5. Other attempts at dispute resolution.
6. The ability of the parties to participate in the mediation process including the ability of any party, counsel or required representative to participate in virtual mediation.
7. The cost to the parties.

Rule 99.04 No stay of proceedings

New Rule 99.04 shall read:

Referral of a case to mediation shall not operate as a stay of discovery or other proceedings unless otherwise ordered by the court or agreed to in writing by the parties.

Rule 99.05 Appointment of mediator

New Rule 99.05 shall read:

Within fifteen (15) days of referral, the parties shall agree on a mediator or a mediation service. If the parties cannot agree, they shall notify the court. Only if the parties cannot agree on a mediator, the court will select a mediator who is recognized as a mediator in civil actions.

Rule 99.06 Mediator compensation

New Rule 99.06 shall read:

The mediator shall be compensated at the rate agreed between the mediator and the parties if the mediator is chosen by agreement. If the mediator is appointed by the court, the fee for the mediator shall be no greater than the mediator's standard rate as a mediator. Unless otherwise agreed by the parties or ordered by the court, the parties shall equally divide the mediator's professional fees.

Rule 99.07 Mediation procedure

New Rule 99.07 shall read:

1. The mediation conference shall be held at a time and place agreed between the parties. If the parties cannot agree, the court may direct the time or place of mediation.

2. The mediator may confer with the parties or their counsel prior to the mediation conference for the purpose of establishing procedures for the mediation conference and such other reasons the mediator deems appropriate to advance the process. These conferences may be *ex parte* at the mediator's discretion.
3. The mediator may require the parties to submit a confidential statement of the case or other materials that the mediator reasonably believes appropriate for efficiently conducting the mediation conference.

Rule 99.08 Attendance at mediation conference

New Rule 99.08 shall read:

1. Unless otherwise ordered by the court or explicitly agreed to by the parties, the parties and their counsel, if any, shall attend the mediation conference.
2. If a party is a public entity, it shall appear by the presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body or officer of the entity.
3. If a party is an organization other than a public entity, it shall appear by the presence of a representative, other than the party's counsel of record, who has full authority to settle.
4. If any party is insured for the claim in dispute, that party shall also be required to have its insurance carrier(s) present by the presence of a representative of the insurance carrier(s) who is not that carrier's outside counsel; this representative must have full settlement authority. A court may not restrict a carrier representative from having telephone or other communication to seek additional authority.

Unless expressly ordered by the court, a party who is represented by counsel and the presence of a representative of the party's insurance carrier is not required to be present for the mediation.

5. Full authority to settle, or full settlement authority, means that the representative has authority to negotiate settlement on behalf of a particular party, organization, entity or insurance carrier. It does not require authority to settle for any specific amount or terms.
6. Unless otherwise agreed by the parties or ordered by the court, a mediation may be entirely virtual, or the presence of any attendee may be virtual.

Rule 99.09 Reporting to the court

New Rule 99.09 shall read:

1. If the court designates the mediator, that mediator shall notify the court promptly by written notice to the court and the parties when a case is not accepted for mediation.
2. At any time after a case has been accepted, the mediator may refer it back to the court for good cause, which shall be by written notice to the court and the parties.
3. If a case is settled prior to or during mediation, the attorneys shall promptly notify the court and prepare and submit to the court an order reflecting the fact of settlement as in any other case.
4. If some but not all of the issues in the case are settled during mediation or if agreements are reached to limit discovery or on any other matter, the parties shall submit a joint statement to the court enumerating the issues that have been resolved and the issues that remain for trial. This statement shall be submitted within 10 days of the termination of mediation.
5. At the conclusion of cases accepted for mediation, the attorneys shall promptly report to the court in writing the fact that the mediation process has ended. If the parties do not reach an agreement as to any matter at mediation, their attorneys shall promptly report the lack of an agreement to the court. The attorneys by unanimous agreement, or the mediator with explicit unanimous consent of the parties, may report to the court identifying those matters which, if resolved or completed, would facilitate the possibility of settlement.

Rule 99.10 Agreement

New Rule 99.10 shall read:

If an agreement is reached during the mediation conference, it shall be reduced to writing and signed by the parties. The parties shall be responsible for the drafting of the agreement, although the mediator may assist in the drafting of the agreement with the consent of the parties.

Rule 99.11 Confidentiality

New Rule 99.11 shall read:

1. Unless agreed by the parties and the mediator, mediation conferences shall be closed to all persons other than the parties and their legal representatives.
2. No part of mediation may be recorded without express agreement of the parties, counsel and the mediator.
3. Mediation shall be regarded as settlement negotiations for purposes of KRE 408.
4. For purposes of this rule, all mediation communications, including documents, communicated during the mediation process are both privileged and confidential. For this purpose, the mediation process includes any communications with the mediator in advance of, during and after the mediation conference. They are not subject to disclosure through discovery or any other process and are not admissible into evidence in any judicial or administrative proceeding. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its disclosure or use during the mediation.
5. A mediator shall not disclose, directly or indirectly, to any non-participant any information communicated to the mediator by a participant within the mediation process.
6. It is the responsibility of each party and/or counsel to explicitly advise the mediator precisely what information communicated to the mediator is communicated in confidence so that it will not be divulged to other mediation participants.
7. A mediator shall not disclose, directly or indirectly, to any participant in the mediation any information communicated to the mediator in confidence unless the mediator is given permission by the communicating participant to do so. A mediator may encourage a participant to permit disclosure, but absent such permission, the mediator shall not disclose.
8. Unless otherwise allowed under these Kentucky Mediation Rules, a mediator shall not disclose to, nor discuss with, court officials or staff any information communicated to the mediator by any participant within the mediation process, including correspondence or

communications regarding scheduling or attendance, nor may the mediator comment about the mediation negotiations in any respect.

9. Mediators shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matters shall be 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.
10. Nothing in this rule prohibits a mediator from reporting abuse according to KRS 209.030, KRS 620.030, or other applicable law.
11. Any executed settlement document shall not be deemed privileged and confidential as provided in this rule unless the parties explicitly stipulate that the terms of settlement are to remain confidential. In any event, however, should the settlement agreement be required as proof in a proceeding to enforce the terms of settlement, such settlement agreement shall no longer have the privilege of confidentiality and may be introduced into evidence.
12. Notwithstanding any other provision of this CR 99.11, a mediator will not be bound by the confidentiality requirements of mediation to the extent allowed by a court in considering a claim against the mediator.

CR 100 Code of Conduct for Mediators

Rule 100.01 Purpose

New Rule 100.01 shall read:

1. This Code of Conduct for Mediators shall apply to all mediators conducting mediations in which Kentucky Mediation Rules apply.
2. This Code of Conduct is intended to instill and promote public confidence in the mediation process and to provide uniformity and minimum standards for mediator conduct.
3. It is the mediator's role to facilitate communication and understanding among the parties and to assist them in reaching agreement. The mediator should not, however, render a decision on the issues in dispute. In mediation, the ultimate decision whether, and on what terms, to resolve the dispute belongs to the parties

Rule 100.02 Competency

New Rule 100.02 shall read:

A mediator's most important qualification is the mediator's competence in procedural aspects of facilitating the resolution of disputes rather than the mediator's familiarity with technical knowledge relating to the subject of the dispute. Therefore, a mediator shall obtain necessary skills and substantive training appropriate to the mediator's practice and upgrade those skills on an ongoing basis.

Rule 100.03 Impartiality

New Rule 100.03 shall read:

1. A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.
2. As early as practical and no later than the beginning of the first session, the mediator shall make full disclosure of any known relationships with the parties or their counsel, any personal knowledge of the facts at issue, or an economic interest in the outcome that may affect or give the appearance of affecting the mediator's impartiality.
3. The mediator shall decline to serve or shall withdraw from serving if:
 - a. a party objects to his/her serving on grounds of lack of impartiality, and after discussion, the party continues to object; or
 - b. the mediator determines he/she cannot serve impartially.

Rule 100.04 Confidentiality

New Rule 100.04 shall read:

A mediator shall strictly endeavor to protect confidentiality as required by CR 99. Subject to exceptions set forth in CR 99.11, a mediator shall maintain the confidentiality of all information obtained within the mediation process.

Rule 100.05 Consent

New Rule 100.05 shall read:

1. A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator and the party's options within the process.

2. In appropriate circumstances, a mediator may inform the parties of the importance of seeking legal, financial, tax or other professional advice before, during or after the mediation process.

Rule 100.06 Self-determination

New Rule 100.06 shall read:

1. A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.
2. A mediator may raise questions for the participants to consider regarding their perceptions of the dispute as well as the acceptability of proposed options for settlement and their impact on third parties. Furthermore, a mediator may suggest for consideration options for settlement in addition to those conceived of by the parties themselves.
3. A mediator shall not impose his/her opinion about the merits of a dispute or about the acceptability of any proposed option for settlement. Upon request, however, a mediator may provide evaluative observations.

Rule 100.07 Separation of mediation from legal and other professional advice

New Rule 100.07 shall read:

A mediator shall limit himself or herself solely to the role of mediator and shall not give legal or other professional advice during the mediation.

Rule 100.08 Conflicts of interest

New Rule 100.08 shall read:

1. A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.
2. A mediator shall not charge a contingent fee or a fee based on the outcome of the mediation.
3. A mediator shall not use information obtained or relationships formed during mediation for personal gain or advantage.

4. A mediator shall not knowingly contract for mediation services which cannot be delivered or completed as directed by a court or in a timely manner.
5. A mediator shall not give or receive any commission, rebate or other monetary or non-monetary form of consideration from a party or representative of a party in return for referral or expectation of referral of clients for mediation services, except that a mediator may give or receive de minimis offerings such as sodas, cookies, snacks or lunches served to those attending mediations conducted by the mediator and intended to further those mediations or intended to show respect for cultural norms.
6. A mediator should neither give nor accept any gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

Rule 100.09 Protecting the integrity of the mediation process

New Rule 100.09 shall read:

A mediator shall encourage mutual respect between the parties and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

This Order shall be effective February 1, 2022.

Entered this 14th day of January 2022.


CHIEF JUSTICE

All sitting; all concur.