A PRIMER ON MEDIATION IN ALABAMA

By H. Harold Stephens
Bradley Arant Boult Cummings LLC

I. INTRODUCTION

"Conflict is a growth industry in America." Whether one agrees with this observation or not, the conclusion seems inescapable that our nation has become increasingly litigious. Consequently, our judicial system has diligently searched for alternative means of dispute resolution.

A. Mediation - What is It?

Mediation has been defined as "a process in which individuals meet with a neutral party in an attempt to resolve disputed issues with the objective of reaching a mutually agreeable, workable solution." *The Mediation Process and the Skills of Conflict Resolution* by Troy Anthony Smith at p. 35. Stated differently, "Mediation is a process by which the parties submit their dispute to an impartial person known as the mediator. The mediator may suggest ways for resolving the dispute, but cannot impose a settlement on the parties." Rule 1(a) of the Alabama Civil Court Mediation Rules (1992).

In its simplest form, mediation represents a procedure for non-binding assisted settlement negotiation. Mediation is one of many different alternative methods of dispute resolution with others including, but not limited to, arbitration, summary jury trials and mini-trials. Certainly, at the present time, mediation represents the most widely used form of ADR in Alabama. As Mr. Stephen Benefield, past Chairman of the Alabama State Bar Committee on Alternative Methods of Dispute Resolution observed, "Mediation is emphasized, however, because it has been particularly embraced by lawyers, judges and the public as providing an effective means of making the dispute resolution process more user friendly." *Alternative Dispute Resolution Procedures in Alabama* at p. 3.

B. Why Mediate?

The advantages of mediation have been widely recognized by members of the bench and bar across our state. The most commonly identified benefits of mediation include the following:

1. A win-win alternative.

Any experienced litigation attorney will tell you that in any given jury trial there will be at least one loser and sometimes two. In contrast to the conciliatory nature of dispute resolution offered by mediation, a jury trial forces the combatants (the parties and their legal counsel) to fight a battle with strange rules on a foreign and hostile battlefield where arbitrarily selected strangers will choose who shall win and who must lose. John Travolta plays the role of a plaintiff's attorney pursuing an environmental toxic tort claim in the movie "A Civil Action". Approximately mid-way through the movie, Travolta observes,

> The odds of a plaintiff's lawyer winning in civil court are 2 to 1 against. Think about that for a second, your odds of surviving a game of Russian Roulette are better than winning the case at trial - twelve times better. So why does anyone do it? They don't; they settle. Out of the 780,000 cases filed each year, only 12,000 or one and one-half percent (1 ½%), ever reach a verdict. The whole idea of lawsuits is to settle, to compel the other side to settle. And you do that by spending more money than you should, which forces them to spend more money than they should, and whoever comes to their senses first, loses. Trials are a corruption of the entire process and only fools with something to prove end up ensnared in them.

Ultimately, of course, even a trial may not be the final resolution of a dispute by means of litigation. For either side unhappy with the decision of the "arbitrarily selected strangers", the prospect of an appeal offers yet another opportunity to spend more time and more money in an ongoing legal battle.

In stark contrast, mediation offers a win-win alternative. At the conclusion of the successful mediation, both sides should have a certain satisfaction in reaching a mutually acceptable resolution of their dispute. There are no losers in the mediation process. Even in those cases not settled at mediation, the parties and their legal counsel should have a better understanding of their opponent's position and the parameters for settlement. Many cases not resolved at mediation will subsequently be settled as a result of continued negotiations following mediation.

2. Control

For the litigants who arrive to begin their jury trial, important decisions and the ultimate outcome will be rendered not by the parties or their legal counsel, but instead by a judge and/or jury. On the day of mediation, the parties with advice of their counsel are the only decision-makers. Their fates are not in the hands of a judge, a jury or even the mediator. One of the clear advantages of mediation is that the parties maintain control of resolution of their case.

3. Certainty

Any attorney who has ever tried a case in front of a jury will tell you that there are no sure things in a jury trial. Evidentiary rulings by the trial judge can significantly affect the direction of a given case. The anticipated "star" witness often is not. Furthermore, even with the assistance of professional jury consultants, lawyers and their clients can never feel entirely secure as to a given jury's group mentality until the verdict is announced in open court. In contrast to the many risks and uncertainties associated with a trial, mediation affords certainty of outcome based upon the positions taken by the parties during the mediation process. Again, the parties are ultimately in control of their own destiny at the mediation table.

4. Confidentiality

The entire mediation process is confidential. Any offers made or positions taken by parties at mediation constitute settlement offers and are entirely inadmissible in any subsequent proceeding. No views expressed or statements made by the parties, their attorneys or the mediator should be disclosed outside the mediation. Mediators are not subject to subpoena and cannot and should not testify regarding the mediation or any events which occurred during the mediation. Mediation affords a means of private and confidential dispute resolution. For many litigants, this is far more desirable than a highly publicized trial.

5. Flexibility

Most lawsuits are focused on a plaintiff's claim for monetary damages and a defendant's effort to avoid or minimize any award of damages. In litigation, a jury finds for one party and against the other and, in the event of a plaintiff's verdict, the jury awards monetary damages. In contrast, mediation offers the parties and their legal counsel an opportunity to use imagination and flexibility in trying to resolve disputes. It is the unique aspect of mediation that settlement is only limited by the creativity of the parties and/or legal counsel. Creative settlement of a lawsuit can occur at the mediation conference table, not in the courtroom.

6. Savings of time and money

Absent an especially complex dispute, most cases can be successfully mediated in one day and sometimes less. Certain complex litigation may require mediation sessions extending for multiple days. Even in such complex litigation, an extended mediation is significantly faster and cheaper than a month long trial. For almost any case in litigation, mediation offers the opportunity for substantial savings of time and money.

7. Protection of relationships

"Mediation is particularly useful in situations where the parties have an ongoing relationship." *The Mediation Process and the Skills of Conflict Resolution* by Troy Anthony Smith at p. 40. Indeed, where there is an ongoing business relationship (such as between a retailer and wholesaler), employment relationship or personal relationship (such as between relatives or neighbors), the trial of such litigation only contributes toward destruction of relationships. In contrast, mediation offers an alternative means of dispute resolution which can hopefully preserve and protect such ongoing relationships.

II. PRE-MEDIATION CONCERNS

The author offers the following step-by-step approach to recognition and resolution of various pre-mediation concerns. Ultimately, each case must be carefully considered and the pre-mediation issues set forth below resolved on a case-by-case basis.

A. Step One: What to Mediate?

At a very early stage in any type of litigation, the parties and their counsel should consider this preliminary question: Is this a case which should be mediated? For those of us who serve as mediators, we are inclined to suggest that every case can and should be mediated. However, further reflection suggests that such a simplistic view is, perhaps, inaccurate.

What should be mediated? Certainly most cases are appropriate for mediation. However, counsel for the parties should be cognizant of the fact that certain types of cases do not lend themselves to resolution by means of mediation. For example, a case which seeks declaratory or other equitable relief or a case involving constitutional law issues may be unsuitable for resolution by mediation. A declaratory judgment action commenced by an insurer who seeks to avoid any duty to defend or indemnify its insured will rarely be a candidate for successful mediation. Similarly, a case in which liability is seriously disputed and injuries are either catastrophic or very severe may be difficult to resolve at mediation. Nevertheless, a talented mediator can often bring the parties and their lawyers to reach common ground and a mutually satisfactory resolution.

Even the appellate courts, including the United States Court of Appeals for the Eleventh Circuit and more recently the Alabama appellate courts, have implemented an appellate mediation program. While the mediation of a lawsuit after a trial poses some additional challenges, appellate mediation has still often proven successful in cases pending before the Alabama Supreme Court and the Alabama Court of Civil Appeals. Indeed, the Alabama appellate mediation program has generally enjoyed a success rate of approximately 50% of the cases mediated. At the appellate level, a good settlement is often better than a bad reported public decision which sets judicial precedent for future cases.

While there are some cases which do not lend themselves to mediation, the vast majority of lawsuits can and should be considered for mediation. Employment discrimination claims, product liability cases, business disputes, automobile accident litigation and other categories of cases too numerous to mention are all potential candidates for successful mediation. Furthermore, even in those cases in which mediation may ultimately prove unsuccessful (e.g., a case in which liability is questionable but the claimed compensatory and/or punitive damages are very high), counsel should nevertheless consider the option of mediation. Even if such a case ultimately is not resolved at mediation, the parties may be able to come much closer than expected toward reaching an amicable resolution and may, at a later time, be able to reach an agreed upon settlement.

B. Step Two: When to Mediate?

The timing for mediation is absolutely critical. In some instances, counsel for both the plaintiff and defendant have conducted some preliminary investigation and feel comfortable proceeding to mediation with little, or no, formal discovery having been undertaken. Moreover, some trial courts are increasingly directing the parties to proceed to mediation at an early stage in the litigation. It has generally been the author's experience that both the courts and opposing counsel are cooperative and understanding that some preliminary discovery may be desirable or necessary prior to successful mediation.

When should you mediate? In some instances, counsel for the defendant may feel that the case is one of probable liability and that the corporate representative of the defendant will not make a particularly good witness. In these instances, counsel for the defendant may wish to proceed with mediation immediately. Likewise, in other cases, counsel for the plaintiff may be concerned that the plaintiff would not be the best of witnesses or may make significant admissions during the course of a deposition. Under such circumstances, counsel for the plaintiff may wish to encourage mediation at an early stage. Furthermore, there are some cases where the opportunity to confidentially resolve a matter can be very important to both sides of a dispute. A desire to mediate early should never be equated with simply a sign of weakness by either party.

In most instances, the author has observed that if litigation has already commenced mediation is most likely to succeed if both sides have at least had an opportunity to engage in some preliminary discovery, such as exchanging of documents and/or taking the depositions of the opposing parties. Only through such discovery is counsel able to evaluate the appearance, demeanor and credibility of the opposing party. An ideal time to mediate is when counsel for the parties have conducted sufficient preliminary discovery to familiarize themselves with the case and the opponent's position but prior to the time in which so much time and money have been invested by one party or the other in attorneys' fees, expert fees and/or costs to make settlement economically impracticable.

C. Step Three: Who to Select as a Mediator?

If a case has been determined to be one in which mediation is appropriate and the timing is right, counsel is then faced with the task of determining who to suggest or select as a mediator. In some instances, a mediator may be appointed by the court and the parties or their legal counsel may not be afforded any input in the selection process. In many cases, judges will ask counsel if they are able to agree upon a mediator. Who do you choose?

In general, there are two schools of thought in choosing the best mediator. Some practitioners are proponents of the "mediator expert" approach. These lawyers would employ a mediator who is an expert in the field of the subject litigation (e.g., in an employment discrimination case, employ a mediator who specializes in labor and employment matters). The "mediator expert" school would insist that only by having a mediator with knowledge, training and experience in the field of the case to be mediated can one expect a successful mediation.

Nevertheless, other practitioners favor the "expert mediator" approach. Lawyers who support this view would argue that their preference is for an experienced and able mediator and that his or her expertise in the field of the subject litigation is irrelevant. The "expert mediator" school would argue that a talented mediator can resolve any case even though he or she may not have significant knowledge, training or experience in the specific area of the law involved in the pending litigation.

Frankly, the best approach is a case-by-case analysis and decision in this regard. Certainly, in many cases, the mediation skills of the mediator are far more important than his or her technical expertise. A mediator with good people skills may be of critical importance. On the other hand, in particular types of litigation (e.g., tax disputes, patent infringement or other

intellectual property matters, security violations, ERISA claims, etc.), it may be helpful to have mediators with subject matter expertise if very specialized areas of the law are in dispute.

III. THE MEDIATION PROCESS

A. Mediation Preparation and the Mediation Position Statement.

Most mediators will request and nearly all allow an opportunity for legal counsel to submit position statements in advance of the mediation. Clearly, this is an excellent opportunity to provide significant, useful information to the mediator about the case and about the party's position in particular.

In preparing for mediation, one should be mindful of opportunities to prepare and submit documents, records, chronologies or other materials which may be of valuable assistance in advance of the mediation. Such pre-mediation preparation can prove useful on the day of mediation not only to counsel, but also to the mediator.

Furthermore, a pre-mediation telephone conference may also prove helpful. This allows counsel an opportunity to provide the mediator with an overview of the case as well as insight into any significant issues or problems which may arise in the mediation.

B. Mediation Presentation.

Mediation in its infancy nearly always began with a joint session with everyone present. The author has noted an increasing trend away from an opening joint session. If there is such a session, legal counsel are with increasing frequency employing a variety of demonstrative aids during opening statements at mediation. This can be of great assistance to present a professional and persuasive opening statement. This may include use of medical records or photographs, preparing a summary of damages claimed and/or presenting a PowerPoint presentation. However, careful consideration should be given to any opening statement. The words of a skilled litigator not only have the ability to persuade but also the ability to upset or even offend. An opening session which only serves to alienate or cause the parties to become more entrenched in their positions would best be avoided.

C. The Mediation Caucuses.

After an opening session in which each party has had an opportunity to present his or her opening statement, the mediator will meet separately with plaintiff and plaintiff's counsel and with the defendant and defense counsel. Typically, the initial caucuses are longer as the mediator learns about the case, the parties and the critical issues to be addressed and resolved. Preliminary caucus sessions focus much more on the underlying facts and later sessions tend to generally be more centered on negotiation of dollar amounts.

IV. MEDIATION RULES AND STATUTES

A. Alabama Civil Court Mediation Rules.

In 1992, the Alabama Supreme Court adopted the Alabama Civil Court Mediation Rules. These rules are simple and straightforward, consisting of fifteen (15) rules of approximately five pages. Anyone involved in mediation in Alabama should read and be familiar with these Rules. Rule 1 outlines the definition of mediation and the scope of the mediation rules (which apply in circuit courts but not in district courts in Alabama). Rule 2 sets forth the manner in which mediation may be initiated: (1) Upon motion of a party; (2) by suggestion of the Court; or (3) by agreement of the parties. Rule 2 also provides for a stay of proceedings pending mediation.

Rules 3 through 6 relate to the appointment of a mediator, qualifications of a mediator, vacancies and assistance during mediation, respectively. Rule 7 of the Alabama Civil Court Mediation Rules defines the time and place of mediation and Rule 8 relates to identification of matters in dispute. Rule 9 addresses the authority of the mediator. Rules 10 and 11 relate to privacy and confidentiality. Rule 12 provides that no record shall be made of the mediation proceedings. Rule 13 governs termination of mediation which may be ended by the parties, their attorneys or the mediator. Rule 14 governs interpretation and application of the rules and Rule 15 provides for mediation fees, expenses and deposits.

B. Alabama Rules of Civil Procedure.

Also, in 1992, the Alabama Supreme Court amended Rule 16 of the Alabama Rules of Civil Procedure which governs pre-trial conferences to provide, in pertinent part, as follows:

> (c) The participants at any conference under this Rule may consider and take action with respect to . . . (7) The possibility of settlement or the voluntary use by all parties of extrajudicial procedures to resolve the dispute, including mediation conducted pursuant to the Alabama Civil Court Mediation Rules....

ALA. R. CIV. PROC. 16(c)(7).

C. Mandatory Pre-trial Mediation Act.

On May 17, 1996, the Alabama Legislature enacted Section 6-6-20 of the Code of Alabama which sets forth a procedure for mandatory pre-trial mediation upon motion by a party to a civil action. The provisions of Section 6-6-20 provide that mediation is mandatory where (1) at any time all parties agree to mediation or (2) upon motion by any party. ALA. CODE § 6-6-20(b). It should be noted that a party who moves to compel mediation under the Act will be responsible to pay the entire cost of mediation unless agreed otherwise. The Mandatory Mediation Act excludes matters involving domestic violence, child support or child custody disputes.

D. Alabama Code of Ethics for Mediators.

On December 14, 1995, the Alabama Supreme Court adopted the Alabama Code of Ethics for Mediators. This Code of Ethics sets forth general guidelines for individuals who serve as mediators. The Code of Ethics addresses such matters as the mediator's role, standards applicable to mediators, the responsibility of mediators to the Court, impartiality and conflict of interest issues, confidentiality, professional advice, fees, expenses and other issues.

E. United States District Court for the Northern District of Alabama ADR Plan.

Effective December 1, 1993, the United States District Court for the Northern District of Alabama adopted an Alternative Dispute Resolution Plan. In its introduction, the Alternative Dispute Resolution Plan for the Northern District of Alabama states as follows:

> The disposition rate for cases in the Northern District of Alabama is presently, and consistently has been, very favorable, ranking the district among the most efficient courts in the nation. Nevertheless, implementation of an Alternative Dispute Resolution (ADR) Plan in the district offers several potential advantages for the court system, attorneys and litigants. The variety of mechanisms available through ADR present opportunities for resolving some disputes more quickly than traditional litigation would allow. Further, ADR can greatly reduce the expense to the parties of resolving a dispute. ADR processes frequently are used in the early stages of case development, providing substantial savings in discovery and expert witness costs.

United States District Court for the Northern District of Alabama, Alternative Dispute Resolution Plan at p. 1.

V. CONCLUSION

Abraham Lincoln once observed,

> Discourage litigation, persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser - in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man.

Mr. Lincoln would no doubt be pleased to know that mediation has become widely used in Alabama state and federal courts. As an alternative means of dispute resolution, mediation offers members of the legal profession a new and different role in society as peacemakers.

H. Harold Stephens
Bradley Arant Boult Cummings LLC
200 Clinton Avenue West, Suite 900
Huntsville, AL 35801
(256) 517-5100
hstephens@babc.com