

# FAMILY COURT MEDIATION

YOUR CASE MAY BE SUBJECT TO  
MEDIATION.

## What is Mediation?

Mediation is an informal process in which a third party mediator assists in settlement discussions between the parties. Any settlement is voluntary. The parties can settle part of the issues, none of the issues or all of the issues.

# ADR: ALTERNATIVE DISPUTE RESOLUTION

## FAMILY COURT MEDIATION

*Court Annexed ADR Rules as of May 3, 2006*

### Rule 2

#### Definitions

- (a) **Mediation.** An informal process in which a third-party mediator facilitates settlement discussions between parties. Any settlement is voluntary. In the absence of settlement, the parties lose none of their rights to trial.
- (b) **Mediator.** A neutral person who acts to encourage and facilitate the resolution of a dispute. The mediator does not decide the issues in controversy or impose settlement.
- (e) **Neutral.** A mediator.
- (f) **Certified.** A mediator who is approved by the Board of Arbitrator and Mediator Certification to be eligible for court appointment pursuant to these rules.
- (g) **Alternative Dispute Resolution (ADR) Conference.** A mediation
- (h) **Roster.** The official list of certified neutrals maintained and published by the South Carolina Supreme Court Board of Arbitrator and Mediator Certification.
- (i) **Board.** The South Carolina Supreme Court Board of Arbitrator and Mediator Certification.

### Rule 3

#### Actions Subject to ADR

- (a) **Mediation.** All contested issues in domestic relations actions filed in family court, except for cases set forth in Rule 3(b) or (c), are subject to court-ordered mediation under these rules unless the parties agree to conduct an arbitration. The parties may select their own neutral and may mediate or arbitrate at any time.
- (c) **Motion to Refer Case to Mediation.** In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

### Rule 4

## Selection or Appointment of Neutral

(a) **Eligibility.** A neutral may be a person who:

(1) is a certified neutral under Rule 15; or

(2) is not a certified neutral but in the opinion of all of the parties is otherwise qualified by training or experience to mediate or arbitrate all or some of the issues in the action.

(b) **Roster of Certified Neutrals.** The Board shall maintain a current roster (“Roster”) of neutrals certified under Rule 15 who are willing to serve in each county. The Board shall make the Roster available to the clerks of court for each county. A certified neutral shall notify the Supreme Court’s Board of Arbitrator and Mediator Certification if the neutral desires to be added to or deleted from the Roster. The Board and clerk of court for each county shall make this roster available to the public.

(d) **Appointment of Mediator by Family Court.** In family court cases subject to ADR, early mediation is encouraged.

(1) If there are unresolved issues of custody or visitation, an early mediation of those issues is required. In such event, the court shall appoint a mediator at a temporary hearing. If there is no temporary hearing, then the parties shall agree upon a mediator or notify the court for the appointment of a mediator within fifteen (15) days of the joinder of the issues of custody or visitation. In the event a mediation has not already been held to attempt resolution of the issues of custody and visitation, the temporary order shall designate a mediator in language substantially complying with the form approved by the Supreme Court or its designee. The designation shall include the name, address and phone number of the primary mediator, whether the mediator was selected or appointed, and if appointed, the name, address and phone number of a secondary mediator. E-mail addresses shall be included, if available.

(2) If issues other than custody or visitation are in dispute and no Proof of ADR has been filed certifying that the issues have been mediated, the parties must mediate those issues prior to the scheduling of a hearing on the merits; provided, however, the parties may submit the issues of property and alimony to binding arbitration in accordance with subparagraph (5). A mediator shall be designated in the following manner:

(A) When the parties file a request for a merits hearing, the request shall include the name of the stipulated mediator or a request for appointment of a mediator. The court shall not schedule a hearing on the merits until a Proof of ADR has been filed.

(B) If a mediator has not been stipulated in the request for merits hearing, the clerk of court shall appoint a primary mediator and a secondary mediator from the current Roster on a rotating basis from among those mediators agreeing to accept cases in the

county in which the action has been filed. A Notice of ADR appointing the mediators shall be issued upon a form approved by the Supreme Court or its designee.

(3) In the event of a conflict with the primary mediator, the secondary mediator shall serve. In the event of a conflict with the secondary mediator, and if the parties have not agreed to the selection of an alternative mediator, the plaintiff or the plaintiff's attorney shall immediately file with the Clerk of Court a written notice advising the court of this fact and requesting the appointment of two more mediators.

(4) An initial mediation conference must occur within thirty (30) days of appointment or selection. The parties must complete mediation and file a Proof of ADR with the clerk's office before a merits hearing can be scheduled.

(5) In lieu of mediation, the parties may elect to submit issues of property and alimony to binding arbitration in accordance with the Uniform Arbitration Act, S.C. Code § 15-48-10 et seq.

(e) **By agreement.** By agreement, the parties may choose a neutral at any time. In any event, the ADR conference shall be held on or before the deadlines provided for in these rules.

(f) **Notice to Neutral.** The parties shall notify the selected or appointed neutral to initiate scheduling of the ADR Conference.

#### Rule 5 The ADR Conference

(a) **Location of the Conference.** The ADR Conference is to be held within the county where the case is filed at a site designated by the neutral or any other site agreed upon by the parties and the neutral.

(b) **Discovery and Motions.** The ADR conference shall not be cause for delay of other proceedings in the case, including the completion of discovery, the filing and hearing of motions, or any other matter that would delay preparation of the case for trial, except by order of the court.

(c) **Recesses.** The neutral may recess the ADR conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference.

(d) **Privacy.** ADR conferences are private. Other persons may attend only with the permission of the parties, their attorneys and the mediator.

(e) **Motion to Defer ADR.** A party may file a motion to defer an ADR conference. For good cause, the Chief Judge for Administrative Purposes of the circuit may grant the motion.

(g) **Scheduling in Family Court.** The parties shall contact and cooperate with the mediator to set the schedule for conferences and the mediator may recess a conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference. The case shall not be docketed in family court for trial until a Proof of ADR is filed.

## Rule 6

### Duties of the Parties, Representatives and Attorneys – Mediation

(a) **Duty to Inform.** In cases subject to ADR under these rules, all attorneys should fairly and objectively inform their clients about mediation and arbitration.

(b) **Attendance.** The following persons shall physically attend a mediation settlement conference unless otherwise agreed to by the mediator and all parties or as ordered or approved by the Chief Judge for Administrative Purposes of the circuit:

(1) The mediator;

(2) All individual parties; or an officer, director or employee having full authority to settle the claim for a corporate party; or in the case of a governmental agency, a representative of that agency with full authority to negotiate on behalf of the agency and recommend a settlement to the appropriate decision-making body of the agency;

(3) The party's counsel of record, if any; and

(4) For any insured party against whom a claim is made, a representative of the insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim.

(c) **Identification of Matters in Dispute.** The mediator may require, prior to the scheduled mediation conference, that each party provide a brief memorandum setting forth their position with regard to the issues that need to be resolved. The memorandum should be no more than five (5) pages in length unless permitted by the mediator. With the consent of all parties, such memoranda may be mutually exchanged by the parties.

(d) **Cooperation.** The parties and their representatives shall cooperate with the mediator.

(e) **Confidentiality.** Communications during the mediation settlement conference shall be confidential in accordance with Rule 8.

(g) **Agreement in Family Court.** Parties must participate in at least three (3) hours of mediation unless an agreement is reached sooner. Upon the parties reaching an agreement, the mediator shall provide a Memorandum of Agreement to the parties, attorneys of record, and guardians ad litem of record. It is the obligation of the parties to seek approval of the agreement by the family court.

## Rule 7

### Authority and Duties of Mediators

(a) **Authority of Mediators.** The mediator shall at all times be authorized to control the conference and the procedures to be followed.

(b) **Duties.** The mediator shall set up the mediation conference. The mediator shall define and describe the following to the parties:

(1) The mediation process, including the difference between mediation and other forms of conflict resolution;

(2) The facts that the mediation conference is not a trial; the mediator is not a judge, jury or arbitrator; and the parties retain the right to trial if they do not reach a settlement;

(3) The inadmissibility of conduct and statements as evidence in any arbitral, judicial or other proceeding;

(4) The circumstances under which the mediator may meet alone with either of the parties or with any other person;

(5) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(6) The duties and responsibilities of the mediator and the parties;

(7) The fact that any agreement must be reached by mutual consent of the parties; and

(8) The costs of the mediation settlement conference.

(c) **Confidentiality.** The mediator must comply with Rule 8 regarding confidentiality.

(d) **Duty of Impartiality/Disclosure.** The mediator has a duty to be impartial and to disclose any circumstance likely to affect impartiality or independence, including any bias, prejudice or financial or personal interest in the result of the mediation or any past or present relationship with the parties or their representatives.

(e) **Declaring Impasse.** It is the duty of the mediator to timely determine when the mediation is not viable, that an impasse exists, or that the mediation should end. A mediation cannot be unilaterally ended without the permission of the mediator.

(f) **Reporting Results of Conference.** Within ten (10) days of conclusion of the conference, the mediator shall file with the Clerk of Court a Proof of ADR on a form approved by the Supreme Court or its designee. Any request for a final hearing in a contested case subject to ADR under these rules shall include a copy of a Proof of ADR. South Carolina Court Administration or the South Carolina Commission on Alternative Dispute Resolution may require the mediator to provide additional statistical data for evaluation of the program.

(g) **Immunity.** The mediator shall have immunity from liability to the same extent afforded judicial officers of this state.

## Rule 8

### Confidentiality

(a) **Confidentiality.** Communications during a mediation settlement conference shall be confidential. Additionally, the parties, their attorneys and any other person present must execute an approved Agreement to Mediate that protects the confidentiality of the process. To that end, the parties and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications having occurred in a mediation proceeding, including, but not limited to:

(1) Views expressed or suggestions made by another party or any other person present with respect to a possible settlement of the dispute;

(2) Admissions made in the course of the mediation proceeding by another party or any other person present;

(3) Proposals made or views expressed by the mediator;

(4) The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; or

(5) All records, reports or other documents created solely for use in the mediation.

(b) **Limited Exceptions to Confidentiality.** This rule does not prohibit:

(1) Disclosures as may be stipulated by all parties;

(2) A report to or an inquiry from the Chief Judge for Administrative Purposes regarding a possible violation of these rules;

(3) The mediator or participants from responding to an appropriate request for information duly made by persons authorized by the court to monitor or evaluate the ADR program;

(4) Threats of harm or attempts to inflict physical harm made during the mediation sessions; and

(5) Any disclosures required by law or a professional code of ethics.

(c) **Private Consultation/Confidentiality.** The mediator may meet and consult individually with any party or parties or their counsel during a mediation conference. The mediator without consent shall not divulge confidential information disclosed to a mediator in the course of a private consultation.

(d) **No Waiver of Privilege.** No communication by a party or attorney to the mediator in private session shall operate to waive any attorney-client privilege.

(e) **Mediator Not to be Called as Witness.** The mediator shall not be compelled by subpoena or otherwise to divulge any records or to testify in regard to the mediation in any adversary proceeding or judicial forum. All records, reports and other documents received by the mediator while serving in that capacity shall be confidential.

## Rule 9

### Compensation of Neutral

(a) **By Agreement.** When the parties stipulate the neutral, the parties and the neutral shall agree upon compensation.

(b) **By Court Order – Mediation.** When the mediator is appointed by the court, the mediator shall be compensated by the parties at a rate of \$175 per hour, provided that the court-appointed mediator shall charge no greater than one hour of time in preparing for the initial mediation conference. Travel time shall not be compensated. Expense reimbursement shall be limited to actual expenses not exceeding \$50, unless otherwise ordered by the Chief Judge for Administrative Purposes of the circuit. An appointed mediator may charge no more than \$175 for cancellation of an ADR Conference.

(c) **Payment of Compensation by the Parties.** Unless otherwise agreed to by the parties or ordered by the court, fees and expenses for the ADR conference shall be paid in equal shares per party. Payment shall be due upon conclusion of the conference unless other arrangements are made with the neutral, or unless a party advises the neutral of his or her intention to file a motion to be exempted from payment of neutral fees and expenses pursuant to Rule 9(d).

(d) **Indigent Cases.** Where a mediator has been appointed, a party may move before the Chief Judge for Administrative Purposes to be exempted from payment of neutral fees and expenses based upon indigency. Applications for indigency shall be filed no later than ten (10) days after the ADR conference has been concluded. Determination of indigency shall be in the sole discretion of the Chief Judge for Administrative Purposes.

## Rule 10

### Sanctions

(a) **Proof of ADR.** If by the time required by these rules, no Proof of ADR has been filed with the Office of the Clerk of Court and the case has not been exempted or deferred from ADR by court order, the court may issue a Rule to Show Cause why sanctions should not be imposed, including the dismissal of an action without prejudice or the striking of a pleading. The court may also manage such cases through status conferences and/or scheduling orders.

(b) **Sanctions.** If any person or entity subject to the ADR Rules violates any provision of the ADR Rules without good cause, the court may, on its own motion or motion by any party, impose upon that party, person or entity, any lawful sanctions, including, but not limited to, the payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference; contempt; and any other sanction authorized by Rule 37(b), SCRCF.

## Rule 14

## Board of Arbitrator and Mediator Certification

There is hereby established a Board of Arbitrator and Mediator Certification. The Board will be composed of five (5) persons appointed by the Supreme Court for a term of three (3) years or until a replacement member is appointed. In the event of a vacancy on the Board, the Supreme Court shall appoint someone to fill the unexpired term. Three members of the Board shall constitute a quorum. In the event that members of the Board disqualify themselves in a pending matter leaving less than a quorum, the Supreme Court may appoint ad hoc members to restore the Board to full membership in that matter.

### Rule 15

#### Certification of Court-Appointed Neutrals

The Board of Arbitrator and Mediator Certification ("Board") shall receive and approve applications for certifications of persons to be appointed as mediators or arbitrators. The application shall be on a form approved by the Supreme Court or the Board.

(b) **Family Court Mediator Certification.** For family court mediator certification, a person must:

(1) Either:

(A) Be admitted to practice law in this State for at least three (3) years and be a member in good standing of the South Carolina Bar;

(B) Be admitted to practice law in the highest court of another state or the District of Columbia for at least three (3) years and:

(i) Be at least 21 years old;

(ii) Have received a juris doctorate degree or its equivalent from a law school approved by the American Bar Association;

(iii) Be a member in good standing in each jurisdiction where he or she is admitted to practice law;

(iv) Be an associate member of the South Carolina Bar in good standing; and,

(v) Agree to be subject to the Rules of Professional Conduct, Rule 407, SCACR, and the Rule on Disciplinary Procedure, Rule 413, SCACR, to the same extent as an active member of the South Carolina Bar; or,

(C) Be a psychologist, master social worker, independent social worker, professional counselor, associate counselor, marital and family therapist, or physician specializing in psychiatry, licensed for at least three (3) years under Title 40 of the 1976 Code of Laws, as amended.

(2) Have completed a minimum of forty (40) hours in a family court mediation training program approved by the Board, or any other training program attended prior to the promulgation of these rules or attended in other states and approved by the Board;

(3) Demonstrate familiarity with the statutes, rules and practice governing mediation settlement conferences in South Carolina;

(4) Be of good moral character;

(5) Have not, within the last five (5) years, been:

(A) Disbarred or suspended from the practice of law or a profession set forth in Rule 15(b)(1)(C);

(B) Denied admission to a bar or denied a professional license for character or ethical reasons; or

(C) Publicly reprimanded or publicly disciplined for professional conduct;

(6) Pay all administrative fees and comply with all procedures established by the Supreme Court, the Board and the Commission on Alternative Dispute Resolution; and

(7) Agree to provide mediation to indigents without pay.

## Rule 16

### Approval of Training Programs

A training program must be approved by the Supreme Court or its designee, the Board of Arbitrator and Mediator Certification, before the program can be used for compliance with Rule 15(a)(6)(A) (certification of circuit court mediators), Rule 15(b)(2) (certification of family court mediators), or Rule 15(a)(7)(B) (certification of circuit court arbitrators). Approval need not be given in advance of training attendance. The Supreme Court may set administrative fees, which must be paid in advance of approval.

(b) Approval of Family Court Mediator Training Programs

(1) An approved training program for mediators in the Family Court shall consist of a minimum of forty (40) hours of instruction, unless otherwise provided by these rules. The curriculum of such programs shall at a minimum include:

(A) Statutes, rules and practice concerning family and related law in South Carolina, including the law regarding custody, visitation, support, division of property and alimony;

(B) Conflict resolution, family dynamics, and mediation theory in general, as well as specific training regarding domestic violence;

(C) Mediation processes and techniques, including the process and techniques of trial court mediation;

(D) Standards of conduct and ethics for mediators;

(E) Statutes, rules and practice governing mediation settlement conferences in South Carolina;

(F) Demonstrations of mediation conferences;

(G) Simulations of mediation settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(H) Such other requirements as the Supreme Court from time to time may decide are appropriate for good instruction.

(2) Training programs completed in South Carolina or other states may be approved by the Board if:

(A) The program consisted of a minimum of 37 hours of instruction;

(B) The program covered all the topics enumerated in paragraph (b)(1) of this Rule except subparagraphs (A) and/or (E) related to South Carolina law; and

(C) The applicant takes at least three (3) hours of supplemental training pre-approved by the Supreme Court or the Board, covering the South Carolina law topics enumerated in paragraph (b)(1), subparagraphs (A) and (E) of this Rule.

## Standards of Conduct, Decertification and Discipline of Neutrals

(a) **Standards of Conduct for Mediators.** Any person serving as a mediator, whether certified or not, shall comply with the Standards of Conduct for Mediators, which is attached as Appendix A to these rules.

(c) **Decertification of Neutrals.** Certification under Rule 15 may be revoked at any time if it is shown that the neutral no longer meets the requirements to be certified under Rule 15 or that the neutral has failed to faithfully observe these rules, the ethical standards of Rules 17(a) or (b), or has engaged in any conduct showing an unfitness to serve as a neutral.

(d) **Discipline of Neutrals.** A neutral who violates these rules, the ethical standards of Rules 17(a) or (b), or who has engaged in any conduct showing an unfitness to serve as a neutral may, in addition to decertification under Rule 17(c), be subject to discipline by the Supreme Court. This discipline may include any sanction the Supreme Court determines is appropriate, to include an order publicly reprimanding the neutral for the conduct, an order barring the neutral from serving as a neutral in any court of this State for a definite or indefinite period of time, an order requiring the neutral to complete additional training, and/or the assessment of a fine. The fact that discipline is taken against an attorney under this Rule shall not preclude action against the attorney under Rule 413, SCACR, if the conduct is misconduct under that rule. The fact that discipline is taken under this Rule against a licensed professional listed in Rule 15(b)(1)(C) shall not preclude action against the professional under the rules or statutes governing that profession, if the conduct is misconduct under that rule or statute.

(e) **Processing Complaints of Misconduct by Neutrals.** Persons alleging that a neutral has engaged in misconduct may file a complaint with the Board of Arbitrator and Mediator Certification. Misconduct includes any conduct or other circumstances that would warrant decertification or discipline under Rule 17(c) or (d). The Board shall review each complaint, may require the neutral to file a response to the complaint, may conduct such investigation as it deems appropriate, and may dismiss complaints it finds to be without merit. The Board may petition the Supreme Court to temporarily suspend a neutral pending further action on the complaint. If the Board finds that there is probable cause to believe that misconduct has occurred that would warrant decertification or other disciplinary action under these rules, the Board shall conduct a hearing into the matter after giving the neutral at least ten (10) days notice of the hearing. The Board may issue subpoenas compelling persons to attend the hearing or to produce records. A person violating such a subpoena shall be in contempt of the Supreme Court. The rules of evidence applicable to the circuit court shall generally be observed in the conduct of the hearing, and all testimony shall be under oath or affirmation. The proceedings shall be transcribed. If, after conducting the hearing, the Board determines that decertification or other disciplinary action is not warranted, it shall dismiss the matter. If the Board determines that decertification or other

disciplinary action is appropriate, it shall make a written recommendation to the Supreme Court and provide a copy to the neutral. A copy of the transcript of the hearing and any exhibits shall be filed with the Supreme Court. The neutral may, within fifteen (15) days after the Board submits its recommendation to the Supreme Court, file a response to the Board's recommendation. The Supreme Court shall then take such action as it deems appropriate. The Supreme Court shall not be bound by any specific sanction recommended by the Board. No hearing shall be held before the Supreme Court unless it determines that a hearing is appropriate.

June 30, 2006