MISSISSIPPI LEGAL PROFESSIONAL ASSOCIATION

SPEAKER: BOBBY L. DALLAS

July 31, 2024
8:30 am - 10:00 am
(HOLIDAY INN - TRUSTMARK PLAZA - PEARL)

A Review of the Court Annex Mediation Rules for Civil Litigation

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Getting to Yes & Enforcing It

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Bobby L. Dallas

I. INTRODUCTION

Tucked away in the West, *Mississippi Rules of Court* are five and one-half (5 ½) pages of rules that govern not only the mediation process, but the conduct of the mediator. These rules govern civil cases pending before Circuit, Chancery, and County Courts within the State of Mississippi. What follows is a general overview of these rules along with practical commentary.

1. What is the Policy of the State of Mississippi Regarding Mediation?

The rules provide as follows:

I. POLICY

> It shall be the policy of the courts of the State of Mississippi (1) to encourage the peaceable resolution of disputes and early settlement of pending litigation by voluntary action of the parties, and (2) to identify cases appropriate for referral to mediation pursuant to the guidelines set out in these rules.

As indicated above, it is the policy of the State of Mississippi to encourage the use of mediation through the voluntary agreement of the parties or by court referral of civil litigation to

mediation. The parties should disclose, and the mediator should inquire, as to whether the mediation is voluntary and/or court ordered. If the mediation is court ordered, the parties should inform the mediator if the mediation is:

a. The result of a standing order that all civil cases be mediated before trial;

b. Is the result of a motion filed by a party seeking to compel mediation; or

c. Is the result of the Court's own motion.

An understanding of how the case came to mediation gives the mediator some idea what to expect from the parties and/or their positions.

2. ***What Cases Are Subject to Mediation***

Section II CASES APPROPRIATE FOR REFERRAL TO MEDIATION and III REFERRAL OF CIVIL CASE governs what civil cases are appropriate for referral for mediation and how the court may order or refer cases to mediation. Section II applies the following basic procedures:

a. All civil cases are appropriate for referral to mediation (in the discretion of the court).

b. A case can be referred for mediation by the court's own order, or on motion made by any party.

c. A court cannot order a case to mediation more than one (1) time;

d. Should the court, on its own motion, refer a case to mediation, any party can file a written objection to the referral order and request a hearing by the court. The motion shall be filed within ten (10) days of the court's entry of an order referring mediation.

e. Any party can move the court for referral of the case to mediation. The motion shall be filed pursuant to the general requirements of the *Mississippi Rules of Civil Procedure.*

f. Once the court enters an order referring a case to mediation, the parties have a period of twenty (20) days from the date of entry of the court's order to schedule the mediation. If the parties are unable to agree on a date for the mediation and a mediator, the clerk or administrator of the court shall assign a date, time, and location to conduct the mediation. The assignment is binding on the parties unless there is an objection filed within ten (10) days of the entry of the notice of the clerk or court administrator.

Although there are exceptions, most cases go to mediation based on a voluntary agreement of the parties or based on a standing order of the court that requires mediation of all civil cases before the case is either set for trial or before the date of trial.

In the State of Mississippi, most mediations are conducted in the office of one of the lawyers involved in the case or in the mediator's office. Outside the State of Mississippi, the local practice can be consistent with Mississippi, or it can vary. It is not uncommon for the mediation to be conducted in a neutral location. From a mediator's perspective, the location is not important so long as the facility in which the mediation is conducted provides appropriate space and privacy. It is hard to conduct a mediation in a location where one party has to stand in a hall or occupy an open area of a building that does not allow for privacy.

3. *Who Must Attend the Mediation?*

The rules state:

> **IV. AUTHORITY TO SETTLE**
>
> The attorneys for all parties must appear at the mediation unless otherwise ordered by the court. Each party including a person with authority to settle the case on the party's behalf shall be present during the mediation unless otherwise ordered by the court.

The rule makes clear that the party and the attorney for each party must appear at the mediation. The rule also requires that a "person with authority to settle the case on the party's behalf shall be present during the mediation unless otherwise ordered by the court." Unfortunately, the rule does not define "a person with authority to settle the case...."

Several years ago this was not a problem. In almost every civil case that went to mediation, the attorney for each party was present. Also present were the traditional plaintiff(s) and the defendant(s), and/or the claims professional employed by the insurance carrier for the defendant(s). In the last few years, it is not uncommon for the plaintiff to appear, but the only person present on behalf of the defendant is the defendant's lawyer. The open question is whether the defendant must be present and whether the defendant or counsel for the defendant constitutes the "person with authority to settle the case on the party's behalf...." Many times, the parties will agree prior to the mediation to go forward with the understanding that the claims professional will only be available by video or telephone. On other occasions, no such agreement has occurred prior to the mediation and the plaintiff shows up to find only defense counsel present. Valuable time is lost in resolving the issue before the mediation can begin. Absence of the claims representative can adversely impact the resolution of the case since the absent claims

professional is not directly involved in the mediation. In such a case, all communication by and between the mediator and the parties is through counsel. It is not impossible to settle a case without the presence of a claims professional, but there are cases that do not settle based on either the absence of the claims professional or the advantage, or perceived advantage, of not having a claims representative physically present at the mediation.

4. What is a mediation?

The rule provides:

V. MEDIATION

A. Mediation is a forum in which an impartial person, the mediator, facilitates communications between parties to promote reconciliation, settlement, or understanding among them.

B. A mediator may not impose his or her own judgment on the issues for that of the parties.

In the abstract, the rule is simple and correct. Mediation is a forum in which an impartial mediator attempts to resolve a dispute between one or more parties. To do this, the mediator must make every attempt to be impartial and avoid judgment calls. However, it is, to some extent, the advice, experience, and judgment of the mediator that can make the difference between the case settling and not settling. The mediator must honor the letter and spirit of the rule, but at the same time use his/her skills to get the case settled. Ultimately, it is the job and responsibility of the mediator to get the case settled.

5. Sanctions

Under Section VI of the rules, the court can impose sanction(s) against a party or party's attorney:

a. Who fails to obey an order made by the court pursuant to this rule;

b. Who fails to appear at the scheduled mediation; or

c. Who fails to participate in the mediation.

It is the duty of the party to report these activities to the court. Pursuant to the rule, the court can require the offending party and/or his/her lawyer to pay reasonable expenses incurred as a result of the offending party's conduct. The rule specifically authorizes the court to consider both attorney fees and mediator fees. Under the rule, the mediator cannot be called as a witness at the hearing for sanctions.

The rule makes it clear that it is the responsibility of the party who perceives the other party to have violated the terms and conditions of the rules to seek redress from the court. No specific time frame is listed in the rules for this action, but one must assume that such a motion should be expeditiously filed and considered by the court. Of particular importance is the fact that the rule states that the court can impose the sanction on the lawyer and/or the party in violation of the mediation rule. The rule does not define (by rule or commentary) what constitutes failure "to participate in the mediation." One party's definition of participation can differ substantially from another party's definition. One party may consider the conduct or offer(s) by the other party to be "bad faith." At present, I am unaware of any decision or opinion on what constitutes failure to participate in mediation.

6. *Confidentiality of the Mediation Process*

Under Section VII, entitled "Confidentiality of Communications in Mediation," communications relating to the subject matter of any civil dispute are confidential. These communications "...may not be used as evidence against the participant in any judicial or administrative proceeding." The rule also mandates that "...no record shall be made...and the mediator may not be required to testify in any proceedings relating to matter occurring during the mediation session." In addition, the mediator is not "...subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute."

Paragraph C of Section VII provides that "[a]ny oral communication or written material used in or made a part of a mediation is admissible or discoverable only if it is admissible or discoverable independent of the mediation.." Where this rule becomes important is when one or more parties makes an extensive power point presentation during opening statements. The presentation itself or some particular slide or document that was contained in the presentation can become a discovery issue.

7. *What is the Effect of Written Settlement Agreement?*

This rule is as follows:

RULE VIII. EFFECT OF WRITTEN SETTLEMENT AGREEMENT

A. If the parties reach a settlement and execute a written agreement disposing of the dispute or any part thereof; the agreement is enforceable in the same manner as any other written contract.

B. The court in its discretion may incorporate the terms of the agreement in the court's final order disposing of the case.

As a general matter, the settlement agreement executed at mediation is the complete agreement.

As a mediator, preparation of the final settlement agreement puts the interpretation of the agreement at issue and can result in the parties asking the mediator to resolve the issues. To avoid this problem, many mediators will ask the parties to draft the document that will become the final mediation agreement. It has been my experience that if the mediator requires the parties to draft the settlement agreement, it takes longer to get the settlement agreement completed than it does if the mediator prepares the document and presents it to the parties for review, agreement, and signature.

In addition, a number of cases do not settle on the actual day of mediation, but settle post-mediation with input from the mediator. In that circumstance, it is almost impossible for anyone other than the mediator to actually draft a mediation agreement. Generally speaking, acceptance of the basic terms of the settlement agreement are accepted by the respective parties by e-mail confirmation. As a general rule, the simpler the terms and conditions, the easier it is to get the parties to agree and/or accept the final basic terms of an agreement.

8. ***Who is Responsible for the Cost of Mediation?***

IX. COST OF MEDIATION

> The fees and expense of the mediation shall be established by agreement between the mediator and the parties charged with those fees and expenses. Unless otherwise agreed to by the parties or ordered by the court, the party seeking mediation shall pay the fees and expenses of the mediation. When mediation is ordered by the court on its own motion, the court shall allocate the fees and expense of the mediation, or such fees and expenses may be taxed as costs of the litigation. The attorney's fees of the parties shall not be included in the fees and expenses of mediation.

As a general matter, the cost of mediation is defined by the Mediation Agreement and/or agreement of the parties.

9. What is the Mediator's Responsibility to Report Results of Mediation to the Court?

Section XIV is entitled "REPORTING REQUIREMENTS." Section XIV provides an outline of what information shall be reported by the court clerk to the Mississippi Supreme Court and what information the mediator shall report to the court. As a general rule, unless the mediation is court ordered, the mediator is not required to report the outcome of the mediation to the court. Practically, there appears to be a discrepancy between a case that has a specific order entered by the court compelling mediation and the cases that go to mediation based on the fact that the court has a standing order requiring mediation prior to obtaining a trial setting or before trial. Generally, the parties will inform the mediator if there is an official order to mediate a case by a certain date. In that situation, the mediator must report the outcome of the mediation to the court pursuant to this rule. In other circumstances, the mediator may or may not know if there was a standing order unless the parties informed the mediator at or during the course of the mediation of the standing order. If the mediator is aware of such an order, then the mediator is under an obligation to report the mediation results to the court pursuant to the rule.

10. What are the duties and responsibilities of the Mediator?

Section XV is entitled "Standards of Conduct for Mediators." Section XV is divided into subparagraphs A through I. Unlike the general rules governing mediation, the duties and obligations of the mediator contain not only a rule, but commentary on the rule.

A. Self-Determination: A mediator Shall Recognize that Mediation is Based on the Principle of Self-Determination by the Parties.

> Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Having complied in good faith with any order entered under Rule III, any party may withdraw from mediation at any time.

B. Impartiality: A Mediator shall Conduct the Mediation in an Impartial Manner.

> The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and, evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

Not only is impartiality required by the rule, but impartiality is necessary for an effective mediation. Effective mediation requires that the mediator be fair to each party and provide each party with an honest, good faith attempt to resolve the matters at issue between the parties. Does this mean that the mediator cannot express an opinion regarding the matter(s) involved in the litigation or to express his/her opinions regarding the potential outcome of the case – NO. Different mediators take different positions on this issue, but a mediator cannot divorce himself/herself from past experiences. This is particularly true of a mediator who is also a practicing lawyer.

Given our relatively small legal community, it is not uncommon for all participants in a mediation, including the mediator, to know each other, and to have had past interactions.

C. Conflicts of Interest: A Mediator shall Disclose All Actual and Potential Conflicts of Interest Reasonably Known to the Mediator.

The rule states in part:

> A conflict is a dealing or relationship that might create an impression of possible bias.

The mediator has the responsibility to "...disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality." Should the mediator make such disclosures, the parties can agree to continue the mediation after being informed of the conflicts. Should the mediator believe the conflict of interest casts a serious doubt on the integrity of the process, the mediator can decline to proceed with the mediation.

The mediator "...must avoid the appearance of conflict of interest both during and after the mediation." As such, "...a mediator shall not subsequently establish a professional relationship with one of the parties to the mediation in a related matter."

D. Competence: A Mediator shall Mediate Only When the Mediator has the Necessary Qualifications to Satisfy the Reasonable Expectations of the Parties.

> Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's qualifications. Training and experience in mediation, however, are often necessary for effective mediation. A person who offers herself or himself as available to serve as a mediator gives parties and the public the expectation that she or he has the competence to mediate effectively. In court-connected or other forms of mandated mediation, it is essential that mediators assigned to the parties have the requisite training and experience.

E. Confidentiality: A Mediator shall Maintain the Reasonable Expectations of the Parties with Regard to Confidentiality.

> The mediator shall follow the requirements of Rule VII regarding confidentiality. The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on te provisions of Rule VII, the circumstances of the mediation and any agreements they may make. The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by rule, law, or other public policy.

Although the rule seems to be directed toward the mediator's disclosure outside the mediation of what occurred during the mediation, the issue of confidentiality inside the mediation should be discussed. On many occasions, the parties will submit position papers to the mediator and indicate that nothing in the position paper shall be disclosed to the other side without the express permission of the participant. In addition, some participants in a mediation consider anything they tell the mediator to be confidential unless and until such time the mediator is given permission to disclose that information to the other side. This places the mediator between the proverbial 'rock and a hard place.' The mediator has information regarding the case that is helpful to successful resolution of the case, but he is barred or precluded from using the information to successfully resolve the case. The better rule is to honor the confidentiality as it pertains to the position paper, but to inform the parties that anything they tell you during the course of mediation can be used by the mediator to get the case resolved. This allows the party to specifically identify any information they consider "confidential" or that they do not want used by the mediator or passed on to the other side during mediation.

F. Quality of the Process: A Mediator shall Conduct the Mediation Fairly, Diligently, and in a Manner Consistent with the Principle of Self-Determination by the Parties.

A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when they will reach an agreement or terminate a mediation.

G. Advertising and Solicitation: A Mediator shall be Truthful in Advertising and Solicitation for Mediation.

Advertising or any other communication with the public concerning services offered or regarding the education, training, and expertise of the mediator shall be truthful. Mediators shall refrain from promises and guarantees of results. Further, advertising or other communications with the public by attorneys who offer themselves as mediators are governed by the Rules of Professional Conduct.

H. Fees: A Mediator shall fully Disclose and Explain the Basis of Compensation, Fees, and Charges to the Parties.

The parties should be provided sufficient information about fees at the outset of a mediation to determine if they wish to retrain the services of a mediator. If a mediator charges fees, the fees shall be reasonable, considering among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary to the community. The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement.

Conclusion

The rules that govern the mediation process and the duties and responsibility of the mediator are very general and broad. They provide the basic outline under which mediation should be conducted and how the mediator should conduct himself/herself. However, it should not be forgotten that mediation is a dynamic process. It requires that each party have at least some interest in resolving the dispute and it requires that each participant in the process engage fully in the process. The parties participating in the mediation, as well as all lawyers representing the parties and the mediator, are all human. The mediator can get just as wrapped up in trying to reach resolution as the parties. However, when mediation works, amazing results are obtained.

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