University of Arkansas

An Agricultural Law Research Project

States' Alternative Dispute Resolution Statutes

State of Kentucky

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States' Alternative Dispute Resolution Statutes

STATE OF KENTUCKY

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Uniform Arbitration Act

Title XXXVII, Chapter 417

Current through the end of 2008 legislation

417.045 Title

This chapter may be cited as the "Uniform Arbitration Act."

417.050 Validity of arbitration agreement; exempt agreements

A written agreement to submit any existing controversy to arbitration or a provision in written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract. This chapter does not apply to:
(1) Arbitration agreements between employers and employees or between their respective representatives; and
(2) Insurance contracts. Nothing in this subsection shall be deemed to invalidate or render unenforceable contractual arbitration provisions between two (2) or more insurers, including reinsurers.

417.060 Proceedings to compel or stay arbitration

(1) On application of a party showing an agreement described in KRS 417.050, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration. If the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the

determination of the issue so raised. The court shall order arbitration if found for the moving party; otherwise, the application shall be denied.
(2) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.
(3) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subsection (1) of this section, the application shall be made therein. Otherwise and subject to KRS 417.210, the application may be made in any court of competent jurisdiction.
(4) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section; or if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.
(5) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

417.070 Appointment of arbitrators by court

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one (1) or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

417.080 Majority action by arbitrators

The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by this chapter.

417.090 Hearing

Unless otherwise provided by the agreement:
(1) The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by certified mail not less than five (5) days before the hearing. Appearance at the hearing waives such notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party and for good cause, or upon their own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award, unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.
(2) The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.
(3) The hearing shall be conducted by all the arbitrators but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

417.100 Representation by attorney

A party has the right to be represented by an attorney at any proceeding or hearing under this chapter. A waiver thereof prior to the proceeding or hearing is ineffective.

417.110 Witnesses, subpoenas and depositions

(1) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served and, upon application to the court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.
(2) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.
(3) All provisions of law compelling a person under subpoena to testify are applicable.
(4) Fees for attendance as a witness shall be the same as for a witness in the Circuit Court.

417.120 Award

(1) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by certified mail, or as provided in the agreement.
(2) An award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on application of a party. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he notifies the arbitrators of his objection prior to the delivery of the award to him.

417.130 Change of award by arbitrators

On application of a party to the arbitrators or, if an application to the court is pending under KRS 417.150, 417.160 or 417.170, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in paragraphs (a) and (b) of subsection (1) of KRS 417.170, or for the purpose of clarifying the award. The application shall be made within twenty (20) days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating he must serve his objections thereto, if any, within ten (10) days from the notice. The award so modified or corrected is subject to the provisions of KRS 417.150, 417.160 and 417.170.

417.140 Fees and expenses of arbitration

Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses, fees and other expenses incurred in the conduct of the arbitration shall be paid as provided in the award. Attorneys' fees shall not be awarded unless a provision therefor is contained in the written agreement submitted to arbitration.

417.150 Confirmation of an award

Upon application of a party, the court shall confirm an award unless, within the time limits hereinafter imposed, grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in KRS 417.160 and 417.170.

417.160 Vacating an award

(1) Upon application of a party, the court shall vacate an award where:
(a) The award was procured by corruption, fraud or other undue means;
(b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
(c) The arbitrators exceeded their powers;
(d) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of KRS 417.090, as to prejudice substantially the rights of a party; or
(e) There was no arbitration agreement and the issue was not adversely determined in proceedings under KRS 417.060 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court is not ground for vacating or refusing to confirm the award.
(2) An application under this section shall be made within ninety (90) days after delivery of a copy of the award to the applicant; except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety (90) days after such grounds are known or should have been known.
(3) In vacating the award on grounds other than stated in paragraph (a) of subsection (1) of this section, the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with KRS 417.070, or, if the award is vacated on grounds set forth in paragraphs (c) and (d) of subsection (1) of this section, the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with KRS 417.070. The time within which the agreement requires the award to be made is applicable to the rehearing and commences on the date of the order.
(4) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

417.170 Modification or correction of award

(1) Upon application made within ninety (90) days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:
(a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
(b) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
(c) The award is imperfect in a matter of form, not affecting the merits of the controversy.
(2) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.
(3) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

417.180 Judgment or decree on award

Upon the granting of an order confirming, modifying or correcting, an award, judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements may be awarded by the court.

417.190 Applications to court

Except as otherwise provided, an application to the court under this chapter shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions in civil cases. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in civil cases.

417.200 Court; jurisdiction

The term "court" means any court of competent jurisdiction of this state. The making of an agreement described in KRS 417.050 providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this chapter and to enter judgment on an award thereunder.

Arbitration and Award

417.210 Venue

An initial application shall be made to the court of the county in which the agreement provides the arbitration hearing shall be held, or, if the hearing has been held, in the county in which it was held. Otherwise, the application shall be made in the county where the adverse party resides or has a place of business or, if he has no residence or place of business in this state, to the court of any county. All subsequent applications shall be made to the court hearing the initial application, unless the court otherwise directs.

417.220 Appeals

(1) An appeal may be taken from:
(a) An order denying an application to compel arbitration made under KRS 417.060;
(b) An order granting an application to stay arbitration made under subsection (2) of KRS 417.060;
(c) An order confirming or denying confirmation of an award;
(d) An order modifying or correcting an award;
(e) An order vacating an award without directing a rehearing; or
(f) A judgment or decree entered pursuant to the provisions of this chapter.
(2) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

417.230 Chapter 417 not retroactive

This chapter applies only to agreements made subsequent to the taking effect of this chapter.

417.240 Uniformity of interpretation

This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Rules of the Supreme Court

Current with amendments received through October 2008

SCR 3.815 Mediation and arbitration
(1) Purpose.

The purpose of this Rule 3.815 is to establish a procedure whereby disputes arising among attorneys from their professional and economic relationships may be resolved by submission to mediation, binding arbitration, or non-binding arbitration.

(2) Definitions.

(A) "Attorney" means an attorney-at-law who is a member in good standing of the Association.

(B) "Association" means the Kentucky Bar Association.

(C) "Director" means the Director of the Kentucky Bar Association.

(D) "Vice-President" means Vice-President of the Kentucky Bar Association.

(E) "Controversy" means a dispute or disagreement between attorneys relative to questions of representation of clients, questions arising when law firms or other legal associations between attorneys are dissolved or otherwise terminated, or other economic disputes between attorneys.

(F) "Panel" means the arbitrator or arbitrators appointed or designated to assist in resolving the controversy as hereinafter provided.

(3) Scope of Authority.

(A) The Rules and Procedures herein set forth shall be available to settle or resolve any controversy as herein defined only when all parties to the controversy agree and bind themselves in writing to submit such controversy to the arbitration or mediation procedures herein set forth and further, agree in writing that they shall be fully bound by the decision and award of the arbitrator(s).

(B) The provisions of these Rules shall not be used unless the parties to the dispute certify in writing that a good faith effort has been made by them to resolve the dispute and has failed.

(C) The provisions of these Rules shall not be used if the dispute proposed to be submitted is the subject matter of a pending lawsuit, unless the parties follow the procedures of KRS 417.060.

(4) Institution of Proceedings.

(A) Proceedings hereunder shall be begun by completing three copies of a petition. The petition must be signed by one of the parties to the dispute. The petition shall state the origin and details of the dispute, acts or omissions deemed to be in controversy, and the relief desired from the mediation or arbitration. Upon the filing of the petition, the petitioner shall also sign three copies of an arbitration or mediation agreement, as applicable. The petition and agreement shall be on forms provided by the Association and when completed shall be filed in the office of the Association.

(B) Upon the filing of the petition, the Director of the Association shall forward a copy of the petition to the Vice-President. The Vice-President, upon receipt of the petition, shall determine whether the plan and this rule apply, and the Vice-President's decision on that matter shall be final. The Vice-President shall have full power to require additional information from the petition in all disputes wherein additional information is deemed desirable or necessary.

(C) If the Vice-President determines that the Association shall not accept jurisdiction of a controversy, the petition shall be returned to the Director, or other designated employee of the Association with a brief explanation as to why jurisdiction has been refused. The Director shall then notify the petitioner that the Association has not accepted jurisdiction and will not arbitrate or mediate the controversy and shall advise the petitioner why the Association has not accepted jurisdiction of the matter.

(D) If the Vice-President determines that the Association shall accept jurisdiction, the Vice-President shall notify the Director and shall return the petition to the Director or other designated employee of the Association. The Director shall then forward to respondent a copy of the petition and three copies of the agreement signed by the petitioner, and he or she shall require the respondent to sign and return to the Director two copies of the agreement and three copies of the respondent's answer to the petition. The letter to the respondent shall state that respondent has twenty days in which to answer and return the two signed agreements, and that if respondent's answer is not received within twenty days, the Association will construe such failure to answer as constituting a refusal to submit to arbitration or mediation. Upon receipt of the respondent's answer, the Director shall forthwith forward to the petitioner one signed copy of the agreement and one copy of the respondent's answer.

(E) If the respondent's refusal to submit the controversy to arbitration or mediation, or failure within twenty days following receipt of the documents described in (4)(D) to sign and return the agreement, the Director shall so notify the petitioner and the file of the Association shall be closed.

(5) Arbitration panel.

(A) Composition.

(i) Where the matter is to be mediated, the mediator shall consist of one person who shall be a practicing Attorney.

(ii) Where the matter is to be arbitrated, the arbitration panel shall consist of one practicing Attorney, if the amount in controversy is $2,500.00 or less, or if it exceeds $2,500.00, the panel shall consist of three persons, all of whom shall be practicing Attorneys.

(iii) The practicing Attorney(s) referred to in paragraph (5)(A)(i) and (5)(A)(ii) above, shall each:

(a) be a member in good standing of the Association;

(b) be appointed or designated for a particular controversy by the Vice-President;

(c) if a panel member or sole arbitrator is engaged in the private practice of law shall maintain or carry on a private law practice in an office more than fifty (50) miles from the county seat of the county where the attorneys who are parties to the controversy maintain their principal offices for the practice of law.

(iv) Any attorney appointed or designated by the Vice-President may refuse to serve. Such refusal shall be by written notice to the Director within ten (10) days of the appointment.

(v) The Vice-President, in cases of a three-member panel, shall designate one member of the panel as Chairperson of the panel.

(B) Objections.

(i) Either party to a controversy may object for cause to any of the panel members. Such objection shall be in writing and shall be made within twenty (20) days of written notification of the names of the panel members. Failure to object within twenty (20) days shall constitute a waiver of any objection to the composition of the panel. The following shall constitute grounds for objection for cause to a proposed panel member serving:

(a) If the member is associated in any business or profession with or related in any way to any of the parties or their attorneys;

(b) If the member has a personal or financial interest or any bias or prejudice regarding any of the parties or the nature of the controversy;

(c) If the member has pending any business transactions or controversy as a party with any party to the controversy or their attorney or has then pending any business transactions or controversies as an attorney with any party to the controversy or any attorney for a party, and there is such a conflict that it would render the arbitrator incapable of fairly exercising independent judgment.

(ii) Objections to panel members shall be made to the Chair of the panel and shall be ruled upon by the Chair of the panel whose decision shall be final. Each side may have one peremptory strike.

(C) Compensation.

Members of the panel shall not be paid or compensated for their services.

(D) Vacancies.

If any arbitrator or mediator should resign, die, withdraw, refuse to act or be disqualified or unable to act, the Vice-President shall declare the office vacant and, if the matter has already been heard, shall be reheard, unless the parties otherwise agree. In the absence of such agreement, a new arbitration panel

shall be selected in accordance with these Rules.

(E) Communication Between the Parties and Panel Members.

There shall be no communication between the parties and the members of the arbitration or mediation panel upon the subject matter of the arbitration or mediation other than at arbitration or mediation proceedings. Copies of any written communication between members of the panel and any party, or any attorney for any parties or between parties or their attorneys and the panel shall be furnished contemporaneously to each participant in the proceeding and filed with the Director.

(6) Hearings.

(A) The mediation shall be held in the county where the attorneys involved in the controversy maintain their principal offices for the practice of law, or in the event the dispute is between two or more attorneys, the hearings shall be held in the county where the attorney petitioning for arbitration maintains that attorney's principal office for the practice of law.

(B) Arbitration hearings shall be held and conducted as follows:

(i) Notice: The Chair of the panel shall fix the time and place for the hearing and shall cause written notice of time and place to be served upon all parties to the dispute by Certified Mail not less than ten (10) days prior to the time set for the hearing. Such notice of hearing shall also inform the parties of their right to be represented by an attorney and their right to present evidence in support of their respective positions.

(ii) Stenographic Record: Any party may have a hearing before a panel reported by a Certified Shorthand Reporter at their expense by written request presented to the Director at least four (4) days prior to the date of the hearing. In such event, any other party to the arbitration or mediation shall be entitled to acquire, at their own expense, a copy of the reporter's transcript of the testimony by arrangements made directly with the reporter. When no party to the arbitration or mediation requests that the hearing be reported, and the panel or sole arbitrator deems it necessary to have the hearing reported, the panel or sole arbitrator may record the proceedings or employ a Certified Shorthand Reporter for such purpose if authorized to do so by the Director. Costs of making a record will be assessed by the panel or sole arbitrator as a part of the award. Prior to assessment of such costs, the Association will pay same upon notice to the Director.

(iii) Subpoenas: The provisions of KRS 417.110 shall apply to proceedings under these Rules.

(iv) Oath of Panel Members: Panel members shall take a written oath to be filed with the Director to decide the controversies submitted to them according to the law and evidence and the equity of the case to the best of their judgment without favor, affection or prejudice.

(v) Conduct of Hearings:

(a) The testimony of all witnesses shall be given under oath. When so requested, the member of the panel presiding at the hearing may administer oaths to witnesses.

(b) The panel Chair, or sole arbitrator, shall preside at the hearing. The member of the panel who is presiding shall be the judge of the relevancy and materiality of the evidence offered and shall rule on questions of procedure and shall exercise all powers relating to the conduct of the hearing. However, strict conformity to rules of evidence shall not be required.

(c) In cases involving a three (3) member panel, if at the time set for any hearing all three members of the panel are not present, the hearing shall be postponed, or, with consent of the parties to proceed with the hearing with one (1) member of the panel chosen by the parties as the sole arbitrator. In no event shall a hearing be conducted by or proceed with two (2) members of the panel acting as arbitrators.

(d) If any party to an arbitration or mediation who has been duly notified fails to appear at a scheduled hearing, the panel may proceed with the hearing and determine the controversy upon the evidence produced, notwithstanding such failure to appear.

(e) The panel Chair, or if the hearing is conducted by a sole arbitrator, then the latter, may adjourn the hearing from time to time as necessary. Upon request of a party to the arbitration for good cause, or upon their own determination, the panel Chair or sole arbitrator may postpone the hearing from time to time.

(f) No briefs or legal memorandum shall be submitted by the parties unless specifically requested by the panel or a majority thereof.

(7) The Award.

(A) If the mediator is able to mediate the controversy successfully and the parties are able to reach agreement, that agreement shall be reduced to a written agreement and executed by the parties. The agreement shall consist of a preliminary statement reciting the jurisdictional facts, the nature of the controversy, and the specific agreement reached. The agreement will be thereafter enforceable and have the same force and effect as a judgment in a court of law in the Commonwealth of Kentucky.

(B) Arbitration Award Rendition and Form.

(i) The panel shall render its award within fifteen (15) days after the close of the hearing or final hearing if more than one has been held. The award of the panel shall be made by a majority of the panel when heard by three (3) members, or by the sole arbitrator.

(ii) The original and four (4) copies of the award shall be in writing and shall be signed by the members of the panel concurring therein unless the hearing shall have been conducted by a sole arbitrator, in which event the original and copies of the award shall be signed only by the sole arbitrator. The award shall include a determination of all questions submitted to the panel, the decision of which shall be necessary to resolve the controversy.

(iii) While it is not required that the award be in any particular form, it should, in general, consist of a preliminary statement reciting the jurisdictional facts, i.e., that a hearing was held upon notice pursuant to a written agreement to arbitrate, the parties were given an opportunity to testify and cross-examine, etc., a brief statement of the dispute, findings, conclusions, and the amount to be paid or reimbursed. The panel shall avoid reciting information in the text of the award that is privileged unless the client

specifically waives any privilege.

(iv) An award may also be entered by consent of all parties to the dispute.

(C) Effect and Enforcement.

The provisions of KRS 417.180 and of the arbitration agreement of the parties shall govern and determine the effect and enforcement of the award. The law of the Commonwealth of Kentucky will govern the award of interest on any judgment.

(D) If the parties selected non-binding arbitration, they may agree to have the award be binding and enterable as a judgment.

(8) Confidentiality.

By agreeing to participate in the proceedings authorized by this rule, the parties agree to hold in confidence the award, all records, documents, files, proceedings and other matters pertaining to the procedures authorized herein, and such records shall not be opened to the public or to any person not involved in the dispute.

(9) Death or Incompetence of a Party.

In the event of the death or incompetence of a party to the arbitration proceedings, during the course of arbitration but prior to the rendering of a decision, the proceedings shall be abated without prejudice to either party to proceed in a court of proper jurisdiction to seek such relief as may be proper. In the event of death or incompetence of a party after the close of the proceedings but prior to a decision, the decision rendered shall be binding upon the heirs, administrators, or executors of the deceased and on the estate or guardian of the incompetent.

(10) Indemnity Provision.

By agreeing to the procedures authorized herein, the parties further agree to indemnify and hold harmless the hearing officer, arbitrator, mediator or presiding officer or panel concerning any action arising out of the procedures set forth by this rule and for any and all conduct of the hearing officer, arbitrator, mediator or presiding officer or panel presiding over the procedures herein.

(11) Costs.

(A) Costs shall be allowed to the prevailing party unless otherwise directed by the mediator/sole arbitrator/panel. In the event of a partial award in favor of a party, or of an award in which neither party prevails entirely against the other, costs of the proceeding may be apportioned and shall be borne as directed by the mediator/sole arbitrator/panel.

(B) A party to a mediation/arbitration procedure entitled to recover costs shall prepare and serve promptly upon the party liable for costs a bill itemizing the costs incurred in the mediation/arbitration proceeding, including fees incident to summoning witnesses, transmittal of documents to the parties and the mediator/sole arbitrator/panel, the cost of depositions used in lieu of live testimony at any

hearing, if permitted by the mediator/sole arbitrator/panel, the costs associated with the location of the hearing, if any, except that no costs for the location will be assessed for any hearing conducted on the premises of the Kentucky Bar Center, travel, lodging and meal expenses of the mediator/sole arbitrator/panel, and fees for extraordinary services, if specifically awarded by the mediator/sole arbitrator/panel. If a stenographic record of the hearing has been ordered by the mediator/sole arbitrator/panel pursuant to paragraph (6)(B)(ii), and the costs billed to or paid by the Association, the mediator/sole arbitrator/panel shall assess the costs in accordance with this rule. Any party to the mediation/arbitration who requests a stenographic or other record pursuant to paragraph (6)(B)(ii) shall bear the cost of that record.

(C) Prohibited recovery: Notwithstanding the provisions of paragraph (B) above, no award of costs shall be made to any party for attorney's fees incurred in the mediation/arbitration, nor shall any recovery be allowed to any party or witness for lost wages or other expenses incurred as a result of attendance at the hearing.

Model Mediation Rules

Current with amendments received through October 2008

Rule 1 Preamble and scope

The _____ County Trial Courts find 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.

Mediation is intended to help both litigants and the Courts facilitate the settlement of disputes. Litigants should participate in good faith and in an earnest attempt to resolve their differences.

This Rule refers to mediation. Nothing in this Rule shall prohibit parties from resolving disputes through other methods. However, in any case where one party may pose a risk of harm (such as domestic violence) to another party or family member, mediation should not be used.

Rule 2 Mediation defined

Mediation is an informal process in which a neutral third person(s) 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 3 Referral of cases to mediation

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. In this decision, the court shall consider:

(a) the stage of the litigation, including the need for discovery, and the extent to which it has been

conducted;

(b) the nature of the issues to be resolved;

(c) the value to the parties of confidentiality, rapid resolution, or the promotion or maintenance of on-going relationships;

(d) the willingness of the parties to mutually resolve their dispute;

(e) other attempts at dispute resolution; and

(f) the ability of the parties to participate in the mediation process.

Rule 4 No stay of proceedings

Unless otherwise ordered by the Court, mediation shall not stay any other proceedings.

Rule 5 Appointment of mediator

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, which will select a mediator or a mediation service.

Rule 6 Mediator compensation

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 reasonable and 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 7 Mediation procedure

Following selection of the mediator, the mediator shall set an initial mediation conference within thirty (30) days. The mediation conference shall be held in the county in which the case is pending or at a site agreed upon by the parties. The mediator may meet with the parties or their counsel prior to the mediation conference for the purpose of establishing a procedure for the mediation conference. The mediator may require the parties to submit a confidential statement of the case or other materials that the mediator may reasonably believe appropriate for efficiently conducting the mediation conference.

Rule 8 Attendance at mediation conference

The parties must attend the mediation conference. Counsel shall attend the mediation conference unless otherwise agreed to by the parties and the mediator or ordered by the Court. If a party is a public entity, it shall appear by the physical 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. If a party is an organization other than a public entity, it shall appear by the physical presence of a representative, other than the party's counsel of record, who has full authority to settle

without further consultation. If any party is insured for the claim in dispute, that party shall also be required to have its insurer(s) present by the physical presence of a representative of the insurance carrier(s) who is not that carrier's outside counsel; this representative must have full settlement authority. The foregoing requirements of attendance may be varied only by stipulation of the parties or by order of the Court for good cause shown.

Rule 9 Completion or termination mediation

The mediator may terminate the mediation conference after a settlement is reached or when the mediator determines that continuation of the process would be unproductive. After the initial mediation conference, mediation shall continue only by the agreement of the parties, their counsel and the mediator, or by order of the Court.

Rule 10 Report to the court

The mediator shall report 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.

Rule 11 Agreement

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 12 Confidentiality

A. Mediation sessions shall 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 shall be regarded as settlement negotiations for purposes of K.R.E. 408.

C. 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.

D. Nothing in this rule shall prohibit the mediator from reporting abuse according to KRS 209.030, KRS 620.030, or other applicable law.

Part XII. Mediation Guidelines for Court of Justice Mediators

Current with amendments received through October 2008

AP XII, Sec. 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.

AP XII, Sec. 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.

AP XII, Sec. 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.

AP XII, Sec. 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.