

**KENTUCKY BAR ASSOCIATION
RULES OF THE SUPREME COURT OF KENTUCKY**

PRACTICE OF LAW

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 Kentucky Bar Association.

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

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

(D) "Vice-President" means the 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) In the event 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 entered 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.

HISTORY: Amended by Amended by Order 2005-10, eff. 1-1-06; prior amendment eff. 3-1-98 (order 97-3), 1-1-97 (Order 96-1); adopted eff. 9-1-93