

## **MEDIATION BEST PRACTICES IN ALABAMA**

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“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses and waste of time.” The quotation sounds like the words of a modern day trial judge. However, these words of wisdom actually come from lawyer turned President, Abraham Lincoln, in his “Notes from a Law Lecture.” Although the words are more than 150 years old, the advice offered by President Lincoln still rings true for us today.

The idea of “compromise” is likely as old as our judicial system in the State of Alabama. Settlement negotiations and settlement conferences have long been a part of our judicial process. However, in the early to mid-1990s a new term was introduced to many of us as Alabama lawyers and judges: “mediation.” While mediation came late to the Yellowhammer State, the concept of alternative dispute resolution is now clearly an integral part of our court system. Though perhaps not as fully embraced in Alabama as the “Big Three” (faith, family and football), mediation has become widely utilized across the state.

Indeed, the 2017 Annual Report for the Alabama Center for Dispute Resolution provides a compilation from 1997 through 2017 showing that in Alabama over this 20 year span 100,435 cases were mediated with 79,701 of those cases settled for a settlement rate of 79.4 %. The success of mediation in Alabama is clearly shown in the Center’s Report for 2017 alone with 2,558 non-divorce civil cases mediated with 1,973 of those cases settled for a settlement rate of 77 %. In

2017, 891 divorce cases in Alabama were mediated with 662 of those settled for a success rate of 74%. Over the last 20 years, mediation truly has come of age in Alabama.

In fact, on July 17, 2003, the Alabama Supreme Court adopted Rule 55 of the Alabama Rules of Appellate Procedure which provides for appellate mediation. Subsequently, on November 17, 2003, the Supreme Court adopted the Alabama Appellate Mediation Rules. Our state's appellate mediation program is truly a model for appellate courts across the country. It is administered through the outstanding efforts of Ms. Michelle Ohme, as Executive Director and Supreme Court Administrator, and Ms. Lynn DeVaughn, as Court of Civil Appeals Administrator. Almost since its inception, the Alabama appellate mediation program has consistently achieved resolution of approximately fifty percent (50%) of all appellate cases sent to mediation, a truly remarkable result!

With the widely successful use of mediation in the Alabama court system, how do we continue this successful track record? How do we best utilize mediation as an alternative dispute resolution tool? How are members of the public, the Alabama State Bar and the Alabama judiciary best served in the use of mediation? It is with these goals and thoughts in mind that the author offers the following best practices for mediation in Alabama.

## **I. BE FAMILIAR WITH MEDIATION RULES AND STATUTES.**

The history of mediation in Alabama is not exactly a time consuming review. Following a study by a task force of the Alabama State Bar, the Alabama Supreme Court in 1992 adopted an Amendment to Rule 16 of the Alabama Rules of Civil Procedure. In its current form, Rule 16(c) of the Alabama Rules of Civil Procedure provides that the parties at a pre-trial conference may consider and take action with regard to a variety of subjects including "(7) the possibility of

settlement or the voluntary use by all parties of extra judicial procedures to resolve the dispute, including mediation conducted pursuant to the Alabama Civil Court Mediation Rules”. ALA. R. CIV. PROC. 16(c)(7). The 1992 Amendment of Rule 16 was to encourage the parties to consider resolution of disputes through alternative dispute resolution. Also, in 1992, the Alabama Supreme Court adopted the Alabama Civil Court Mediation Rules (“the Rules”). The starting point for mediation best practices in Alabama clearly begins with a review of and familiarization with the Rules. Subsequent to their implementation in 1992, the Rules have been amended in 1998 and later in 2002. The Rules are straightforward and concise. There are only fifteen (15) Rules at present and, in print edition, they cover less than 10 pages. A clear understanding of the Rules is vital to laying the groundwork for a successful mediation.

A couple of other major milestones in the development of mediation in Alabama occurred in 1994. In that year, the Alabama Supreme Court created the Alabama Supreme Court Commission on Dispute Resolution. The Commission is made up of a variety of members appointed by the Courts and various other organizations. The Commission promotes alternative dispute resolution, provides education and training to the members of the state bar, the judiciary and the public about ADR, maintains statistical data related to the effectiveness of ADR in Alabama and helps to promote community based ADR programs, such as the Parents Are Forever Family Mediation Program. This latter program assists low-income families who are going through an initial divorce or separation by providing a mediator at no cost to them. In 2017, the program helped more than 125 families and benefited 191 children with a settlement rate of 73%. Mediators in the program are compensated at a reduced rate and are expected to provide some pro bono service as a participant in the program. For those who may be interested in providing such community service as a mediator or if you are interested in including your local courts in the

Parents Are Forever Family Mediation Program, please contact Ms. Eileen Harris who serves as the Executive Director of the Alabama Center for Dispute Resolution.

Also, in 1994, the Alabama State Bar established a standing committee on Alternative Methods of Dispute Resolution. That committee has evolved and has now become the Dispute Resolution Section of the Alabama State Bar. Again, for those interested in professional service opportunities and ADR issues, the Dispute Resolution Section of the state bar is a great opportunity for involvement.

The success of mediation at the trial court level was quickly recognized in Alabama. Consequently, as noted earlier, the Alabama Supreme Court in July 2003 adopted Rule 55 of the Alabama Rules of Appellate Procedure. Rule 55 of the Appellate Rules generally authorizes an appellate court to direct the attorneys and parties to appear before a mediator and to engage in privileged and confidential negotiations in an effort to resolve the litigation. ALA. R. APP. PROC. 55. Subsequently, on November 17, 2003, the Alabama Supreme Court adopted the Alabama Appellate Mediation Rules. Like their trial court counterpart, the Alabama Appellate Mediation Rules are quite brief and straightforward. At present, there are nine (9) Rules which address an overview of the Appellate Mediation Program, screening, referral, the mediator, mediation procedures and completion of the mediation process. A best practices approach to appellate mediation in Alabama clearly begins with familiarity with Rule 55 of the Alabama Rules of Appellate Procedure and a review and understanding of the Appellate Mediation Rules.

Additionally, those engaged in alternative dispute resolution in Alabama should be familiar with the provisions of Sections 6-6-20 and 6-6-25 of the Code of Alabama. Although the statutory enactments in Alabama related to alternative dispute resolution/mediation are small in number, the provisions are very important to the overall process.

On May 17, 1996, the Alabama Legislature enacted a statute which provides for mandatory mediation prior to trial. The provisions of Section 6-6-20(b) of the Code of Alabama currently provide as follows:

Mediation is mandatory for all parties in the following instances:

- (1) At any time where all parties agree.
- (2) Upon motion by any party. The party asking for mediation shall pay the costs of mediation, except attorney's fees, unless otherwise agreed.
- (3) In the event no party requests mediation, the trial court may on its own motion order mediation. The trial court may allocate the costs of mediation, except attorney's fees, among the parties.

ALA. CODE § 6-6-20(b).

While all of us as attorneys are certainly familiar with the use of mediation in Alabama courts, not everyone may be aware of the provision of Section 6-6-20(b)(2) which provides that mediation is mandatory "upon motion by any party". The only qualifying limitation is that the party who moves to compel mediation will be responsible for payment of the cost of mediation but not attorney's fees.

A significant portion of the Mandatory Mediation Act also deals expressly with domestic mediations. For example, the statute prohibits a court from ordering parties into mediation for resolution of issues in a petition for an order for protection or in any petition where domestic violence is alleged. ALA. CODE § 6-6-20(d) and (e). Furthermore, the statute requires that a mediator who receives an order to conduct mediation or a referral from a court for mediation shall screen for the occurrence of domestic or family violence between the parties and outlines procedures related to addressing the issue of domestic or family violence. ALA. CODE § 6-6-20(f). Moreover, the Mandatory Mediation Act provides that where a claim of immunity is asserted as a

defense, that the trial court shall dispose of that issue prior to mediation. ALA. CODE § 6-6-20(g). Lastly, the statute provides that a court should not order parties into mediation if the action is one involving child support, adult protective services or child protective services where the Department of Human Resources is a party. ALA. CODE § 6-6-20(h).

A second Alabama statute addresses the issue of mediator confidentiality. In May 2008, the Alabama Legislature enacted a statute which generally provides that a mediator may not be compelled to divulge the contents of documents received or viewed during mediation or to otherwise testify regarding any statements made, actions taken or positions stated by a party during a mediation. ALA. CODE § 6-6-25.

Notably, if the litigation is in federal court, best practices certainly require review and familiarity with local ADR Rules. Each of Alabama's Federal District Courts have their own specific provisions related to mediation and ADR (e.g., Local Rule 16.2 and the Alternative Dispute Resolution Plan for the Middle District of Alabama, Local Rule 16.1 and the Alternative Dispute Resolution Plan for the Northern District of Alabama and Local Rule 16 and the Alternative Dispute Resolution Plan for the Southern District of Alabama).

Finally, attorneys in Alabama and especially those who serve as mediators clearly should be aware of and familiar with the provisions of the Alabama Code of Ethics for Mediators. This Code of Ethics was originally adopted by order of the Alabama Supreme Court on December 14, 1995. This Code outlines standards to be a guide for mediators and their practices.

In summary, a best practices approach to mediation in Alabama certainly begins with reviewing and understanding the Alabama Mediation Rules and statutory provisions governing mediation.

## **II. SELECT THE OPTIMUM TIME TO MEDIATE.**

The provisions of Rule 2 of the Alabama Civil Court Mediation Rules declare that parties to a civil action “may engage in mediation by mutual consent at any time.” ALA. CIV. MED. R. 2. So when is the optimum time to mediate a case? Clearly, there are no hard and fast rules as to when a case should go to mediation. Each case must be considered on its own merits based upon the issues involved, the parties and other relevant circumstances.

Undoubtedly, some matters can and should be mediated even before a lawsuit is filed. The advantage of confidentiality to protect one or both parties’ privacy, the ability to continue or amicably end a business relationship or the avoidance of a lengthy and protracted litigation battle are all important reasons to consider pre-suit mediation.

The complaint has been filed, the defendant served and an answer provided. Is now the time to mediate? In some such instances, mediation will succeed. However, where no discovery has been undertaken, no documents exchanged and no depositions taken, the parties and their counsel often arrive at mediation with each party fully aware of his or her side of the case and virtually oblivious as to the opposing party’s views, evidence, credibility, strengths or weaknesses. Thus, once litigation has commenced, the author’s general experience has been that mediation is more likely to succeed if some limited discovery has been completed. Interrogatory answers, document production and perhaps the depositions of the parties certainly allows a better understanding of the opposing side’s case and evaluation of the credibility and appeal of the opposing party as a witness.

Some would suggest that an ideal time for mediation is with a pending motion for summary judgment. With a dispositive motion pending but not yet ruled upon, it certainly allows the mediator a clear opportunity to encourage both parties to heavily weigh the potential for two

significantly different outcomes of the case if mediation does not succeed. The downside of waiting until this stage of the litigation to mediate is often voluminous documents have been produced and numerous depositions taken, including those of experts. When the parties arrive at mediation, each side has incurred significant time, fees and expenses and may have become deeply entrenched in their respective positions.

Neither side wanted to mediate or the early case mediation was unsuccessful. Discovery has been completed and dispositive motions filed. Summary judgment has been denied. A trial has taken place and the jury has announced its verdict. Too late to mediate? Clearly not with the previously noted successful record of appellate mediation in Alabama. While mediation of a case on appeal presents its own difficulties, particularly where summary judgment has been granted or a successful jury verdict has been obtained, there still remains a window of opportunity for resolution even at this stage of the litigation.

Best practices for mediation require that both plaintiff's and defendant's counsel consider as a part of their preliminary case evaluation the optimum time for mediation.

### **III. CHOOSE THE RIGHT MEDIATOR.**

Rule 3 of the Alabama Civil Court of Mediation Rules provides that in ordering mediation the trial court should appoint "a qualified mediator." ALA. CIV. MED. R. 3. Rule 4 specifically addresses the issue of qualifications of a mediator. In general, this Rule requires that in court ordered mediations, a mediator shall meet those qualifications required by statute or by the Alabama Supreme Court Mediator Registration Standards or shall have those qualifications which the court "may deem appropriate given the subject matter of the mediation." *Id.* 4. As a current member of the Alabama Supreme Court Commission on Dispute Resolution, the author would

certainly encourage litigators to select individuals who are registered with the Alabama Center for Dispute Resolution.

Do you need a specialized mediator for your case? Certain types of cases may warrant use of a mediator with specialized knowledge, training or experience, especially with regard to cases such as tax disputes, patent or intellectual property litigation, domestic relation matters, environmental and/or regulatory claims and/or employment cases.

In addition to the type of litigation involved and the possible need for specialized knowledge, training or experience, a second consideration relates primarily to the style of the mediator. Depending upon the parties involved, the nature of the case or other circumstances, counsel may prefer a more facilitative or a more evaluative mediator.

While different states impose different rules upon mediators, Rule 9 of the Alabama Civil Court Mediation Rules states that the authority of a mediator includes “at the request of the parties, to make oral and written recommendations for settlement.” ALA. CIV. MED. R. 9. Furthermore, the Comment to Rule 9 emphasizes, “Nothing in this section would prohibit the parties from mutually requesting a mediator to propose a solution to the dispute or an amount to settle a dispute. Indeed, the revision is not intended to reduce a mediator’s role in helping parties in joint or private sessions to create solutions.” ALA. CIV. MED. R. 9, Comment. Mediation best practices in Alabama includes selection of the best person to serve as mediator determined on a case by case basis.

#### **IV. PREPARE YOUR CLIENT FOR MEDIATION.**

For insurance defense counsel this may be a simple or perhaps even an unnecessary step. The insurance claim representative attending the mediation may have participated in more

mediations than the lawyers and mediator combined. Nevertheless, even for the sophisticated client or client representative, a pre-mediation discussion and/or meeting is generally helpful.

For the party, whether plaintiff or defendant, who has never attended a mediation, preparation is essential. Counsel should explain the mediation process to the client and answer any questions or concerns the client may raise with regard to the mediation procedure. Furthermore, even for the sophisticated business client, it should never be assumed that the client is familiar with the mediation process or understands what to expect on the day of mediation.

Mediation best practices in Alabama certainly includes preparing the client for mediation.

## **V. PREPARE YOUR MEDIATOR FOR MEDIATION.**

When the author serves as a mediator, the letter generally provided to counsel requests that they forward a position statement outlining the significant factual and legal issues in the case, as well as copies of any pleadings, motions or other materials which would be beneficial prior to the mediation. In response to this request, I have received (without in any way violating any confidences and referring to no attorney or mediation in particular) the following: (1) nothing; (2) a short email on the morning of the mediation; (3) a short email the evening before the mediation; (4) a lengthy email; (5) a telephone call; (6) a one to three page position statement with no attachments; (7) a three to five page position statement with a copy of the complaint attached; (8) a five to seven page position statement with a copy of relevant pleadings attached; (9) a seven to twenty page position statement with a copy of the motion for summary judgment and all documents submitted in support of and in opposition to such motion; (10) a four to ten page position statement with a copy of all depositions taken in the case; and (11) no position statement and three or four boxes of documents.

And which of these is the better practice? The answer is: all of the above. At times as a litigator, if forced to provide a position statement, the author would simply provide the mediator with a sheet of paper and the word “oops” or “sorry.” Sometimes, there is nothing more to say. The mediator really does not always need a position statement.

However, generally, as a mediator the author has been eternally grateful for a short email or a telephone call with counsel that gives a heads up as to some particularly sensitive issue, some difficult legal question, or some important relationship that the mediator needs to know about. Consequently, from a mediator’s perspective, please do not view a request for a position statement as a burden or imposition. To the contrary, it is simply an invitation – an invitation to communicate any significant factual matters or legal issues which the mediator should be aware of prior to the mediation session. Sometimes it is useful to know that the parties should be kept on separate floors. In some cases, it is extremely helpful to have copies of summary judgment motions and briefs, depositions and, yes, even boxes of documents. On other occasions, a pre-mediation telephone call is simply all that needs to be done. The author would encourage litigators to put themselves in the position of the mediator. If you were the mediator, what would you want to know about your client and your client’s position in advance of the mediation?

Best mediation practices in Alabama include using the opportunity for a pre-mediation telephone conference or a mediation position statement to prepare your mediator for the mediation session.

## **VI. HAVE THE RIGHT PERSON OR PERSONS PRESENT FOR MEDIATION.**

While perhaps surprising to some, the provisions of Rule 6 of the Alabama Civil Court Mediation Rules do not require that a person with authority be physically present for the mediation.

Indeed, Rule 6 of the Rules simply provides that “someone with authority to settle those issues must be present at the mediation session or reasonably available to authorize settlement during the mediation session.” ALA. CIV. CT. MED. R. 6. The concern of having the correct person physically present for a mediation is expressly addressed in the Comment to Rule 6, in part, as follows:

The Rule attempts to strike the proper balance between having a person with full settlement authority physically present at the mediation session and allowing such person to be within reasonable contact, such as by telephone. Mediation of disputes with small amounts in controversy or where the person with settlement authority would incur substantial cost to travel to the site of the mediation might best be accommodated by using a telephone conference or similar long-distance communication. On the other hand, one value of mediation is having the decision-maker, such as a corporation’s chief financial officer or chief executive officer, present to hear the discussions during mediation to personally assess the pros and cons of pursuing litigation versus settlement of the controversy for a particular amount.

Ala. Civ. Ct. Med. R. 6, Comment.

As noted in the Comment, where the amount in dispute is quite small or travel is cost prohibitive or unduly expensive in relation to the amount in dispute, it may be entirely appropriate to have an insurance claims representative available by telephone. However, absent such factors, certainly the default preference should be to have a decision-maker personally present “to hear the discussions during mediation.”

Mediation best practices in Alabama certainly dictates that the issue of “present at the mediation session” or “reasonably available to authorize settlement during the mediation session” should be considered, discussed and resolved in advance of the mediation session itself. Some trial judges do specifically require personal physical presence in their standing mediation order.

One should be particularly aware if in federal court of the provisions of any local Alternative Dispute Resolution Plan. For example, in the United States District Court for the

Northern District of Alabama under its ADR Plan the provisions of Rule IV(6), state, in part, as follows:

The attorney primarily responsible for each party's case must personally attend the mediation conference and must be prepared and authorized to discuss all relevant issues, including settlement. The parties must also be present in person unless otherwise ordered by the Court or excused by the mediator. However, when a party is other than an individual or when a party's interests are being represented by an insurance company, an authorized representative of such party or insurance company, with full authority to settle, must attend in person unless otherwise ordered by the Court or excused by the mediator with notice to the opposing party. The mediator will report a party's willful failure to attend the mediation conference to the Court, including the failure to attend of an authorized representative with full authority to settle, which may impose appropriate sanctions. Failure to attend a mediation is not considered to be confidential for the purposes of Paragraph 9 below.

United States District Court for the Northern District of Alabama, Alternative Dispute Resolution Plan, Rule IV(6).

It has certainly been the author's experience that mediation is more likely to be successful where those with settlement authority are in personal attendance at the mediation. If personal attendance by a party or insurance representative is important to counsel, then consideration should be given to including required attendance as a part of the Court's mediation order. On the other hand, if personal attendance at the mediation is not feasible or practical, this should also be addressed prior to mediation with the Court and the mediator. Best practices in mediation is generally to have those with decision-making authority personally present for the mediation session.

## **VII. GIVE APPROPRIATE CONSIDERATION TO THE MOST IMPORTANT NUMBERS.**

After more than 20 years' experience as a mediator, the author has concluded that the two most important numbers at a mediation are the following: (1) plaintiff's first offer and (2) defendant's last offer.

Although not always the case, the success or failure of some mediations is directly linked to the plaintiff's first offer. An offer from plaintiff's counsel that is seen as completely unrealistic and extremely high may precipitate a knee-jerk response, low-ball counteroffer from the defendant ensuring an early stalemate in the mediation process. At times, the parties come to mediation having already engaged in settlement negotiations. This is certainly a welcome development from the mediator's perspective and enables both sides to begin the mediation process with a clear understanding of the opposing party's opening position.

However, at other times, when there has been no settlement discussion at all between the parties prior to mediation, an opening offer is sometimes made with seemingly little, if any, prior thought or consideration of the impact. The author would encourage plaintiff's counsel to give significant thought in advance of the mediation to the plaintiff's first offer, a number which will set the stage for the negotiations to come. Certainly, it must be recognized that from the plaintiff's starting offer it is extremely difficult, though not impossible, to go backwards. Thus, the thought of allowing "room to move" is an entirely logical part of the analysis. However, this should not be the entire analysis. How will this first offer be perceived in the other room? It is a question which is not consistently asked but should always be considered. One of the two most important numbers at mediation is the plaintiff's first offer.

A second critically important number at mediation is the defendant's last offer. As with plaintiff's first offer, counsel should give considerable thought and analysis before declaring a

number to be the “best and final offer.” Indeed, while an unrealistically high first offer can make for a difficult mediation, an unrealistically low last number can certainly assure the mediation’s unsuccessful conclusion. Hopefully, the endpoint of a mediation is viewed by both parties as a target or goal as opposed to an arbitrarily selected number with a line drawn in the sand. With a healthy exchange of information, litigants on both sides may learn information about their case for the first time at mediation. Documents or witnesses may be disclosed or identified at mediation which were previously unknown. Views regarding a witness’s testimony or a party’s credibility may be changed as a result of information learned at the mediation. Indeed, one of the very advantages of mediation is to afford an opportunity for introspection and renewed self-critical analysis. Is that your final offer?

Best practices in mediation in Alabama require careful thought and objective insight into the most important numbers at mediation: the plaintiff’s first offer and the defendant’s last offer.

### **VIII. NOT EVERYONE LIES TO THE MEDIATOR.**

Well known lawyer, talented magician and exceptional mediator, Mr. Don Spurrier (who practiced law for many years in Huntsville but sadly is no longer with us), was sometimes heard to say in his later days as a mediator, “Everyone lies to the mediator.” For Don, this was simply a whimsical recognition that a certain amount of gamesmanship takes place in every mediation session. Don Spurrier, the magician, understood that at times a delicate sleight of hand may be in order to try to reach one’s goal. And, certainly, Don Spurrier, the seasoned litigator, well understood the reluctance of counsel to fully disclose everything about one’s case to a mediator who ultimately is not the decision maker for the other room. Thus, according to Don, “Everyone lies to the mediator.”

Certainly, in many mediations there simply are no “juicy secrets.” The issue of disclosing some significant document, witness or fact, perhaps not known by the opposing party, does not arise in every case. However, there are instances when one side or sometimes even both come to a mediation with highly relevant information which is unknown to the opposing party. As an experienced litigator, the author fully and completely understands the reluctance to disclose such information. As a mediator, the author certainly understands an approach by counsel who discloses information for my ears only but then states, “If we get close, I may let you tell this to the other side.” In the adversarial world of litigation, this is an entirely reasonable and appropriate approach.

However, if the ultimate objective is to reach a resolution of the dispute at mediation, the full disclosure of known information definitely enhances such an opportunity. Under certain limited circumstances, the author would acknowledge that some “juicy secrets” simply cannot and should not be disclosed. Don, you were probably right, “Everyone lies to the mediator.” Nonetheless, the author urges participants in the mediation process to consider how the strategic use and timely disclosure of damaging information can be employed as a tactical advantage to achieve dispute resolution. Indeed, if one party evaluates a case based upon secret information known only to their side, it should come as no surprise that opposing counsel, lacking such information, will likely reach a very different evaluation of the case.

Best practices at mediation in Alabama requires that not everyone lies to the mediator.

## **IX. THE ULTIMATE OBJECTIVE MUST BE RESOLUTION.**

In one theoretical sense, cases should never settle at mediation. After all, mediation becomes a process where two parties are brought together with entirely conflicting and, in fact,

diametrically opposed objectives: (1) the plaintiff wants to get as much money as possible at mediation, and (2) the defendant wants to pay as little money as possible at mediation. With these two conflicting ideas, one would think that mediation most often is a failed process. However, as the numbers reported earlier from the Alabama Center for Dispute Resolution indicate, the exact opposite is true. Most cases in Alabama are settled at mediation.

How can this be possible? The answer is fairly simple but of utmost importance: both parties must want resolution. Settlement occurs at mediation when a defendant offers a dollar amount which the plaintiff feels that he or she cannot walk away from and/or when the plaintiff expresses a willingness to settle a case for an amount which is better than the risk of a trial. The parties come to mediation with differing objectives (one wanting more and one wanting less). Resolution occurs when it is the most important objective for both sides. Mediation ultimately is not about winning or losing. To resolve a case at mediation requires two parties who are willing to negotiate and compromise and who believe that resolution is more important than a time-consuming and destructive litigation battle.

Best practices in mediation in Alabama require both parties to approach mediation with the willingness to negotiate and a true desire to obtain a final resolution of their dispute.

## **X. BE CREATIVE.**

If you want a fight, the courtroom is the place for you. If your client wants a protracted and expensive battle to be decided by arbitrarily selected strangers, then litigation is where they need to be. But remember that a jury trial only has three possible outcomes: (1) a verdict for the plaintiff; (2) a verdict for the defendant, or (3) a hung jury.

The possibilities for creative solutions to disputes at mediation are endless. The author has seen mediation prove to be effective in resolving disputes ranging from The International Space Station to neighbors quarreling. Solutions at mediation range from millions of dollars to “I’m sorry”. Lawyers, as a group, are not just socially fun people; they are, on the whole, a creative bunch! When you go to mediation, put the swords and spears in the corner, put on your thinking caps and be willing to think outside the box to reach an acceptable resolution of the case. Be willing to work toward a creative solution no matter how difficult the circumstances.

Best practices in mediation in Alabama require that counsel for the parties and the mediator be willing to consider and identify creative methods to settle cases. Remember: “Blessed are the peacemakers.”

Harold Stephens is a partner in the firm of Bradley Arant Boult Cummings LLP. Harold currently serves as Chair of the Alabama Supreme Court Commission on Alternative Dispute Resolution. He is a charter member of the Alabama Academy of Attorney Mediators, a member of the National Association of Distinguished Neutrals and a member of the Panel of Neutrals for the United States District Court for the Northern District of Alabama. He has mediated hundreds of disputes including complex business litigation, product liability cases, employment matters and personal injury/wrongful death cases. In addition to his mediation practice, he also handles a variety of litigation including health care litigation, medical malpractice cases, products liability and personal injury matters as well as business and commercial disputes. He currently serves as a member of the Alabama Supreme Court Committee on Pattern Jury Instructions, is past Chair of the Litigation Section of the Alabama State Bar and is a former member of the Board of Bar Commissioners.