Mediation in Alabama

Presented by:

V. Michelle Obradovic, Esq.
Wise Resolution, LLC
2100A SouthBridge Parkway, Ste. 650
Birmingham, Alabama 35209
205-414-7589 phone
205-414-7400 fax

For:

CLE by the Hour
2:20 p.m. to 3:20 p.m.
December 29, 2009
Cumberland School of Law

I. GOALS FOR THE SESSION

The primary purpose of this session is to update you on developments in mediation law and policy in Alabama applicable in civil trial matters. To do so, we must survey the state and federal legislative, executive and judicial branches of government. The handout is a comprehensive reference source while the accompanying lecture is designed to highlight individual significant case law developments and their practical implications on advocates in mediation and mediation practitioners.

In addition to federal and state case law, the sources consulted in the course of preparing this handout are as follows: On the State level, the Alabama Rules of Civil Procedure; Alabama Civil Court Mediation Rules; Alabama Code of Ethics for Mediators; Rules Regarding the Alabama Supreme Court Commission on Dispute Resolution; Alabama Small Claims Rules; Alabama Rules of Evidence; Alabama Rules of Appellate Mediation, Alabama Rules of Judicial Administration; Standards and Recommendations Relating to Delay Reduction; Attorney General Opinions, Executive Orders and Mediator Ethics Opinions.

II. ALABAMA'S LEGAL FRAMEWORK

<u>Mandatory Mediation Act - Effective Date. -- May 17, 1996.</u>

§6-6-20. **Definition; instances requiring mediation; sanctions; exceptions;** etc. (a) For purposes of this section, "mediation" means a process in which a neutral third party assists the parties to a civil action in reaching their own settlement but does not have the authority to force the parties to accept a binding decision. (b) 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 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 fees, among the parties. (c) If any party fails to mediate as required by this section, the court may apply such sanctions as it deems appropriate pursuant to Rule 37 of the Alabama Rules of Civil Procedure. (d) A court shall not order parties into mediation for resolution of the issues in a petition for an order for protection pursuant to The Protection from Abuse Act, Sections 30-5-1 through 30-5-10 or in any other petition for an order for protection where domestic violence is alleged. (e) In a proceeding concerning the custody or visitation of a child, if an order for protection is in effect or if the court finds that domestic violence has occurred, the court shall not order mediation. (f) A mediator who receives a referral or order from a court to conduct mediation shall screen for the occurrence of domestic or family violence between

the parties. Where evidence of domestic violence exists mediation shall occur only (1) Mediation is requested by the victim of the alleged domestic or family violence; (2) Mediation is provided by a certified mediator who is trained in domestic and family violence in a specialized manner that protects the safety of the victim; and (3) The victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate. (g) Where a claim of immunity is offered as a defense, the court shall dispose of the immunity issue before any mediation is conducted. (h) A court shall not order parties into mediation in any action involving child support, adult protective services or child protective services wherein the Department of Human Resources is a party to said action. (Acts 1996, No.96-515,1.)

Mediator Confidentiality Act - (Acts 2008 No. 387, §1,2,3) – Effective date May 16, 2008 a.k.a. Testimonial Immunity Bill

§6-6-25. Definitions: legislative findings; compelled testimony, etc. mediators. (a) For the purposes of this act, the following words shall have the following meanings: (1) MEDIATION. A process in which a mediator acts to encourage and facilitate the resolution of a dispute without imposing a settlement. (2) MEDIATOR. A neutral third party conducting a mediation, including any co-mediators, employees, agents, or independent contractors of the mediator or co-mediator, and any person attending or observing the mediation for purposes of training. (b) The Legislature finds that it is desirable to encourage public confidence in the use of alternative methods of dispute resolution by preventing a mediator from being compelled to testify or produce documents about a mediation. (c) Except as otherwise permitted by the Alabama Civil Court Mediation Rules, a mediator shall not be compelled in any adversary proceeding or judicial forum, including, but not limited to, a hearing on sanctions brought by one party against another party, to divulge the contents of documents received, viewed, or drafted during mediation or the fact that such documents exist, nor shall the mediator be otherwise compelled to testify in regard to statements made, actions taken, or positions stated by a party during the mediation.

Alabama Civil Court Mediation Rules – Effective 8/1/1992 as amended through May 1, 2009.

Introduction: These rules have been promulgated with the assistance of the American Arbitration Association, whose mediation procedures have been applied in whole or in part in these rules. Outline: - Rule 1 DEFINITION OF MEDIATION AND SCOPE OF RULES - Rule 2 INITIATION OF MEDIATION; STAY OF PROCEEDINGS - Rule 3 APPOINTMENT OF A MEDIATOR - Rule 4 QUALIFICATIONS OF A MEDIATOR - Rule 5 VACANCIES - Rule 6 ASSISTANCE AND SETTLEMENT AUTHORITY - Rule 7 TIME AND PLACE OF MEDIATION - Rule 8 IDENTIFICATION OF MATTERS IN DISPUTE - Rule 9 AUTHORITY OF MEDIATOR - Rule 10 PRIVACY - Rule 11 CONFIDENTIALITY - Rule 12 NO RECORD - Rule 13 TERMINATION OF MEDIATION - Rule 14 EXPENSES, MEDIATOR'S FEE, AND DEPOSITS - Rule 15 EXPENSES, MEDIATOR'S FEE, AND DEPOSITS.

RULE 1. DEFINITION OF MEDIATION AND SCOPE OF RULES - (a) Mediation is an extra judicial procedure for the resolution of disputes, provided for by statute and by the Alabama Rules of Civil Procedure. A mediator facilitates negotiations between parties to a civil action and assists the parties in trying to reach a settlement, but does not have the authority to impose a settlement upon the parties. (b) These rules shall apply: (1) In mediations ordered by the courts of this State as provided by statute or by the Alabama Rules of Civil Procedure; (2) In any other mediations by parties in a pending civil action in an Alabama court, other than the Alabama Supreme Court or Alabama Court of Civil Appeals, unless the parties expressly provide otherwise; and, (3) In other mediations if the parties agree that these Rules shall apply.

RULE 2. INITIATION OF MEDIATION; STAY OF PROCEEDINGS - Parties to a civil action may engage in mediation by mutual consent at any time. The court in which an action is pending shall order mediation when one or more parties request mediation or it may order mediation upon its own motion. In all instances except where the request for mediation is made by only one party, the court may allocate the costs of mediation, except attorney fees, among the parties. In cases in which only one party requests mediation, the party requesting mediation shall pay the costs of mediation, except attorney fees, unless the parties agree otherwise. Upon the entry of an order for mediation, the proceedings as to the dispute in mediation may be stayed for such time as set by the court in its order of mediation. Upon motion by any concerned party, the court may, for good cause shown, extend the time of the stay for such length of time as the court may deem appropriate.

RULE 3. APPOINTMENT OF A MEDIATOR - Upon an order for mediation, the court, or such authority as the court may designate, shall appoint a qualified mediator. The mediator appointed shall be agreed upon by the parties concerned, subject to the

qualifications provisions of Rule 4, except that if the parties do not agree upon a mediator, then the selection of the mediator shall be in the discretion of the court or its designated authority. A single mediator shall be appointed unless the parties or the court determines otherwise.

RULE 4. QUALIFICATIONS OF A MEDIATOR - In court-ordered mediations, the mediator shall have those qualifications required by statute or by the Alabama Supreme Court Mediator Registration Standards or, in the absence of such statute or standards, the mediator shall have those qualifications the court may deem appropriate given the subject matter of the mediation. No person shall serve as a mediator in any dispute in which that person has any financial or personal interest, except by the written consent of all parties. Before accepting an appointment, the prospective mediator shall disclose to the parties any circumstances likely to create an appearance of bias or likely to prevent the mediation from commencing within a reasonable time. Upon receipt of such disclosure, the parties may name a different person as mediator. If the parties disagree as to whether a prospective mediator should serve, the court shall appoint the mediator.

RULE 5. VACANCIES - If any mediator becomes unwilling or unable to serve, the court shall appoint another mediator. The appointment of a successor mediator shall be by the same procedures and upon the same terms as an initial appointment.

RULE 6. ASSISTANCE AND SETTLEMENT AUTHORITY - Any party not represented by an attorney may be assisted by persons of his or her choice in the mediation. Each party, or that party's representative, must be prepared to discuss during mediation sessions the issues submitted to mediation and, unless otherwise expressly agreed upon by the parties or ordered by the court before the first mediation session, someone with authority to settle those issues must be present at the mediation session or reasonably available to authorize settlement during the mediation session.

RULE 7. TIME AND PLACE OF MEDIATION - The mediator shall fix the time of each mediation session. The mediation sessions shall be held at any convenient location agreeable to the mediator and the parties or as otherwise designated by the court.

RULE 8. IDENTIFICATION OF MATTERS IN DISPUTE - A mediator may require each party concerned, within a reasonable time before the first scheduled mediation session, to provide the mediator with a brief memorandum setting forth the party's position with regard to the issues that need to be resolved. The mediator shall not distribute the memoranda to the parties without their consent. At the first session, the parties shall produce all information reasonably required for the mediator to understand the issues presented. The mediator may require either party to supplement this information.

RULE 9. AUTHORITY OF MEDIATOR - The mediator does not have authority to impose a settlement upon the parties, but the mediator shall attempt to help the parties reach a satisfactory resolution of their dispute. The mediator is authorized to conduct joint and separate meetings with the parties, to communicate offers between the parties as the parties authorize, and, at the request of the parties, to make oral and written recommendations for settlement. Whenever necessary, the mediator may also obtain expert advice concerning technical aspects of the dispute, provided the parties agree to the mediator's obtaining such advice and assume the expenses of obtaining it. Arrangements for obtaining such advice shall be made by the mediator or by the parties. The mediator is authorized to end the mediation whenever, in the judgment of the mediator, further efforts at mediation would not contribute to a resolution of the dispute between the parties (see Rule 13(a)(2)).

RULE 10. PRIVACY - Mediation sessions are private. An alleged victim of domestic or family violence may have in attendance at mediations a supporting person of his or her choice. In all other cases, persons other than the parties and their representatives may attend mediation sessions only with the permission of the parties and with the consent of the mediator.

RULE 11. CONFIDENTIALITY - (a) All information disclosed in the course of a mediation, including oral, documentary, or electronic information, shall be deemed confidential and shall not be divulged by anyone in attendance at the mediation except as permitted under this Rule or by statute. The term "information disclosed in the course of a mediation" shall include, but not be limited to: (1) views expressed or suggestions made by another party with respect to a possible settlement of the dispute; (2) admissions made by another party in the course of the mediation proceedings; (3) proposals made or views expressed by the mediator; (4) the fact that another party had or had not indicated a willingness to accept a proposal for settlement made by the mediator; and (5) all records, reports, or other documents received by a mediator while serving as mediator. (b) The following are exceptions to the general rule stated in Rule 11(a): (1) A mediator or a party to a mediation may disclose information otherwise prohibited from disclosure under this section when the mediator and the parties to the mediation all agree to the disclosure. (2) Information otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its use in mediation. (3) The confidentiality provisions of this Rule shall not apply: (i) to a communication made during a mediation that constitutes a threat to cause physical injury or unlawful property damage; (ii) to a party or mediator who uses or attempts to use the mediation to plan or to commit a crime; or (iii) to the extent necessary if a party to the mediation files a claim or complaint against a mediator or mediation program alleging professional misconduct by the mediator arising from the mediation. (c) A court shall neither inquire into nor receive information about the positions of the parties taken in mediation proceedings; the facts elicited or presented in mediation proceedings; or the cause or responsibility for

termination or failure of the mediation process. (d) A mediator shall not be compelled in any adversary proceeding or judicial forum, including, but not limited to, a hearing on sanctions brought by one party against another party, to divulge the contents of documents received, viewed, or drafted during mediation or the fact that such documents exist nor shall the mediator be otherwise compelled to testify in regard to statements made, actions taken, or positions stated by a party during the mediation.

RULE 12. NO RECORD - There shall be no record made of the mediation proceedings.

RULE 13. TERMINATION OF MEDIATION - (a) The mediation process may be terminated at any time after the initial mediation session by any party to the mediation. It also may be terminated by the mediator. Court-ordered mediations shall be terminated by filing with the court one of the following: (1) Notice that the parties concerned have executed a settlement agreement. Such a notice shall be signed by all parties concerned or by their attorneys; or (2) A written declaration signed by the mediator stating that in the mediator's judgment further efforts at mediation will not contribute to a resolution of the dispute among the parties (see Rule 9). (b) Mediation also shall be terminated by the expiration of the period of any court-ordered stay provided by Rule 2. (c) The fact that mediation has once been terminated as to a particular dispute shall not bar the entry of a later order to mediate that dispute.

RULE 14. INTERPRETATION AND APPLICATION OF RULES - The mediator shall interpret and apply these rules insofar as they relate to the mediator's duties and responsibilities. In other respects, they shall be interpreted and applied by the court.

RULE 15. EXPENSES, MEDIATOR'S FEE, AND DEPOSITS - (a) Expenses. The expenses of a witness for a party shall be paid by the party producing the witness. All other expenses of the mediation, including necessary travel and other expenses of the mediator, the expenses of any witnesses called by the mediator and the cost of any evidence or expert advice produced at the direct request of the mediator, shall be borne equally by the parties unless the parties agree otherwise, or unless the court directs otherwise. (b) Mediator's Fee. A mediator shall be compensated at a reasonable rate, agreed to by the parties, or as set by the court. The mediator's fee shall be borne equally by the parties, unless they agree otherwise, or unless the court directs otherwise pursuant to Rule 2. (c) Deposits. Before the mediation process begins, each party to the process shall deposit with the mediator such an amount of the anticipated expenses and fees as the court shall direct or the mediator reasonably requires. When the mediation process has been terminated, the mediator shall render an accounting, requiring payment of additional expenses and fees by the appropriate parties, or returning any unexpended balance to the appropriate parties.

* Mediation is governed largely by the Alabama Civil Court Mediation Rules. However, settlement resulting in joint dismissal with or without prejudice is governed in part by case law, and in part by procedural rules, such as Alabama Rule of Civil Procedure 41(a)(1)(ii), Ala.Code 1975, § 34-3-21 which governs settlement agreements reached while the case is still at the trial level and Ala. R.App. P.47 for settlement agreements reached while the case is at the appellate level.

* Additionally, Rule 16(c)(7) of the Alabama Rules of Civil Procedure also addresses voluntary use by all parties of extrajudicial procedures to resolve the dispute, including mediation conducted pursuant to the Alabama Civil Court Mediation Rules.

* Sanctions for failure to abide by a Court's mediation order are governed by Rule 37 of the Alabama Rules of Civil Procedure.

Mediator Code of Ethics

The Alabama Code of Ethics for Mediators was adopted by Order of the Supreme Court of Alabama on December 14, 1995 and became effective March 1, 1996, with amendments on June 1, 1997.

I. INTRODUCTION This Code of Ethics for Mediators sets forth Standards to guide mediators in their mediation practices. These Standards are intended as rules of reason and should be interpreted with reference to the purposes of mediation. This Code does not exhaust the moral and ethical considerations that should guide a mediator. Rather, this Code provides a framework for the ethical practice of mediation. Failure to comply with a Standard set out in this Code may be the basis for removal from the roster of mediators maintained by the Alabama Center for Dispute Resolution and for such other action as may be taken by the Alabama Supreme Court Commission on Dispute Resolution. This Code is designed to provide guidance to mediators. Violation of a Standard shall not give rise to a cause of action nor shall it create any presumption that a legal duty has been breached. Nothing in this Code should be deemed to establish or augment any substantive legal duty on the part of mediators.

II. SCOPE, DEFINITION, MEDIATOR'S ROLE, GENERAL PRINCIPLES, AND EFFECTIVE DATE (a) Scope. The Standards set out in this Code shall apply to: - Mediation of cases pending in courts of the State of Alabama: and - Mediation conducted by persons whose names are listed on the roster of mediators maintained by the Alabama

Center for Dispute Resolution. (b) Definition of Mediation. Mediation is a process whereby a neutral third party encourages and facilitates the resolution of a dispute

without deciding what the resolution should be. It is an informal and non adversarial process whose objective is helping the disputing parties reach a mutually acceptable agreement. (c) Mediator's Role. In mediation, decision-making authority rests with the disputing parties. The role of the mediator includes, but is not limited to, assisting the disputing parties in identifying issues, facilitating communication, focusing the disputing parties on their interests, maximizing the exploration of alternatives and helping the disputing parties reach voluntary agreements. (d) General Principals. Mediation is based on communication, negotiation, facilitation, and the technique or method of solving problems. It emphasizes: - The needs and interests of the disputing parties: - Fairness; - Procedural flexibility; - Privacy and confidentiality; - Full disclosure; and - Self-determination. (e) Effective Date. This Code shall govern all mediation proceedings commenced on or after March 1, 1996.

III. STANDARDS - STANDARD 1. GENERAL (a) Integrity, Impartiality, and Professional Competence. Integrity, impartiality, and professional competence are essential qualifications of any mediator. Professional competence means the knowledge, skill, and thoroughness reasonably necessary for the mediation. - A mediator shall not accept any engagement, perform any service, or undertake any act that would compromise the mediator's integrity. - A mediator shall maintain professional competence in mediation skills. This includes, but is not limited to: (A) Staying informed of, and abiding by, all statutes, rules, and administrative orders relevant to the practice of mediation; and (B) Regularly engaging in educational activities promoting professional growth. - If the mediator decides that a case is beyond the mediator's competence, the mediator shall decline appointment, withdraw, or request technical assistance. (b) Concurrent Standards. Nothing contained herein shall replace, eliminate, or render inapplicable relevant ethical standards not in conflict with these rules that may be imposed upon any mediator by virtue of the mediator's profession.

STANDARD 2. RESPONSIBILITIES TO COURTS A mediator shall be candid, accurate, and fully responsive to a court concerning the mediator's qualifications, availability, and other matters pertinent to his or her being selected to mediate. A mediator shall observe all administrative policies, procedural rules, and statutes that apply to mediation. A mediator shall refrain from any activity that has the appearance of improperly influencing a court to secure placement on a roster of mediators or appointment to a case.

STANDARD 3. THE MEDIATION PROCESS (a) Orientation Session. In order for parties to exercise self determination they must understand the mediation process. At the beginning of the mediation session, the mediator should explain the mediation process. This explanation should include: - The role of the mediator as a neutral party who will facilitate the discussion between the disputing parties but who will not decide the

outcome of the dispute; - The procedures that will be followed during the mediation session or sessions; - The pledge of confidentiality that applies to the mediation process:

- The fact that the mediator does not represent either party and will not give professional advice in the absence of a party's attorney and that, if expert advice is needed, the parties will be expected to consult with experts other than the mediator: and - The fact that the mediation can be terminated at any time by the mediator or by any of the parties. Further, in the event a party is not represented by an attorney, the mediator should explain: - That the parties are free to consult legal counsel at any time and are encouraged to have any settlement agreement resulting from the mediation process reviewed by counsel before they sign it: and - That a mediated agreement, once signed, is binding and can have a significant effect upon the rights of the parties and upon the status of the case. (b) Continuing Mediation. A mediator shall withdraw from a mediation if the mediator believes the mediation is being used to further illegal conduct. A mediator may withdraw if the mediator believes any agreement reached would be the result of fraud, duress, overreaching, the absence of bargaining ability, or unconscionability. A mediator shall not prolong a mediation session if it becomes apparent that the case is unsuitable for mediation or if one or more of the parties is unable or unwilling to participate in the mediation process in a meaningful manner, (c) Avoidance of Delay. A mediator shall perform mediation services in a timely and expeditious fashion, avoiding delays whenever reasonably possible. A mediator shall refrain from accepting additional appointments when it becomes apparent that completion of mediation assignments already accepted cannot be accomplished in a timely fashion.

STANDARD 4. SELF-DETERMINATION. (a) Parties' Right to Decide. A mediator shall assist the parties in reaching an informed and voluntary agreement. Substantive decisions made during mediation are to be made voluntarily by the parties. (b) Prohibition of Coercion. A mediator shall not coerce or unfairly influence a party into entering into a settlement agreement. (c) Misrepresentation Prohibited. A mediator shall not intentionally misrepresent material facts or circumstances in the course of a mediation. (d) Balanced Process. A mediator shall promote a balanced process and shall encourage the parties to participate in the mediation proceedings in a non-adversarial manner. (e) Responsibility to Nonparticipating Parties. A mediator may promote consideration of the interests of person who may be affected by an agreement resulting from the mediation process and who are not represented in the mediation process.

STANDARD 5. IMPARTIALITY AND CONFLICT OF INTEREST (a) Impartiality. A mediator shall be impartial and shall advise all parties of any circumstances that may result in possible bias, prejudice, or impartiality on the part of the mediator. Impartiality means freedom from favoritism or bias in work. action, and appearance, impartiality implies a commitment to aid all parties, as opposed to one or more specific parties, in moving toward an agreement. - A mediator shall maintain impartiality While raising

questions for the parties to consider concerning the fairness, equity, and feasibility of proposed settlement options. - A mediator shall withdraw from mediation if the mediator believes the mediator can no longer remain impartial. (b) Required Disclosures and Conflicts of Interest. - A mediator must disclose to the disputing parties the following: (A) Any current or past representation of or consulting relationship with any party or the attorney of any party involved in the mediation. (B) Any pecuniary interest the mediator may have in common with any of the parties or that may be affected by the outcome of the mediation process. (C) Known potential conflicts, including membership on a board of directors, full or part time service as a representative or advocate, consultation work performed for a fee, current stock or bond ownership other than mutual fund shares or appropriate trust arrangements, or any other form of managerial, financial, or immediate family interest with respect to a party involved. A mediator who is a member of a law firm is obliged to disclose any representation of any of the disputing parties by the mediator's firm or a member of that firm of which the mediator is aware. (D) Any close personal relationship or other circumstances, in addition to those specifically mentioned in this Standard, that might reasonably raise a question as to the mediator's impartiality. - Mediators establish personal relationships with many representatives, attorneys, other mediators, and member of various other professional associations. Mediators should not be secretive about such friendships or acquaintances, but disclosure of these relationships is not necessary unless that relationship is one of those mentioned in this Standard or some feature of a particular relationship might reasonably appear to impair impartiality. - Prior service as a mediator in a mediation involving a party or an attorney for a party does not constitute representation of the party or consultation work for the party. However, mediators are strongly encouraged to disclose such prior relationships. Mediators must disclose any ongoing relationship with a party or an attorney for a party involved in a mediation, including membership on a panel of persons providing mediation, arbitration, or other alternative dispute resolution services to that party or attorney. - A mediator shall not provide counseling or therapy to any party during the mediation process, and a mediator who is a lawyer shall not represent a party in any matter during the mediation. - All disclosures required by this Standard shall be made as soon as practicable after the mediator becomes aware of the interest or the relationship. - The burden of disclosure rests on the mediator and continues throughout the mediation process. After appropriate disclosure, the mediator may mediate the dispute if all parties to the mediation agree to the mediator's participation and that agreement is reduced to writing. If the mediator believes that the relationship or interest would affect the mediator's impartiality, he or she should withdraw, irrespective of the expressed desires of the parties. - A mediator shall not use the mediation process to solicit any party to the mediation concerning future professional services, - A mediator must avoid the appearance of a conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a substantially related matter.

STANDARD 6. CONFIDENTIALITY (a) Confidentiality. A mediator shall preserve and maintain the confidentiality of all mediation proceedings except where required by law to disclose information gathered during the mediation. (b) Records and Research Data. A mediator shall store and dispose of records relating to mediation proceedings in a confidential manner and shall ensure that all identifying information is removed and the anonymity of the parties is protected when material included in those records are used for research, training, or statistical compilations.

STANDARD 7. PROFESSIONAL ADVICE (a) Generally. A mediator shall not provide information the mediator is not qualified by training or experience to provide. (b) Independent Legal Advice. When a mediator believes a party does not understand or appreciate how a potential agreement reached through the mediation process may adversely affect the party's legal rights or obligations, the mediator should advise the participants to seek independent legal advice. (c) Absent Party. If one of the parties is unable to participate in the mediation process for psychological or physical reasons, a mediator should postpone or cancel mediation until such time as all parties are able to participate. (d) Personal or Professional Opinion. A mediator may discuss possible outcomes of a case, but a mediator may not offer a personal or professional opinion regarding the likelihood or any specific outcome except in the presence of the attorney for the party to whom the opinion is given.

STANDARD 8. FEES AND EXPENSES; PRO BONO SERVICE (a) General Requirements. A mediator occupies a position of trust with respect to the parties and the court system. In charging for services and expenses, the mediator must be governed by the same high standards of honor and integrity that apply to all other phases of the mediator's work. A mediator shall be scrupulous and honest in billing and must avoid charging excessive fees and expenses for mediation services. (b) Records. A mediator shall maintain adequate records to support charges for services and expenses and shall make an accounting to the parties or to the court upon request. (c) Referrals. No commissions, rebates, or similar remuneration shall be given to or received by a mediator for referral of persons for mediation or related services. (d) Contingent Fees. A mediator shall not charge or accept a contingent fee or base a fee in any manner on the outcome of the mediation process. (e) Minimum Fees. A mediator may specify in advance minimum charges for scheduling or conducting a mediation session without violating this Standard. (f) Disclosure of Fees. When a mediator is contacted directly by the parties for mediation services, the mediator has a professional responsibility to respond to questions regarding fees by providing a copy of the basis for charges for fees and expenses. (g) Pro Bono Service. Mediator have a professional responsibility to provide competent service to persons seeking their assistance, including those unable to pay for their services. As a means of meeting the needs of those who are unable to pay, a mediator should provide mediation services pro bono or at a reduced rate of compensation whenever appropriate.

STANDARD 9. TRAINING AND EDUCATION (a) Training. A mediator is obligated to acquire knowledge and training in the mediation process, including an understanding of appropriate professional ethics, standards, and responsibilities. Upon request, a mediator is required to disclose the extent and nature of the mediator's education, training, and experience. (b) Continuing Education. It is important that mediators continue their professional education as long as they are actively serving as mediators. A mediator shall be personally responsible for ongoing professional growth, including participation in such continuing education as may be required by law or rule of an appropriate authority. (c) New Mediator Training. An experienced mediator should cooperate in the training of a new mediators, including serving as a mentor.

STANDARD 10. ADVERTISING Advertising or any other communication with the public concerning mediation services offered by the mediator or regarding the education, training, and expertise of the mediator shall be truthful. Mediators shall refrain from making promises and guarantees of results.

STANDARD 11. PROHIBITED AGREEMENTS A mediator shall not enter into a partnership or employment agreement that restricts the rights of the mediator to mediate after the relationship forming the basis of the agreement is terminated, except that a mediator may enter into an agreement concerning benefits upon retirement.

STANDARD 12. ADVANCEMENT OF MEDIATION A mediator should support the advancement of mediation by encouraging and participating in research, evaluation, or other forms of professional development and public education.

<u>Executive Order Number 42</u>
Office of the Governor – Fob James, Jr. Governor
Jim Bennet – Secretary of State
3/18/1998

WHEREAS, alternative dispute resolution (ADR) offers a number of voluntary procedures which, when properly employed, commonly result in more timely, less costly dispute resolution than traditional litigation; and

WHEREAS, in an effort to continue to seek to improve the quality of the judicial system, many government agencies across the nation have called for the development and implementation of appropriate alternative methods of dispute resolution, particularly meditation; and

WHEREAS, in Alabama effective alternatives for resolving conflicts are desirable and mediation is a voluntary process in which a neutral third party, the mediator, assists disputing parties in reaching a mutually acceptable agreement regarding their dispute by conducting sessions intended to identify pertinent issues, clarify any misunderstandings, and seriously explore the possibility of settlement among the parties -- the mediator does not render any decision or impose a solution on any party, but facilitates discussions among the parties to assist them in resolving, by consensus, their dispute; and

WHEREAS, meditation offers many advantages to state agencies in securing timely and cost effective resolution of disputes governed by the Alabama Administrative Procedure Act, while at all times preserving the sovereign immunity of the State of Alabama; and

WHEREAS, the Alabama Legislature has favored mediation, having passed the Alabama Mediation Act, which became effective on May 17, 1996 and is now codified at Section 6-6-20, Code of Alabama, 1975.

NOW THEREFORE, I, Fob James, Jr., by virtue of the authority vested in me by the Constitution and laws of the United States of America and the State of Alabama, as Governor of the Great State of Alabama, for these reasons and for other good and valid considerations, do hereby encourage state agencies to study, develop and implement appropriate procedures within their agencies to allow, upon agreement and after all sovereign, discretionary, and qualified immunity issues are resolved, the use of mediation to resolve disputes among parties, whether involving other state agencies, their agents, servants, employees, or other third parties.

BE IT FURTHER ORDERED, that this order shall be in effect until altered or amended by the Governor of the State of Alabama in subsequent executive orders on this subject.

DONE AND ORDERED this 18th day of March, 1998

Executive Order Number 50
Office of the Governor – Fob James, Jr.
Jim Bennett, Secretary of State
9/16/98

WHEREAS, Executive Order No. 42 issued March 18, 1998, encouraged all Alabama state agencies to examine and promote mediation as an alternative dispute resolution ("ADR") concept in their respective administrative processes; and

WHEREAS, other ADR procedures, such as negotiated rulemaking, collaborative problem solving, agency ombuds and consensus building, have also proven effective in making state administrative processes more cost effective and efficient while improving fairness in agency actions; and

WHEREAS, to facilitate the implementation of Executive Order No. 42, and to develop other ADR processes for use by state agencies, it has been determined that the appointment of a task force is required to develop programs for information, education, training, coordination and implementation of ADR concepts to the fullest extent in agency administrative processes;

NOW THEREFORE, I, Fob James, Jr., Governor of the State of Alabama, by virtue of the authority vested in me by the Constitution and laws of Alabama, and for other good and valid reasons, which relate thereto, do hereby appoint a state agency Alternative Dispute Resolution Task Force comprised of the following: Co-Chair - One member of the Alabama Supreme Court Commission on Dispute Resolution, C-Chair - One member of the Alabama State Bar ADR Committee, Coordinating Director - Director of Alabama Center for Dispute Resolution, Task Force Members: One appellate Judge of the Alabama Court of Civil Appeals, One representative of the Governor's Staff, One representative of a State School of Law, One representative from each of the following state agencies: Alabama Department of Conservation and Natural Resources Alabama Department of Environmental Management, Alabama Department of Finance Alabama Department of Public Health Alabama Department of Personnel

BE IT FURTHER ORDERED that the Task Force shall meet at least quarterly, and shall submit annual Interim Reports and a Final Report, to the Governor, no later than forty-eight (48) months from the date of this Executive Order.

BE IT FURTHER ORDERED that this Executive Order shall become effective immediately upon the Governor's signature and shall remain in effect until amended or modified by the Governor.

DONE AND ORDERED this 16th day of September, 1998.

Executive Order Number 07
Office of the Governor - BOB RILEY Governor
David Azbell - Press Secretary Pepper Bryars - Deputy Press Secretary
March 20, 2003

WHEREAS, alternative dispute resolution (ADR) offers a number of voluntary procedures which, when properly employed, commonly result in more timely, less costly dispute resolution than traditional litigation; and

WHEREAS, in Alabama, effective alternatives for resolving conflict are desirable, and mediation, as such an alternative, is a voluntary process in which a neutral third party, the mediator, assists disputing parties in reaching a mutually acceptable agreement regarding their dispute by conducting sessions intended to identity pertinent issues, clarify any misunderstandings, and seriously explore the possibility of settlement among the parties. The mediator does not render any decision or impose a solution on any party, but facilitates discussions among the parties to assist them in resolving, by consensus, their dispute; and

WHEREAS, the Alabama Legislature has favored mediation, having passed the Alabama Mediation Act, which became affective on May 17, 1996, and is now codified at Section 6-6-20, Code of Alabama, 1975; and

WHEREAS, mediation offers many advantages to state agencies in securing timely and cost effective resolution of disputes governed by the Alabama Administrative Procedures Act, while at all times preserving the sovereign immunity of the State of Alabama; and

WHEREAS, the Attorney General of Alabama has endorsed and now requires a mediation provision for inclusion in contracts executed by state governmental entities in instances in which Chapter 5, Section 4B(6) of the Alabama Fiscal Policy and Procedures Manual is normally applied concerning contacts and Board of Adjustment cases; and

WHEREAS, Executive Order No. 42, dated March 18, 1998, encouraged state agencies, to study, develop and implement appropriate procedures within their agencies to allow, upon agreement and after all sovereign, discretionary, and qualified immunity issues are resolved, the use of mediation to resolve disputes among parties, whether involving other state agencies, their agents, servants, employees, or other third parties; and

WHEREAS, other non-binding ADR concepts and procedures, such as negotiated rulemaking (reg-neg), collaborative problem solving, agency Ombuds, and consensus building, have also proven effective in making state administrative processes more cost effective and efficient while improving fairness in agency actions; and

WHEREAS, Executive Order No. 50, dated September 16, 1998, appointed a state agency Alternative Dispute Resolution Task Force to facilitate implementation of Executive Order # 42, and to develop, during the subsequent four years, programs for information, education, training, coordination, and implementation of ADR concepts and procedures to the fullest extent in agency administrative process; and

WHEREAS, the Alternative Dispute Resolution Task Force completed its work, including establishing the Fellows Program for educating government executives about the use of ADR, in the fall of 2002, submitted its final report and recommendations, and established as its successor, the Alabama State Agency ADR Support Group, to continue the implementation of ADR education, concepts, and programs; and

WHEREAS, the Alabama Workplace Mediation Pilot, as developed by the Alternative Dispute Resolution Task

Force, has been tested in nine agencies.

NOW THEREFORE, I, Bob Riley, Governor of the State of Alabama, by virtue of the authority vested in me by the Constitution and laws of Alabama, and for other good and valid reasons, which relate thereto, and in support of the recommendations of the Alternative Dispute Resolution Task Force, and the continued work of the Alabama ADR Support Group, do hereby announce the expansion of the Workplace Mediation Pilot Program.

BE IT FURTHER ORDERED that each state agency, board or commission executive office is charged with implementing and utilizing, where appropriate, the Workforce Mediation Program to resolve workplace disputes in the earliest possible stages and to consider mediation prior to or after, the institution of any lawsuit against the agency.

BE IT FURTHER ORDERED that each state agency, board or commission should consider mediation and other collaborative ADR processes in other administrative areas including, but not limited to, licensing and permitting, policy-making, rulemaking, regulation and enforcement, and intergovernmental relations and coordination.

BE IT FURTHER ORDERED that each state agency, board or commission is directed to designate a permanent ADR coordinator to interface with the Alabama State Agency ADR Support Group.

BE IT FURTHER ORDERED that this Executive Order shall become effective immediately upon its execution and shall remain in effect until amended or modified by the Governor.

DONE AND ORDERED this 20th day of March, 2003.

Attorney General Opinion 2003-213 – August 12, 2003

Dear Mayor Oden:

This opinion of the Attorney General is issued in response to your request on behalf of the City of Mountain Brook.

QUESTION

Is the City of Mountain Brook prohibited by any provision of law from entering into a development agreement with Head Acres, LLC? Is the agreement subject to Alabama's competitive bid laws?

FACTS AND ANALYSIS

The City of Mountain Brook recently annexed property. As an inducement to the property owner, Head Acres, LLC, to petition the city for annexation, the city agreed to de-annex the property if a suitable business of commercial zoning classification for the property could not be secured. The property was recently given a local business zoning classification, or "village" district as it is described by the City of Mountain Brook. The classification was deemed to be suitable. In Mountain Brook, the "village" district classification imposes comparatively strict use and development restrictions designed to achieve specific aesthetic and functional objectives within the classified property. Also, once a prospective tenant is identified, in this case a well-established national grocery store chain, the city's local business ordinance requires that a comprehensive and detailed development plan be prepared and submitted. This plan is then subject to intensive review and revision by city officials and their consultants. In this situation, the city, the property owner, and the tenant also made additional concessions and commitments to neighboring property owners in a formal **mediation** agreement. Along with the rezoning process, the city and the property owner negotiated a development agreement. Under the development agreement, the property owner agrees to construct and, where appropriate, convey to the city various on and off-site road and drainage improvements and to provide fill dirt for the city's use in developing additional recreational fields and other public projects. The property owner will be reimbursed $501,686 by the city. This amount represents the projected cost of the public roadway and drainage system improvement made necessary by the project and includes the acquisition costs of the dirt to be removed from the site and delivered to other public sites in the city. The money for the reimbursement comes from sales tax revenues generated by retail activity on the site with no payment due by the city until sales tax revenues are realized. The obligation of the city to pay under the development agreement will terminate either when the projected cost figure has been met or on January 31, 2014, whichever comes first. The city sees several advantages to the proposed development agreement. It is the city's opinion that it will realize the benefit of a long-term source of operating revenue and that it will secure significant control over the design and use of the property in a way that serves

fundamental municipal purposes and functions such as municipal development, zoning, drainage, traffic control, public infrastructure enhancement, recreational facilities' improvement, and public safety. The agreement contains provisions that are designed to ensure development of the site that will minimize or potentially eliminate the adverse impact of development on adjoining or nearby property owners. The examples of these benefits given by the city include upgrading and integrating roads and drainage facilities serving the site and adjacent property with the surrounding area and by coordinating development of the site with a larger public improvement project that, when completed, will provide a unified and coordinated program of street and sidewalk improvements, lighting, landscaping, and similar features to the proposed village district and surrounding neighborhood. The city also states that, even though it agrees to repay the stated amount to the owner in return for the services and public improvements to be undertaken by the owner, the owner pays these costs up front and does not get reimbursed until after the project is completed and the property begins generating sales tax revenues. Even then, according to the city, reimbursement is based on only a portion of tax proceeds that are produced by retail activity on the site. As the city sees it, the project pays its own way and the city incurs no repayment obligation if the project is unsuccessful. The city sees two potential legal complications - potential violation of section 94 of the Constitution of Alabama, as amended by Amendment No. 112, and potential violation of Alabama's Competitive Bid Law. Section 94 of the Constitution of Alabama, as amended by Amendment 112, states as follows: The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise. It is provided, however, that the legislature may enact general, special, or local laws authorizing political subdivisions and public bodies to alienate, with or without a valuable consideration, public parks and playgrounds, or other public recreational facilities and public housing projects, conditional upon the approval of a majority of the duly qualified electors of the county, city, town, or other subdivision affected thereby, voting at an election held for such purpose. ALA. CONST. amend. 112. Section 94 was designed to prevent the expenditure of public funds in aid of private individuals or corporations by reason of which a pecuniary liability, a debt of the municipality, is incurred. Mobile Wrecker Owners Ass'n, Inc. v. City of Mobile, 461 So. 2d 1303 (Ala. 1984). There are two elements to a violation of the provisions of this section: (1) the municipality must have performed one of the proscribed acts, and (2) the recipient must be an individual or a private corporation. O'Grady v. City of Hoover, 519 So. 2d 1292 (Ala. 1987). There is no lending of credit by a city, for purposes of constitutional prohibitions against municipalities granting public money to individuals or corporations, when it enters into an ordinary commercial contract with an individual or corporation whereby benefits flow to both parties and there is consideration on both sides. Guarisco v. City of Daphne, 825 So. 2d 750 (Ala. 2002.) ***3** In an opinion to

Manley L. Cummins, III, City Attorney of Daphne, dated December 13, 1995, A.G. No. 96-00065, this Office opined that the restrictions of section 94, as amended, are "not applicable to a contract with mutual benefits to each party and a consideration on both sides," citing Rogers v. City of Mobile, 277 Ala. 261, 169 So.2d 282 (1964) and Dothan Area Chamber of Commerce v. Shealy, 561 So.2d 515 (Ala. 1990). Also, a municipality may enter into a contract with a private corporation to provide services that the municipality is authorized by law to provide. Opinion to Honorable Steven F. Schmitt, Attorney at Law, Tallassee, dated August 10, 1992, A.G. No. 92-00372. The proposed development agreement provides mutual benefits to both parties and a consideration on both sides. The property owner commits to undertake the development project at significant cost and subject to rigorous municipal regulation and control. Additionally, the property owner has agreed to undertake design and construction responsibilities that will serve the surrounding area, as well as the development site. The owner then benefits from reimbursement of the projected cost if the property generates sufficient sales tax revenues. The city receives the benefit of significant infrastructure improvements that will be integrated with a more comprehensive development plan for the area. The city also obtains an enhanced measure of control over the project. The city obtains the ability to enforce requirements for the project directly for its own benefit and that of surrounding property owners. The city secures a supply of suitable fill dirt for use in developing nearby recreational fields and for use in implementing contemplated street improvements in the immediate area. Finally, the city obtains a stable, long-term source of revenue with respect to the property, which is currently undeveloped and economically unproductive. Because this is a contract with mutual benefits to each party and a consideration on both sides, the restrictions of section 94 of the Constitution of Alabama, as amended, are not applicable. This agreement also raises questions regarding Alabama's Competitive Bid Law. If the city were to make the improvements on the property itself, there would be no question that the work would be subject to the Competitive Bid Law. That, however, is not the case here. The city has contracted for a package deal that benefits the city and arises from the project as a whole. The property owner is the only entity that can provide this package deal to the city. The development agreement is not a vehicle for the city to obtain a source of dirt or for street and drainage improvements, but it is a means for securing all the benefits, including a long-term source of revenue. The property owner also stands to lose its entire investment should the property not generate revenues. The agreement is one for a completed, comprehensive, and unique development. Section 41-16-51(a)(13) of the Code of Alabama exempts the following from competitive bidding: "Contractual services and purchases of commodities for which there is only one vendor or supplier and contractual service and purchases of personal property which by their very nature are impossible to award by competitive bidding." ALA. CODE § 41-16-51(a)(13) (2000) (emphasis added). It is the opinion of this Office that the situation presented falls within this exemption. The project itself is inherently unique and integrated. Head Acres, LLC, is the only supplier of the property and the

project. The development agreement would therefore not be subject to the Competitive Bid Law.

CONCLUSION

The City of Mountain Brook is not prohibited by Alabama law from entering into a development agreement with Head Acres, LLC, and the agreement is not subject to Alabama's Competitive Bid Law. I hope this opinion answers your question. If this Office can be of further assistance, please contact Ben Albritton of my staff.

Sincerely, Bill Pryor, Attorney General

By: Carol Jean Smith, Chief Opinions Division

Attorney General Opinion - May 19, 2000

Re: ADR in State Agencies, State Departments and Agencies, Administrative Procedure Act, Alternative Dispute Resolution, Mediation

Section 41-22-12(f) of the Code of Alabama authorizes state agencies to use voluntary, nonbinding alternative dispute resolution processes, such as mediation, to resolve contested cases under the Alabama Administrative Procedure Act, provided: (1) use of such a process is not "precluded by statute" and (2) the parties agree to it in writing. This does not, however, alter the requirements relating to the record which must be kept in contested cases and does not authorize confidential settlements or resolutions unless otherwise authorized by law. Although administrative agencies lack the authority to engage in voluntary, nonbinding alternative dispute resolution processes, such as mediation, outside the context of "contested cases," the Attorney General may engage in such processes in order to avoid litigation. This authority may be delegated by the Attorney General to the general counsel of state agencies and departments and exercised by them under the Attorney General's oversight.

Dear Governor Siegelman:

This opinion of the Attorney General is issued in response to your request. QUESTION 1 Is there any proscription in state law or principles of sovereign immunity which would prevent a state agency from resolving an administrative" contested case," as the term is defined in the Alabama Administrative Procedure Act ("AAPA"), by means of voluntary, nonbinding alternative dispute resolution processes, such as mediation? Stated conversely, would statutory authorization to use an alternative dispute resolution [process] such as mediation be necessary in order to resolve an administrative contested case by mediation?

FACTS AND ANALYSIS The Alabama Administrative Procedure Act defines a "contested case" as follows: A proceeding, including but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing. The term shall not include intra-agency personnel actions; shall not include those hearings or proceedings in which the Alabama Board of Pardons and Paroles considers the granting or denial of pardons, paroles or restoration of civil and political rights or remission of fines and forfeitures; and which are exempt from Sections 41-22-12 through 41-22-21, relating to contested cases. ALA. CODE § 41-22-3(3) (Supp. 1999). As the definition of "contested ease" suggests, the provisions governing contested cases are located in sections 41-22-12 through 41-22-21 of the Code of Alabama. See ALA. CODE §§41-22-12 to 41-22-21 (1991, Supp. 1999). Section 41-22-12(f) provides: Unless precluded by statute, informal dispositions may be made of any contested case by stipulation, agreed settlement, consent order, or default or by another method agreed upon by the parties in writing. ALA. CODE § 41-22-12(f) (Supp. 1999) (emphasis added). Section 41-22-12(f) gives permission to use "another method agreed upon by the parties in writing" and thus authorizes a state agency to use an informal settlement process, such as mediation, in resolving a contested case, provided: (1) use of such a process is not "precluded by statute" and (2) the parties agree to it in writing. The comments pertaining to this provision state that this "is consistent with Alabama's statutory requirement that the judiciary encourage informal settlement of disputes, section 6-6-1, as well as the intent of Ala. R. Civ. P., Rule 16 to discourage judicial proceedings if resolution may be reached in a more informal manner." ALA. CODE § 41-22-12 Commentary (1991). This Office has previously observed that "[s]ettling disputes without litigation is a good public policy. The importance of this policy is evidenced in the actions of the three branches of government — by the Legislature's inclusion in the APA of a process by which contested cases can be settled, see section 41-22-12(f) of the Code of Alabama, by the Governor's issuance of two executive orders encouraging state agencies to engage in dispute resolution measures where appropriate, and in the words of numerous decisions of the courts .... "Opinion to Honorable D. David Parsons, Acting Commissioner, Alabama Department of Insurance, dated May 10, 1999, A.G. No. 99-00201 at 2. We note, however, that the permission contained in section 41-22-12(f) does not alter the requirements relating to the record which must be kept in contested cases. See ALA. CODE § 41-22-12(g), (h) (Supp. 1999). In addition, section 41-22-12(f) does not authorize a state agency to enter into a settlement or resolution that is confidential, unless otherwise authorized by law. See Alabama Open Records Act, ALA. CODE § 36-12-40 (1991). In Stone v. Consolidated Publishing Co., 404 So. 2d 678 (Ala. 1981), the Supreme Court of Alabama stated that "[r]ecorded information received by a public officer in confidence, sensitive personnel records, pending criminal investigations, and records the disclosure of which would be detrimental to the best interests of the public are some of the areas which may not be subject to public disclosure. Courts must balance the

interest of the citizens in knowing what their public officers are doing in the discharge of public duties against the interest of the general public in having the business of government carried on efficiently and without undue interference." Id. at 68l. In a later decision, the Supreme Court also stated that "[t]here is a presumption in favor of public disclosure of public writings and records expressed in the language of § 36-12-40" and "[t]he exceptions set forth in Stone must be strictly construed." Chambers v. Birmingham News Co., 552 So. 2d 854, 856 (Ala. 1989); see also Opinion to Constance S. Aune, Mobile County Board of Education, dated October 4, 1995, A.G. No. 96-00003 (discussing section 36-12-40 and Stone exceptions).

CONCLUSION Section 41-22-12(f) of the Code of Alabama authorizes state agencies to use voluntary, nonbinding alternative dispute resolution processes, such as mediation, to resolve contested cases under the Alabama Administrative Procedure Act, provided: (l) use of such a process is not "precluded by statute" and (2) the parties agree to it in writing. This does not, however, alter the requirements relating to the record which must be kept in contested cases and does not authorize confidential settlements or resolutions unless otherwise authorized by law.

QUESTION 2 May a state agency use voluntary, nonbinding alternative dispute resolution processes such as mediation to resolve disputes that occur, but which do not rise to the level of a "contested case," or which are exempted from the provisions of the AAPA?

FACTS AND ANALYSIS - This Office addressed an issue similar to your second question in an opinion to Honorable D. David Parsons, Acting Commissioner, Alabama Department of Insurance, dated May 10, 1999, A.G. Opinion No. 99-00201. In that opinion, we addressed whether the Department of Insurance could "settle administrative cases through an agreement, which includes the payment of moneys to the State of Alabama, not related to any express statutory fining authority." Id. at 1. In our opinion, we noted that the Department of Insurance was exempted from the AAPA. Id. at 2; ALA. CODE § 41-22-2(e)(1991). This Office thus opined: Administrative agencies ... are creatures of the Legislature and may only exercise those powers conferred upon them by the Legislature. Bates v. Jefferson County Board of Health, 486 So. 2d 439 (Ala. Civ. App. 1986). Since the APA does not apply to the Department, and since no other provision of state law grants the department any legal authority to settle cases in return for a cash payment, it may not do so. A.G. Opinion No. 99-00201 at 2. This Office then noted, however, that: Section 36-15-21 of the Code of Alabama grants the Attorney General the general authority to oversee the conduct of the state's litigation. It provides that "[a]ll litigation concerning the interest of the state, or any department of the state, shall be under the direction and control of the Attorney General." ALA. CODE§ 36-15-21 (1998). This general grant of authority empowers the Attorney General to settle cases, including administrative cases such as those that are the subject of your letter where the

licensee has the right to take his case to the circuit court, in order to avoid such litigation. As with many other aspects of litigation, the Attorney General may delegate the power to settle these cases to the general counsel of the various agencies and departments of government. A.G. Opinion No. 99-00201 at 2-3. The authorization to engage in voluntary, nonbinding alternative dispute resolution processes contained in section 41-22-

12(f) applies only to a "contested case." ALA. CODE § 41-22-12(f) (Supp. 1999). This authorization thus does not apply to disputes which do not fall within the definition of a "contested case" or which are otherwise exempted from the AAPA. As we noted previously, "[a]dministrative agencies.., are creatures of the Legislature and may only exercise those powers conferred upon them by the Legislature." A.G. Opinion No. 99-00201 at 2; Bates v. Jefferson County Board of Health, 486 So. 2d 439, 440 (Ala. Civ. App. 1986). Since the AAPA does not authorize agencies to engage in voluntary, nonbinding alternative dispute resolution processes outside the context of "contested cases," they may not do so. Section 36-15-21 of the Code of Alabama, however, authorizes the Attorney General to settle cases, including administrative cases that may result in litigation, in order to avoid litigation. ALA. CODE § 36-15-21 (Supp. 1999); A.G. Opinion No. 99-00201 at 2-3. This grant of authority permits the Attorney General to engage in voluntary, nonbinding alternative dispute resolution processes in cases which do not rise to the level of a "contested case" or which are otherwise exempt from the AAPA, if litigation could result if the matter is not settled or resolved. As we noted previously, "the Attorney General may delegate the power to settle these cases to the general counsel of the various agencies and departments of government." A.G. Opinion No. 99-00201 at 3.

CONCLUSION - Although administrative agencies lack the authority to engage in voluntary, nonbinding alternative dispute resolution processes, such as mediation, outside the context of "contested cases," the Attorney General may engage in such processes in order to avoid litigation. This authority may be delegated by the Attorney General to the general counsel of state agencies and departments and exercised by them under the Attorney General's over sight. I hope this opinion answers your questions. If this Office can be of further assistance, please contact Charles B. Campbell of my staff.

Sincerely, BILL PRYOR - Attorney General

By: CAROL JEAN SMITH, Chief, Opinions Division

BP/CBC

22334v2/15174

Mediator Ethical Opinions OPINION 001-05

Questions Presented: May a retried circuit court judge, upon retirement, accept mediation appointments from circuit judges when the case being referred may at one time have been assigned to the retired circuit judge? Does the extent of involvement in the case make a difference? For example, if the judge merely had signed a HIPAA motion requesting documents, or accepted a mutually agreed upon scheduling order, would such acts preclude the retired circuit judge from accepting the appointment as a mediator? Should the retired judge accept cases for mediation if the retired judge previously had made a ruling in the case that was dispositive of some issue and in favor of one party over the other party?

Response: A retired Judge may accept referrals for mediation made by another judge who had been a judicial colleague of the retired judge. If the retired judge previously had some involvement in the case, he or she must fully disclose the extent of that involvement to all parties to the mediation and allow the parties to request another mediator if either party feels any concern over the inability of the retired judge to be fully impartial. The greater the retired judge's involvement in the case, the greater his or her Responsibility to evaluate whether he or she can remain impartial and Whether the appearance of lack of impartiality may cause any party to be uncomfortable with the judge as a mediator. The concern about lack of impartiality might not occur until after the parties have engaged in some mediation sessions, and the mediator's actions or words have been evaluated by the parties as being impartial or not, thus the mediator should err on the side of refusing an appointment if there is any doubt in his or her mind about how the question of impartiality may be perceived by the parties. (See Standard Five, Alabama Code of Ethics for Mediators). Specifically to this opinion, the mere act of ruling on a motion, such as discovery request or HIPPA request, in most cases should not automatically preclude a retired judge from accepting an appointment as a mediator in the same case. If in ruling on the motion the judge has received information ex parte, or otherwise, which is not known to the other party, the retired judge should decline appointment as a mediator. In all cases where the retired judge has made rulings dispositive of some issue in the dispute, the retired judge should decline to serve as mediator. Ruling on a dispositive issue suggests that the retired judge already has determined that one party is right and the other party is wrong on an issue in dispute. The likelihood that the losing party could accept the retired judge's impartiality in mediating on other issues seems so great that the Commission finds that the retired judge should decline appointment as mediator to avoid the appearance of impropriety. In considering whether to accept appointment as a mediator in a case that previously was assigned to the retired judge, however slight the judge's involvement, the retired judge should keep in mind that parties may be more intimidated in expressing their feelings about impartiality due to the

friendship relationship between the retired judge and the appointing judge. It is therefore important that the retired judge be conscious of this potential concern and develop a non-threatening way for the parties to express their view that another person be appointed as mediator. If the parties, or either of them, express a concern about the retired judge's impartiality, it is the duty of the retired judge to withdraw from service as mediator and inform the court only that he or she is unable to serve because of a conflict of interest. The details of the conflict of interest should not be shared with the appointing judge. The freedom of choice in having a mediator with whom all parties are comfortable should be the overriding consideration.

###