

The Supreme Court of South Carolina

Re: Amendments to Rule 8 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules

Appellate Case No. 2017-002387

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 8 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules is amended as set forth in the attachment to this order. The amendment shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 31, 2018

Rule 8 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules is amended to provide:

**Rule 8
Confidentiality**

(a) Confidentiality. Any mediation communication disclosed during a mediation, including, but not limited to, oral, documentary, or electronic information, shall be confidential, and shall not be divulged by anyone in attendance at the mediation or participating in the mediation, except as permitted under this rule or by statute.

Additionally, the parties, their attorneys and any other person present or participating in the mediation must execute an Agreement to Mediate that protects the confidentiality of the process. The parties and any other person present or participating shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any mediation communication disclosed in the course of a mediation, which shall include, but not be limited to:

- (1) Views expressed or suggestions made by another party or any other person present with respect to a possible settlement of the dispute;
- (2) Admissions made in the course of the mediation proceeding by another party or any other person present;
- (3) Proposals made or views expressed by the mediator;
- (4) The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; and
- (5) All records, reports or other documents created solely for use in the mediation or received by a mediator while serving as a mediator.

(b) Waiver of Confidentiality. Upon the signing by the parties of an agreement reached during mediation, confidentiality is waived as to

the terms of the agreement, unless otherwise agreed to by the parties.

(c) Limited Exceptions to Confidentiality. There is no confidentiality attached to information that is disclosed during a mediation:

- (1) for which the confidentiality against disclosure has been waived or stipulated to by all parties;
- (2) that is used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;
- (3) offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;
- (4) offered for the limited purpose in judicial proceedings of establishing, refuting, approving, voiding, or reforming a settlement agreement reached during a mediation;
- (5) offered to report, prove, or disprove professional misconduct occurring during the mediation; or
- (6) in a report to or an inquiry from the Chief Judge for Administrative Purposes regarding a possible violation of these rules.

(d) Limited disclosures. A mediation communication disclosed under subsections (c)(3), (c)(4), (c)(5), or (c)(6) remains confidential and is not discoverable or admissible for any other purpose, unless otherwise permitted by this rule or by statute.

(e) Private Consultation/Confidentiality. The mediator may meet and consult individually with any party or parties or their counsel during a mediation conference. The mediator without consent shall not divulge confidential information disclosed to a mediator in the course of a private consultation.

(f) No Waiver of Privilege. No communication by a party or attorney to the mediator in private session shall operate to waive any attorney-

client privilege.

(g) Mediator Not to be Called as Witness. The mediator shall not be compelled by subpoena or otherwise to divulge any records or to testify in regard to the mediation in any adversary proceeding or judicial forum. All records, reports and other documents received by the mediator while serving in that capacity shall be confidential.

(h) Admissible information. Information that would be admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure or use in a mediation.

SUBMITTED TO GENERAL ASSEMBLY