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## **States' Alternative Dispute Resolution Statutes**

### **State of West Virginia**

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## States' Alternative Dispute Resolution Statutes

### STATE OF WEST VIRGINIA

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#### **Arbitration**

Chapter 55, Article 10.

*Current through the end of the 2008 Second Extraordinary Session*

#### § 55-10-1. Submission of controversy; defenses; setoff

Persons desiring to end any controversy, whether there be a suit pending therefor or not, may submit the same to arbitration, and agree that such submission may be entered of record in any court. Upon proof of such agreement out of court, or by consent of the parties given in court, in person or by counsel, it shall be entered in the proceedings of such court; and thereupon a rule shall be made that the parties shall submit to the award which shall be made in pursuance of such agreement. When a pending cause is submitted to arbitration, the defendant may make any defense to the plaintiff's claim or demand that he could make under any proper plea filed in court, whether such plea has been filed or not, by giving to the plaintiff reasonable notice in writing of the nature and character of his defense; and in a suit for any debt, he may at the trial before the arbitrators prove and have allowed against such debt any payment or setoff, whether before that time pleaded or not, or whether an account of setoff has before that time been filed or not, which he may plead or file before the arbitrators in such manner as to give the plaintiff notice of its nature, but not otherwise. Although the claim of the plaintiff be jointly against several persons and the setoff be of a debt, not to all, but only to a part of them, this section shall extend to such setoff, if it appear that the persons against whom such claim is stand in the relation of principal and surety, and the person entitled to the setoff be the principal. When the defendant is allowed to file and prove an account of setoff to the plaintiff's demand, the plaintiff shall be allowed to file and prove an account of counter setoff, and make such other defense as he might have made had an original action been brought upon such setoff; and upon the trial the arbitrators shall ascertain the true state of indebtedness between the parties, and the award shall be rendered accordingly.

#### § 55-10-2. Submission irrevocable; extension of time for award

No such submission, entered or agreed to be entered of record, in any court, shall be revocable by any party to such submission, without the leave of such court; and such court may, from time to time,

enlarge the term within which an award is required to be made.

**§ 55-10-3. Entry of award as judgment or decree; compensation of arbitrators**

Upon the return of any such award, made under such an agreement (whether any previous record of the submission or rule thereupon has been made or not), it shall be entered up as the judgment or decree of the court, unless good cause be shown against it at the first term after the parties have been summoned to show cause against it. And the court shall make to such arbitrators such reasonable allowance for their services as it may deem proper, to be taxed in the costs of the suit or proceeding, when no provision is made for the pay of the arbitrators in the arbitration agreement, or to be otherwise paid as the court may direct.

**§ 55-10-4. Setting aside award; equity jurisdiction not affected**

No such award shall be set aside, except for errors apparent on its face, unless it appears to have been procured by corruption or other undue means, or by mistake, or that there was partiality or misbehavior in the arbitrators, or any of them, or that the arbitrators so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made. But this section shall not be construed to take away the power of courts of equity over awards.

**§ 55-10-5. Rehearing by arbitrators**

Where an award is vacated, and the time within which the submission requires the award to be made has not expired, the court, in its discretion, may direct a rehearing by the arbitrators.

**§ 55-10-6. When award may be modified or corrected**

Any party to such submission may also move to modify or correct such award in the following cases: (a) Where there is an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property referred to in such award; (b) where the arbitrators shall have awarded upon some matter not submitted to them, nor affecting the merits of the decision of the matter submitted; (c) where the award shall be imperfect in some matter of form not affecting the merits of the controversy, and when, if it had been a verdict, such defect could have been amended or disregarded by the court.

**§ 55-10-7. Fiduciary may submit to arbitration**

Any personal representative of a decedent, guardian of an infant, committee of an insane person or a convict, or trustee, may file his petition in the circuit court of the county in which he qualified or was appointed, asking permission from such court to submit to arbitration any suit or matter of controversy touching the estate or property of such decedent, infant, insane person, or convict, or in respect to which he is trustee, in which petition shall be stated the facts upon which the petitioner seeks the permission of the court. The court may, in its discretion, grant or refuse the prayer of the petition. If the petition be filed in good faith, and the petition be granted by the court, an order showing that permission to arbitrate was granted shall be entered on the chancery order book of the court, and the award made in any such case shall be binding upon all the parties in interest, and shall be entered as the judgment or decree of the court in the same manner as other submissions and awards are entered, unless set aside by the court. If the petition be filed in good faith and there be no fault or neglect on the part of the fiduciary, he shall not be responsible for any loss sustained by an award adverse to the interests of his decedent, ward, insane person, convict or beneficiary under any such trust.

**§ 55-10-8. Umpires**

Wherever the word "arbitrators" is used in this chapter, it shall be construed as applying to and including any "umpire" who has participated in the arbitration.

## **Mediation**

West Virginia Trial Court Rules Chapter 2, Rule 25.

*Current with amendments received through December of 2007*

### **Rule 25.01 SCOPE**

These rules govern mediation in the judicial system in West Virginia. These rules are to be read in pari materia with Rules 31 through 39 of the West Virginia Rules of Practice and Procedure for Family Court.

### **Rule 25.02 MEDIATION DEFINED**

Mediation is an informal, non-adversarial process whereby a neutral third person, the mediator, assists disputing parties to resolve by agreement or examine some or all of the differences between them. A judge or hearing officer who renders a decision or who makes a recommendation to the decision-maker in the mediated case is not a neutral third person. In mediation, decision-making discretion remains with the parties; the mediator has no authority to render a judgment on any issue of the dispute. The role of the mediator is to encourage and assist the parties to reach their own mutually acceptable resolution by facilitating communication, helping to clarify issues and interests, identifying what additional information should be collected or exchanged, fostering joint problem-solving, exploring resolution alternatives, and other similar means. The procedures for mediation are extremely flexible, and may be tailored to fit the needs of the parties to a particular dispute. Nothing in this rule shall be construed to deprive a court of its inherent authority to control cases before it or to conduct settlement conferences, which are distinguished from mediation.

### **RULE 25.03 SELECTION OF CASES FOR MEDIATION**

Pursuant to these rules and W.Va. R.Civ.P. 16, a court may, on its own motion, upon motion of any party, or by stipulation of the parties, refer a case to mediation. Upon entry of an order referring a case to mediation, the parties shall have fifteen (15) days within which to file a written objection, specifying the grounds. The court shall promptly consider any such objection, and may modify its original order for good cause shown. A case ordered for mediation shall remain on the court docket and the trial calendar.

### **RULE 25.04 LISTING OF MEDIATORS**

The West Virginia State Bar shall maintain and make available to circuit courts, interested parties, and the public a listing of persons willing and qualified to serve as mediators in the circuit courts. The State Bar shall establish minimum qualifications for training and experience, application procedures and fees, and other appropriate requirements for persons interested in being listed. The listing shall identify those persons who are willing to serve as mediators on a volunteer basis (i.e., without compensation). The listing shall be open to all persons who meet the qualifications and complete the application required by the State Bar.

### **RULE 25.05 SELECTION OF MEDIATOR**

Within fifteen (15) days after entry of an order or stipulation referring a case to mediation, the parties, upon approval of the court, may choose their own mediator, who may or may not be a person listed on the State Bar listing. In the absence of such agreement, the court shall designate the mediator from the State Bar listing, either by rotation or by some other neutral administrative procedure established by administrative order of the chief judge of the circuit court.

#### Rule 25.06 COMPENSATION OF MEDIATOR

If the parties by their own agreement choose a mediator who requires compensation, the parties shall by written agreement determine how the mediator will be compensated. If the parties do not select a mediator by agreement, the court may designate a mediator who may require compensation. If it has established a budget approved by the Supreme Court of Appeals for this purpose, the court may reimburse a volunteer mediator for reasonable and necessary expenses, according to Supreme Court of Appeals travel regulations.

#### Rule 25.07 MEDIATOR DISQUALIFICATION

A mediator shall be disqualified in a mediation in which the mediator's impartiality might reasonably be questioned, including but not limited to instances where: (a) the mediator has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts relating to the mediation; (b) the mediator served as a lawyer in the matter in controversy, or a lawyer with whom the mediator previously practiced law served during association as a lawyer in the matter, or the mediator has been a material witness concerning the matter; (c) the mediator knows that, individually or as a fiduciary, or the mediator's spouse, parent or child wherever residing, or any other member of the mediator's family residing in the mediator's household, has an economic interest in the subject matter in controversy or is a party to the matter or has any other more than de minimis interest that could be substantially affected by the proceeding; (d) the mediator or the mediator's spouse, or a person within the third degree of relationship to either of them, or the spouse of such person: (i) is a party to the matter, or an officer, director or trustee, of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the mediator to have more than de minimis interest that could be substantially affected by the matter; (iv) is to the mediator's knowledge likely to be a material witness in the matter. (2) A mediator shall keep informed about their own personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the mediator's spouse and minor children.

Any party may move the court to disqualify a mediator for good cause. In the event a mediator is disqualified, the parties or the court shall select a replacement in accordance with TCR 25.05 and 25.06.

#### Rule 25.08 PROVISION OF PRELIMINARY INFORMATION TO THE MEDIATOR

Before the first mediation session, the court or mediator may require the parties to provide to the mediator pertinent information including but not limited to pleadings, transcripts, and other litigation-related documents.

#### RULE 25.09 TIME FRAMES FOR CONDUCT OF MEDIATION

Unless otherwise agreed by the parties and the mediator or ordered by the court, the first mediation session shall be conducted within sixty (60) days after appointment of the mediator. Mediation shall be completed within forty-five (45) days after the first mediation session, unless extended by agreement

of the parties and the mediator or by order of the court. The mediator is empowered to set the date and time of all mediation sessions, upon reasonable notice to the parties.

#### RULE 25.10 APPEARANCES; SANCTIONS

The following persons, if furnished reasonable notice, are required to appear at the mediation session: (1) each party or the party's representative having full decision-making discretion to examine and resolve issues; (2) each party's counsel of record; and (3) a representative of the insurance carrier for any insured party, which representative has full decision-making discretion to examine and resolve issues and make decisions. Any party or representative may be excused by the court or by agreement of the parties and the mediator. If a party or its representative, counsel, or insurance carrier fails to appear at the mediation session without good cause or appears without decision-making discretion, the court sua sponte or upon motion may impose sanctions, including an award of reasonable mediator and attorney fees and other costs, against the responsible party.

#### RULE 25.11 PARTICIPATION

No party may be compelled by these rules, the court, or the mediator to settle a case involuntarily or against the party's judgment. All parties involved in mediation, however, and their respective representatives, counsel, and insurance carriers shall participate fully, openly and knowledgeably in a mutual effort to examine and resolve issues. "Bad faith," as used in insurance litigation as a legal term of art, is not applicable to the mediation process.

#### RULE 25.12 CONFIDENTIALITY OF MEDIATION PROCESS

Mediation shall be regarded as confidential settlement negotiations, subject to W.Va. R.Evid. 408. A mediator shall maintain and preserve the confidentiality of all mediation proceedings and records. Confidentiality as to opposing parties within a mediation session shall be maintained in a manner agreed upon by the parties and mediator. For example, all information may be kept confidential unless disclosure is specifically authorized by the party, or, all information may be shared unless specifically prohibited by the party. A mediator may not be subpoenaed or called to testify or otherwise be subject to process requiring disclosure of confidential information in any proceeding relating to or arising out of the dispute mediated.

#### RULE 25.13 IMMUNITY

A person acting as mediator under these rules shall have immunity in the same manner and to the same extent as a circuit judge.

#### RULE 25.14 ENFORCEABILITY OF SETTLEMENT AGREEMENT

If the parties reach a settlement or resolution and execute a written agreement, the agreement is enforceable in the same manner as any other written contract.

#### RULE 25.15 REPORT OF MEDIATOR

Within ten (10) days after mediation is completed or terminated, the mediator shall report to the court the outcome of the mediation. Unless otherwise required by the court, the mediator's report shall state the style of the case, the civil action or other administrative identification number, and whether a settlement was reached. With the written consent of the parties, the mediator may identify any pending motions, discovery, or issues which, if resolved, would facilitate the possibility of settlement or

resolution.