



# ADR NEWS

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## A LOOK AT MEDIATOR REPORTING FOR 2009

*R*ule 31, Section 18(e) provides for a mandatory reporting requirement for listed Rule 31 mediators. The reporting requirement not only applies to court-ordered mediations but to all mediations conducted by Rule 31 mediators, except for those conducted in conjunction with an out-of-state or federal court. Mediations must be reported within 15 days of the date of the last mediation session. All mediator reporting is done online. You may file a report by going to <http://www.tsc.state.tn.us/Rule31Report.htm>.

In 2009, listed mediators reported that they conducted 6,321 mediations. Over half of the reported mediations involved disputes that were filed or would have been filed in the Circuit Court. A fourth of the reported mediations involved disputes that were filed or would have been filed in the Chancery Court. Fifty-one percent of reported mediations involved Domestic Relations disputes, with Divorce with Children making up almost 25%. Personal Injury disputes also made up 25% of the reported mediations.

Of all Tennessee counties, Davidson County had the most mediations reported with 775. Knox County was second with 682 mediations and Shelby County was third with 553 mediations. There were twelve other counties from which mediators reported conducting over 100 mediations. Those counties are Hamilton, Sullivan, Rutherford, Williamson, Greene, Washington, Hawkins, Sevier, Blount, Hamblen, Carter, and Madison.

According to the mediator reporting and the 2010 Renewal forms, Rule 31 listed mediators contributed 1,534.55 hours in mediation and 531.65 hours in preparation for or follow-up pro bono, totaling 2,066.20 hours. At a rate of \$200 per hour, the pro bono hours donated by Rule 31 mediators represents a contribution of \$413,240.00.

While these numbers are impressive, there is a sense that there are a large number of mediations that are not being reported to the ADR Commission. To get an accurate representation of the mediation activity in Tennessee, it is important that all listed mediators utilize the mediator reporting database. Please remember to report all mediations you conduct, except for those done in conjunction with an out-of-state or federal court.

If you have questions on the reporting system, please contact Anne-Louise Wirthlin at [Anne.Louise.Wirthlin@tncourts.gov](mailto:Anne.Louise.Wirthlin@tncourts.gov) or by phone at 615-741-2687, ext. 2880.

\*\*\*These statistics are based solely on the data reported by Rule 31 listed mediators to the Administrative Office of the Courts. The Administrative Office of the Courts does not guarantee the accuracy of the reported data.\*\*\*

# The Fifth Step: ABA ADR Ethics Resources

by Margaret M. Huff\*

## Troubled by an ethics enigma? Rule 31 a little vague? No Tennessee ADR Commission ethics opinion on point? I suggest you.....

### Do the 5 Step!

Maybe not as fun as dancing the Texas Two Step or the Tennessee Waltz, but it's definitely worth taking these 5 steps if you want to develop a quality mediation practice.

- Step 1: Anticipate the ethics issues. (Scrambling to find an answer during a mediation is not the best time for thoughtful consideration of thorny dilemmas).
- Step 2: Review Tenn. S. Ct. Rule 31 carefully, including Appendix A, and check for Tennessee ADR Commission opinions on the [AOC web site](#) (at web site, click on "Court Programs" then click on "ADR/Rule 31 (Mediation)").
- Step 3: If you're an attorney, read the relevant Tennessee Rules of Professional Conduct and Board of Professional Responsibility (BPR) opinions. You may want to contact the BPR for an informal opinion if the issue is under its jurisdiction.
- Step 4: Consider court cases on point, first any from Tennessee, then from other jurisdictions.
- Step 5: Research your issue via the American Bar Association Section of Dispute Resolution web site.

Assuming you're comfortable researching a particular ethics dilemma yourself, rather than getting outside professional advice, let's explore some fantastic (and free) resources on the ABA web site . . .

### Free and Organized: ABA Ethics Resources

The American Bar Association provides many valuable online resources at no cost, as a service to all mediators, arbitrators and advocates in ADR proceedings, whether you're an ABA member or not.

**National Clearinghouse for Mediator Ethics Opinions**, a project of the Section's Ethics Committee, ABA Section of Dispute Resolution, is at <http://www.abanet.org/dispute/clearinghouse.html>. Whether you are looking for mediation ethics opinions in a specific jurisdiction or analysis of an ethical standard, this online resource has more than 300 opinions from 43 states to help mediators make smart choices. The database includes a short summary of each opinion with a hyperlink to the original opinion or document issued by the state or national body. The ABA updates the database periodically; the ABA Section of Dispute Resolution makes no representation that the database contains all opinions issued to date.

User-friendly search strategies are available:

- **Keyword:** search through all categories by keyword
- **State, year and opinion type:** search or limit searches by state, year or opinion type (ethics opinion, grievance disposition, or operable rules)
- **Opinion category:** search for opinions on a particular principle, from 10 categories:

Self-Determination  
Impartiality  
Conflicts of Interest  
Competence  
Confidentiality

Quality of the Process  
Advertising & Solicitation  
Fees & Other Charges  
Advancement of Mediation Practices  
Other

**Mediator Ethics Advisory Opinions.** The ABA Section of Dispute Resolution Committee on Mediator Ethical Guidance provides advisory responses to requests for ethical guidance based on the ABA/AAA/ACR Model Standards of Conduct for Mediators (2005). The Committee's scope is limited to consideration of ethical issues pertaining to mediation. To review the mediator ethical guidance opinions, go to <http://www.abanet.org/dispute/ethics.html> and click on the link to the opinions. Opinions are also indexed and included in the National Clearinghouse database described above. To submit a mediation ethics inquiry, go to the intake form at [www.abanet.org/dispute/documents/IntakeFormFINAL.doc](http://www.abanet.org/dispute/documents/IntakeFormFINAL.doc).

Effective January 1, 2010, the Tennessee ADR Commission may issue mediator ethics advisory opinions, under authority granted by new Section 9(d) of Rule 31. The ABA's National Clearinghouse and Mediator Ethics Advisory Opinions will be valuable resources for the Commission.

### **ABA/AAA/ACR Model Standards of Conduct for Mediators**

- [Model Standards of Conduct for Mediators](#) (2005)
- [Reporter's Notes](#) (2005)

### **Code of Ethics for Arbitrations / Settlement Negotiations**

- [Code of Ethics for Arbitrators in Commercial Disputes](#) (2002)
- [Ethical Guidelines for Settlement Negotiations](#) (2002)

### **ABA Model Rules and Standards Relevant to Attorneys and Neutrals** **ABA Model Rules of Professional Conduct - Amendments (2002)**

- Recognition of neutral role for lawyers - Rule 2.4
- Conflicts of interest for lawyer-neutrals - Rule 1.12
- Duty of Candor in mediations and arbitrations - Rule 3.3, 4.1
- Lawyers to advise clients of ADR options in resolving disputes - Rule 2.1, Comment 5
- Spreadsheet on states that have adopted ABA Model Rules of Professional Conduct 2.4 and 2.2 (Rule 2.2 deleted by Ethics 2000 Commission)

### **Additional Resources from ABA Section of Dispute Resolution**

- Ethics Committee web page at [www.abanet.org/dch/committee.cfm?com=DR018000](http://www.abanet.org/dch/committee.cfm?com=DR018000)
- Ethics information web page at [www.abanet.org/dispute/ethics.html](http://www.abanet.org/dispute/ethics.html) (includes links to some of the information described in this article; also has links to ethical dilemmas published in Section's e-newsletter *Just Resolutions*)
- Report of ABA Task Force on Mediation Quality at [www.abanet.org/dch/committee.cfm?com=DR020600](http://www.abanet.org/dch/committee.cfm?com=DR020600) (click on link to get report)
- Online Dispute Resolution Ethics - 2009 Cyberweek collaboration: "[ABA panel on ODR Ethics and Online Mediation](#)" online discussion threads on 5 [Ethics and Online Dispute Resolution topics](#) (impartiality, cost & fees, confidentiality, establishing & enforcing ethics in ODR, ethical dilemmas associated with platform/system design), at [cyberweek.umasslegal.org/forum/?vasthtmlaction=viewforum&f=7.0](http://cyberweek.umasslegal.org/forum/?vasthtmlaction=viewforum&f=7.0)
- ABA Ethics 20/20 Commission's home page at [www.abanet.org/ethics2020](http://www.abanet.org/ethics2020) and Preliminary Issues Outline (Nov. 2009) at [www.abanet.org/ethics2020/outline.pdf](http://www.abanet.org/ethics2020/outline.pdf)

## **Conclusion**

Clients want quality ADR. Part of that quality is adopting best practices informed by Rule 31 and the ABA Model Standards of Conduct for Mediators. Take advantage of ABA ADR Ethics Resources – many of them are free and online.

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# The Role of Caucus in Mediation

by Joseph G. Jarrett\*,

*"To my way of thinking, caucusing is the essence of shuttle diplomacy"*  
Henry Kissinger

## The Debate

Were you to poll a group of mediators, I believe you will find that there does not exist a consensus as to the utility of caucus, i.e., the separation of the parties into different rooms for private conversation, as an essential component to the mediator's tool kit. Some mediators swear by the caucus approach, especially when the parties are hostile to one another. Others feel with equal fervor that the mediation process should be completely open and void of "secret meetings." As in all cases when intelligent people disagree, the truth is usually somewhere in the middle.

## Why Caucus?

There are myriad of reasons why mediators avail themselves of caucusing. Mediator/attorney James Melamed <sup>1</sup> observes that some of the more common reasons mediators will caucus is to:

- Create a productive pause in the process (relief from tension)
- Engage in mediative reference point or "what if" process
- Permit party movement without losing face
- Offer negotiating advice
- Assess alternatives to negotiated settlement
- Test whether a party's proposals are realistic
- Act as a sounding board
- Work to develop settlement proposals
- As means of garnering information that will not otherwise come out

## The Benefits of Caucus

As can be seen by the above, caucus can prove to be a valuable tool if used appropriately. Some of its primary benefits are:

- Assists the mediator in building a sense of trust, rapport, and confidence in her/his role as a neutral;
- Assists the mediator in gaining a better understanding of the facts and law of the case and access to information that a judge, jury, or arbitrator would never have access;
- Assists the mediator in reading the parties, their personalities, etc;
- Assists the mediator in identifying any hidden agendas that might exist.

Interestingly, one of the more overlooked benefits of caucusing is that it allows the mediator to help the attorneys get their clients under control when they have unreasonable expectations. Often times, attorneys will request mediation because they are having difficulties with their clients. <sup>2</sup> An interesting concept, considering that many mediators are of the mind that it is the attorneys who are the problematic link in the mediation chain.

Another benefit of caucusing is it allows the parties to get the mediator's reaction to their case to assist them to more realistically evaluate their case, which can serve as a reality check. Further, parties can discuss candidly their weaknesses and concerns and how they evaluate the case. Such dialogue is normally shorn of advocacy, rhetoric, and the emotional factors lawyers employ in front of judge, jury, or arbitrator. <sup>3</sup>

## Avoiding the Pitfalls

As with any mediation tool, caucusing, if used improperly, can be counterproductive to the mediation process. For instance, the possibility of mis-communicating one side's position to the other is forever present. Further, the probability that the parties will persuade or learn from one another is greatly reduced when the parties are physically separated. Also, parties become suspicious when the mediator spends more time with one party than the other, raising the specter that the mediator may be biased, or not the neutral purported to be. <sup>4</sup> Finally, confidentiality, one of the hallmarks of mediation, can be compromised should the mediator mistakenly divulge a "secret" to the other side.

## Summary

Caucusing can prove to be an invaluable tool provided the mediator takes the time to fully explain the concept to the parties, attempt to spend equal time with each party, diligently protects confidences imparted to the mediator, and most importantly, determines at the outset whether the matter before the mediator is conducive to the caucus style of dispute resolution.

*\*Joseph G. Jarret is a Federal and Rule 31 listed general civil mediator and an attorney serving Knox County as its Chief Deputy Law Director. He has lectured across the country on various mediation issues and is the 2009 President of the Tennessee Valley Mediation Association, and a member of the Tennessee Association of Professional Mediators, the Tennessee Bar Association, and the ADR Section of the Knoxville Bar Association. Mr. Jarret is also an award-winning writer who has published over 85 articles in various professional journals and a former active duty United States Army Combat Arms Officer and Air Force Special Agent with service overseas. He holds the juris doctorate degree, the masters in public administration degree, a bachelors degree, and a post-graduate certificate in public management. Joe Jarret can be reached at joe.jarret@knoxcounty.org .*

### End Notes:

1. Melamed, James, *Mediating Divorce Agreement, 2000*
2. Calkins, Richard, *Caucus Mediation, Putting Conciliation Back Into The Process: The Peacemaking Approach to Resolution, Peace, and Healing*. Drake Law Review, 2010
3. Melamed, James, *Mediating Divorce Agreement, 2000*
4. As most mediators will agree, it isn't always possible/feasible to spend equal amounts of time with both parties in caucus. As there is not bright line rule or litmus test, the mediator must rely upon her/his own experience, taking each case on its own merits.

## Important ADRC Dates

**June 9, 2010** ..... Rule 31 Mediator Applications Deadline for ADRC Review on July 27, 2010

**July 27, 2010** ..... ADR Commission Meeting Administrative Office of the Courts, Nashville

## *We Would Like to Hear From You!*

The Administrative Office of the Courts gladly accepts articles from ADR professionals for publication in the *ADR News*. For more information, please contact Anne-Louise Wirthlin at [Anne.Louise.Wirthlin@tncourts.gov](mailto:Anne.Louise.Wirthlin@tncourts.gov).