



# ADR NEWS

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## IMPORTANT NEWS

At the April 24, 2012 quarterly meeting of the Alternative Dispute Resolution Commission, the Commission adopted Policies 13 and 14. Both policies support and encourage pro bono mediation among Rule 31 listed mediators in Tennessee. These policies were adopted in response to suggestions from the Mediation Subcommittee of the Education Committee of the Access to Justice Commission. To see all of the ADRC policies, go to:

<http://www.tncourts.gov/programs/mediation/resources-mediators/policies>



If you are a co-mediator in a case, please note that only ONE mediator per mediation needs to fill out the *online mediation report* pursuant to ADRC Policy 10. In the “other” section of the online report, type in the co-mediator’s name.



The ADRC is developing the agenda for the Tenth Annual ADRC Workshop which will be held October 19, 2012 at Lipscomb University in Nashville. Please make plans to attend!

# THE JOINT SESSION: WHAT'S IN IT FOR YOU?

*by Tracy L. Allen and Eric R. Galton*

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## **I. The Issue: The Debate Rages and Comments about the Joint Session Remain Consistently Predictable:**

### **A.**

- I never do a joint session.
- I never let my client talk in a joint session.
- We don't need a joint session. We all know the issues.
- Joint sessions are a waste of time.
- If we do a joint session, the whole thing will blow up.

What is also (ironically) consistent: The vast majority of mediation training models include the joint session as a necessary component of mediation.

## **II. The Construct.**

Mediation, by definition, must remain flexible to fit the process to the fuss. Thus, we are not creating a paradigm or promoting a "one size fits all" notion to using joint sessions.

There are obvious situations where a joint session may not be beneficial or helpful. For example:

- Where the interaction of the parties is so volatile that a joint session will prejudice the process
- Where the interaction between lawyers is so toxic that the joint sessions could condemn the process to failure
- The case has been mediated on multiple prior occasions where the participants have had opportunity for joint sessions, explained positions, facts and issues and explained areas of disagreement
- Spousal abuse or physical abuse history, such that one's ability to participate poses a physical threat and/or incapacitates the participants
- Participants are adamant about not conducting a joint session and the mediator puts his/her own credibility and competency at risk by continuing efforts to persuade them to the contrary

For the remaining, run of the mill mediations (probably 90% or higher), what does the joint session have to offer? Cutting through all the excuses and defenses, there is a common theme: FEAR. Fear of the unknown, the uncertainty, the unpredictable. Oddly, when faced with fright, working through the fear generally brings a refreshed, more confident perspective.

Properly designed and scripted, joint sessions have much to offer and reduce fears. At the core, well managed joint sessions present two obvious benefits:

- The tangibles – face-to-face assessment, direct communication with decision-makers, etc.
- The intangibles – what is not available in any other phase of the litigation process.

Each participant has a role in reducing the uncertainty of joint sessions. All of the participants' concerns must be analyzed through the separate sets of eyes participating in the process; i.e., the parties, the lawyers, the mediator.

**QUERY:** Who is the joint session for? Who is the audience? Who gets the benefits from the joint session? Each participant stands alone and distinct from the others when assessing and establishing goals and techniques to make effective use of the joint session.

### **III. The Theoretical Theme of the Joint Session: Opportunity**

#### **A. THE PARTIES:**

- Hear and evaluate the position the opponent will promote at trial
- Learn new information
- Evaluate the resolve of the opponent
- Evaluate the efficacy of the opposing counsel
- Understanding elements driving the conflict
- Making a favorable impression on opponent/decision-maker and counsel (e.g. insurance adjuster, plaintiff)
- Ability to judge sincerity and credibility of opponent and counsel
- Ability to express apology or regret
- Ability to express anger, frustration, disappointment
- Ability to express forgiveness
- Ability to acknowledge contribution to the conflict
- Opportunity to explain, identify and add clarity to areas of disagreement
- Opportunity to explain, identify and add clarity to areas of agreement
- Meet face-to-face with the accused/accuser
- Opportunity to be heard
- Opportunity to be understood
- Experience the risk and full tension of the conflict outside the courtroom
- Evaluate your own counsel's competency, talent, preparedness and persuasiveness

#### **B. THE LAWYERS:**

- Demonstrate preparedness
- Demonstrate skill and expertise (subject matter, trial skills, people skills, persuasive abilities)
- Posturing or marketing the client's case in the most favorable light
- Direct communication with the decision-maker without distraction
- Present opponent's risk on my terms and in my words
- Explain how evidence will be presented, played out and received
- Demonstrate confidence and belief in the client, case, facts, witnesses
- Witness opposition, reactions to your theories, style and methodology
- The dry run phenomenon-how does this really sound as the words leave my mouth?
- Explain damage theories

- Create opportunity for opponent to reevaluate the case
- Opportunity for you and your client to reevaluate the case
- “Size-up” the opposing team
- “Dry run” for your client – how well he/she will hold up in trial
- Creating a favorable settlement dynamic
- Demonstrate negotiation competency
- Measure confidence, skill, expertise of opposition
- Learn more about the case
- Streamline the case facts and issues
- Persuade

### **C. THE MEDIATOR:**

- Observe interaction of the parties
- Observe interaction of the attorneys
- Observe participants’ reactions to words, presentations
- Set a favorable tone for the process
- Develop trust of participants in the mediator and the process
- Demonstrate commitment to and belief in the process
- Demonstrate preparedness and competence
- Distinguishing mediation from traditional litigation process and value of mediation
- Demonstrate balance, neutrality, even-handedness, confidence
- Explain value and role of confidentiality in mediation process in manner that equally benefits the participants
- Obtain commitment and “buy in” together
- Demonstrate and model effective listening
- Demonstrate leadership
- Explain and demonstrate empathetic listening
- Identifying and creating common base of information and assumptions upon which negotiations will build
- Clarifying areas and reasons for agreements and disagreements among participants
- Learn and reevaluate arguments being promulgated by each participant
- Observe parties’ and lawyers’ mannerisms, credibility and skill
- Observe and understand negotiation styles, behaviors and strategies
- Troubleshoot interpersonal dynamics
- Determine if true decision makers are present and who the true decision makers are
- Recast/reframe the dispute
- “Fresh eyes”/reactions, witnesses and participants

### **IV. INTEGRATING POTENTIAL GOALS OF MEDIATION BY USING THE JOINT SESSION**

- First do no harm
- Effective conversation and communication ( a “learning conversation”)
- Effective exchange of information
- Identify matters that are NOT in issue – Where is their agreement?
- Create a positive tone for negotiations and outcome
- Verifying and understanding the past, present and (predictable) future procedural position and posture of the case
- Clarifying the negotiation history and present state of resolution, ideas and efforts
- Establish belief and commitment to the process

## **V. EFFECTIVE TECHNIQUES FOR JOINT SESSIONS: IF YOU WANT IT, YOU HAVE TO GIVE IT**

### **A. THE PARTIES:**

- Parties enhance (up or down) their own case by their appearance, behavior and communication
- Demonstrate how party will appear before the trier-of-fact, especially if prepared to actively participate in the dialogue and negotiation
- Listen for information that may be new or different and seek to understand its genesis and impact
- Refrain from demonstrating disrespect, excess anger and demonstrate one's ability for self control
- Express regret where appropriate or apologize or extend forgiveness where appropriate
- Express belief in your attorney
- Express commitment to the process, willingness to partake in good faith negotiations and participation and set expectations for the same in return from the opponent

### **B. THE ADVOCATE:**

- Know who you're speaking to and then think about how best to motivate that person, e.g., lawyer, decision maker, advisor
- Direct your remarks to the appropriate listener
  - First – decision maker
  - Last – the mediator
- Be prepared
- Be concise
- Be visual
- Be realistic about your goals in the joint session
- Use language and present your remarks to enhance listener's ability to listen and understand your position but not necessarily agree with you
- Acknowledge and admit commitment to the process, the power of the process, good faith participation and willing to do the hard work of effective negotiation
- Express appreciation for opposition's presence and participation

### **C. THE MEDIATOR:**

- Create an environment for a productive, learning conversation
- Express appreciation and acknowledge the privilege to serve these participants in this case
- Model respectful behavior and tone
- Commitment to the process
- Commitment to the participants
- Listen openly and empathetically
- Demonstrate preparedness by reciting sufficient information about the case to let them know the mediator did his/her homework
- Demonstrate readiness to go to work for them
- Express confidence in the lawyers and their skill
- Establish optimism about the process, probabilities of success where commitment to the process and desire to settle remain strong throughout the negotiations
- Establish credibility without bragging

- Point out the value of confidentiality in mediation negotiations and the value of negotiating in the comfort of mediation as opposed to the courthouse
- Contrast the humanity of mediation with the warlike tone of litigation
- Set and obtain affirmative commitment by participants to rules and dynamics of negotiation, e.g., zones, bottom lines, interruptions, language, elements of settlement
- Invite active contributors to brainstorming solutions; ask them to take ownership of the solutions and problem solving
- Emphasize value of using the security of the present (i.e., “today”), to resolve as opposed to the risk and uncertainty of the future

## VI. MORAL OF THE STORY

Don't let fear prevent you from effectively engaging in joint sessions from which resolutions are most often born.

### ***About the Authors:***

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#### ***Tracy L. Allen***

Tracy Allen is an international mediator, arbitrator, ADR educator and newly listed Rule 31 General Civil Mediator. Her ADR experience spans the globe with emphasis in the areas of business, securities, employment, real estate, health care, insurance coverage, commercial, probate and tax law. As a former litigator and business tax attorney for many years, she now specializes in conflict prevention and resolution. In addition to her role as a commercial mediator and arbitrator, Ms. Allen provides extensive training services in the field of dispute resolution. She also acts as a neutral service provider in other ADR areas such as early neutral evaluation, summary jury trials and special master.

#### ***Eric R. Galton***

Eric Galton is considered by many to be a pioneer and defining force in the field of Alternative Dispute Resolution. Since 1989 he has mediated over forty four hundred cases, employing a variety of mediation styles, and consistently maintains a 91% settlement rate. Mr. Galton is highly versatile; he mediates disputes ranging from a half day to two weeks in length, in cities all over Texas and elsewhere in the country, involving anywhere from 2 to 125 parties from a broad spectrum of ethnic, socioeconomic, political, and business backgrounds. He mediates disputes in over 17 areas of law. In addition to his wealth of practical experience, Eric Galton inspires and motivates participants through his uncompromising ethics, incisiveness, compassion, and genuine love of the mediation process. Eric was listed as a Texas Super Lawyer in 2006 and 2007 by *Texas Monthly Magazine* and was one of five mediators listed in the *Texas Lawyer Go-to-Guide* in 2007. Eric is both a fellow and Governor of the International Academy of Mediators.

# ~ Roll Call ~

**Congratulations to the following Newly Listed Rule 31 Mediators!  
These mediators were approved for listing at the ADRC Quarterly Meeting on April 24, 2012.**

Mr. Lawrence R. Ahern, III, General Civil  
Ms. Tracy L. Allen, General Civil  
Mr. James R. Becker, General Civil  
Mr. Christopher Brown, Family  
Mr. Mark A. Brown, General Civil  
Ms. Tina R. Camba, General Civil  
Ms. Brenda D. Clark, General Civil  
Mr. Joseph M. Clark, General Civil  
Mrs. Michele L. Coffman, Family  
Mr. Geoffrey A. Coston, General Civil/Family  
Ms. Julie E. Cummins, General Civil  
Mr. Michael G. Derrick, General Civil  
Mr. John H. Dotson, General Civil  
Ms. Ashley E. Dwire, General Civil  
Ms. Bari B. Gerbig, Family/DV  
Ms. Misty L. Harris, Family  
Mr. Timothy P. Harrison, General Civil  
Mrs. Michelle W. Hellstern, General Civil  
Mr. Charles M. Kincade, General Civil/Family  
Mr. Michael J. King, General Civil  
Mr. James D. Lawson, General Civil  
Ms. Amber F. Lee, Family  
Mr. Robert J. Leibovich, General Civil

Dr. Kenneth S. Letterman, General Civil  
Ms. Sharon L. Lusk, Family  
Dr. Virginia A. Magnus, General Civil  
Mr. Leland M. McNabb, General Civil  
Ms. Lisa A. Overall, General Civil  
Ms. Vicky L. Powell, Family  
Ms. Paula D. Raulston, General Civil  
Mr. Denis W. Retoske, General Civil  
Mr. Sanford M. Roberts, IV, General Civil  
Mrs. Chanel L. Roland, Family  
Ms. Monesca R. Smith, General Civil  
Ms. Elizabeth E. Stacey, General Civil  
Ms. Martha S. Taylor, General Civil  
Mr. Dale A. Tipps, General Civil  
Mr. Hans M. Toecker, General Civil  
Mr. J. Randal Tomblin, General Civil  
Mr. Ernest C. Tubbs, Jr., General Civil  
Mr. Russell R. Vanstory, General Civil  
Ms. Cynthia L. Warren, General Civil  
Ms. Katie L. Wells, General Civil  
Mr. John D. Willet, General Civil  
Ms. Lynn S. Williams, General Civil  
Ms. Mary S. Woods, General Civil

## Important ADRC Dates

**June 5, 2012**.....Rule 31 Mediator Applications Deadline for ADRC review on July 24, 2012  
**July 24, 2012**.....ADR Commission Meeting, Administrative Office of the Courts, Nashville  
**September 4, 2012**.....Rule 31 Mediator Applications Deadline for ADRC review on October 23, 2012  
**October 19, 2012**.....Annual ADRC Workshop, Lipscomb University, Nashville  
**October 23, 2012**.....ADR Commission Meeting, Administrative Office of the Courts, Nashville

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

In an effort to encourage education and communication between and for Rule 31 listed mediators, the ADRC accepts proposed article submissions from Rule 31 listed mediators and others for publication in the *ADR News*. All submissions may or may not be published and are subject to editing according to the Program Manager's discretion. If you are interested in submitting an article for publication in the *ADR News*, please contact Claudia Lewis, AOC Programs Manager, at [Claudia.Lewis@tncourts.gov](mailto:Claudia.Lewis@tncourts.gov).