



ADR NEWS

A publication of the Tennessee Alternative Dispute Resolution Commission

VOLUME 8, ISSUE 2

WINTER 2008

Contacts

Tennessee Alternative Dispute Resolution Commission

- Hayden D. Lait, Esq.
Chairperson, Memphis
- Allen S. Blair, Esq.
Memphis
- Hon. Ben H. Cantrell
Nashville
- Gayden Drew IV, Esq.
Jackson
- J. Wallace Harvill, Esq.
Centerville
- Tommy Lee Hulse
Kingsport
- C. Suzanne Landers, Esq.
Memphis
- Glenna M. Ramer, Esq.
Chattanooga
- D. Bruce Shine, Esq.
Kingsport
- Edward P. Silva, Esq.
Franklin
- Howard H. Vogel, Esq.
Knoxville

Supreme Court Liaison

- Justice William C. Koch, Jr.

Programs Manager

- Andrea D. Ayers, Esq.

Programs Assistant

- Margaret D. Lamons

Send questions and comments to:

Tennessee ADR Commission

Administrative Office of the Courts
Nashville City Center, Suite 600

511 Union Street

Nashville, TN 37219

Phone: 615-741-2687

Fax: 615-741-6285

Email: andrea.ayers@tncourts.gov

Web: www.tncourts.gov

The Year in Review

2007 was an especially productive year for the Tennessee Alternative Dispute Resolution Commission. Over the course of the year, the number of actively listed Rule 31 mediators rose to 967. During 2007, the Commission reviewed 206 applications for listing and 12 curriculum applications from Rule 31 mediation training providers.

On October 10, 2007, Supreme Court Rule 31, Section 11 was amended to clarify the grievance procedure for attorney and non-attorney Rule 31 mediators.

The ADR Commission also adopted four new policies during the year, including a policy that requires all of the Rule 31 listed mediators on active status to submit certain statistical information electronically to the AOC. To see a complete list of the ADR Commission policies, please visit <http://www.tsc.state.tn.us/geninfo/Programs/ADR/adrdir.asp>.

The ADR Commission held its 5th Annual Advanced Mediation Workshop this past October with over 190 mediators in attendance. The comments from attendees were overwhelmingly positive.

The Commission is pleased with all of the efforts that have been made to increase the awareness and use of mediation in communities across the state. The ADR Commission commends Rule 31 mediators and their commitment to advancing the methods the citizens of Tennessee utilize to resolve disputes amicably.

“Mama Loved Me Best!”

The Challenges and Nuances of Estate Mediation

by Joseph G. Jarret, Esq.*

It was Knoxville mediator Robert Murrian who wryly suggested that the controversies surrounding estates and will contests can be dubbed “Mama Loved Me Best” litigation. And clearly, there exists much truth to the quip. As you can imagine, litigation amongst family members can be contentious if not downright cruel. I believe David Aesael drove home this point when he remarked, “They say that blood is thicker than water. Maybe that’s why we battle our own with more energy and gusto than we would ever expend on strangers!”

Unfortunately, more often than not, a mediator does not become involved in such matters until after a challenge to a will, etc., is filed in open court. There is much that can be said about involving a mediator in the estate planning process in an effort to reduce the frequency and severity of protracted, contentious litigation. Estate planners or probate attorneys, when faced with parties who are at odds over the future division of assets should consider engaging a third party neutral to objectively, and non-confrontationally meet with the couple in an effort to craft an agreement that just might minimize future family in-fighting. True, the involvement of a mediator is no guarantee heirs will not ultimately resort to litigation. However, if the heirs are made aware of the fact that the parties to the estate plan took the time and effort to meet with a mediator and as such, put more than a cursory amount of thought into the plan, such knowledge could serve to convince heirs that the plan fully reflects the wishes of the deceased, wishes that should therefore be honored.

In his celebrated work *The Use of Mediation in Estate Planning: A Preemptive Strike Against Potential Litigation*, noted mediator John A. Gromala suggests that the use of an independent mediator during the planning process can serve to assist estate planners in improving client satisfaction, as well as reduce the probability of family litigation. In essence, the mediator is being called upon to prevent a future problem from occurring, rather than to solve an existing dispute. A mediator is crucial in this equation because she or he “does not represent anyone, has no allegiance to any party, gives no advice, makes no decisions and has no conflicts of interest. There are no constraints on the mediator’s ability to speak in confidence with each person.” As all Tennessee mediators know, the

Rules governing mediation in this state mandate that neutrals preserve and maintain the confidentiality of all dispute resolution proceedings except where required by law to disclose information and shall likewise keep confidential from the other parties any information obtained in individual caucuses unless the party to the caucus permits disclosure.

For those mediators who are called upon to mediate the planning of an estate, there are certain subtleties that shouldn’t be overlooked, including but not limited to:

- Often, even the simplest of estates in terms of assets, etc., can be emotionally charged if the couple involved are at odds with one another as to who gets what;

- Never assume that a “happily married” couple has effectively communicated about the division of their estate either amongst themselves or with potential heirs. It is not at all unusual to learn that both parents inadvertently promised two different heirs the same piece of property or asset;

- Be prepared for couples to disagree over seemingly insignificant pieces of property that, although they lack actual value they come attached with intrinsic, emotional value, especially where family heirlooms are involved;

- Be alert for various hidden players that are not sitting at the mediation table who could possibly hold sway over one or both parties and who have a vested interest in the outcome of the mediated agreement;

- In this day and age, it is not at all unusual for families to have children who are the issue of more than one marriage or relationship, thus creating the potential for conflicts of interest and greater complexity during the mediation session.

Clearly, the notion of involving mediators in the estate planning process is not as common as it is in your garden variety civil or family litigation matters, nor is it offered as a panacea for all that ails estate challenges and litigation. Gromala suggests that “dialogue between estate planners and mediators as well as continuing education seminars focusing on mediation in estate planning should be a high priority.” There appears to be some merit to this suggestion. Estate mediation may still be in its infancy, however, maybe it’s time this concept grew into adolescence.

**Joseph G. Jarret is a Rule 31 listed civil mediator and attorney who recently relocated to Knox County, Tennessee. He is a member of the Tennessee Valley Mediation Association, the Tennessee Association of Professional Mediators, and the ADR Section of the Knoxville Bar Association.*

The Where of Mediation: Choosing the Right Location for a Facilitated Negotiation

by Paula M. Young¹

Very few authors have considered the importance of choosing a comfortable location for mediation. The textbook I use in my Dispute Resolution class advises readers that:

You may want to resolve where the mediation sessions will be held, especially in a dispute where parties are located at great distance from each other. In a court-annexed mediation, the courthouse can be a convenient, neutral option. In a mediation in which multiple sessions are expected, the site could be alternated between offices of each attorney or party.²

In reading that advice now, I see it as superficial and oblivious to the psychological and emotional impact location has on parties in mediation.³ Thoughtful consideration of the mediation environment enhances party self-determination, supports quality decision-making, and can enhance the appearance of the mediator's neutrality. It could be the most important decision made by a mediator or a lawyer representing a party.

One of the best discussions of the mediation environment appears in Barbara Madonik's *I Hear What You Say, But What are You Telling Me? Strategic Use of Nonverbal Communication in Mediation* (Jossey-Bass Pub. 2001).⁴ Her thesis is simple. "Environments send messages. . . . Th[e] [mediation] environment includes the physical surroundings that affect people's bodily comfort levels. It also involves some less tangible elements: the parties' relative levels of power, their feelings of safety, and arrangements that convey respect."

Power Imbalances

Madonik spends quite a bit of time talking about how the parties convey to each other their sources of power based on education, information, expertise, reputation, persuasiveness, negotiating skill, money or resource control, employment status, emotional intelligence, race, gender, age, religion, or ethnicity. Later, she recommends the use of a round table in mediation to help reduce the power-distance between parties and between the parties and the mediator. She says: "[I]t sends a strong nonverbal message of mediator neutrality and party equality." Careful selection of the chairs around that table can also send important nonverbal messages. Madonik recommends comfortable adjustable chairs that allow people to easily reach the writing surface of the table, especially if they are more diminutive in stature.⁵ Women, especially, may appreciate this flexibility in the seating arrangement. They may feel more vulnerable if positioned low in relation to the table or in relation to the other parties.

Safety

If people do not feel safe in the mediation process, they will not likely participate effectively. Madonik reminds us that feelings about safety and control begin before the mediation and end when the parties arrive safely at home after the session. Accordingly, she recommends that mediators:

- Provide maps and directions to the location.
- Choose a site accessible by private and public transportation.
- Choose a site that people will perceive as safe after dark.
- Tell parties in advance if parking is limited and provide, if possible, free parking passes.
- Advise parties of the location of bathrooms, phones, and fire exits.
- Survey parties in advance to learn of any special needs, such as:
 - Handicap access
 - Smoking areas
 - Child care needs
 - Translators, or
 - Special dietary requirements.

I would add to this list other concerns about safety. One mediator tells the story about asking all parties to a mediation to leave any weapons they might be carrying with his secretary. Both lawyers stood up, removed their pistols, and deposited them with the secretary. Jeffrey Rubin, a Florida mediator and ethicist, tells the story of a shooting in a Boca Raton mediation involving a probate case. The brother, a firefighter, killed his sister and then tried to shoot everyone else in the room. Later, the brother committed suicide.⁶

See "The Where of Mediation . . ." (Continued, page 4)

The Where of Mediation

Choosing the Right Location for a Facilitated Negotiation

(Continued, from page 3)

People practicing in family mediation often must anticipate high emotions and even undisclosed histories of domestic violence. I recommend that mediators take the following precautions to ensure the safety of the parties and the mediator:

- Keep the parties in separate waiting rooms.
- Make sure adequate staff is present to handle a situation.
- Create staggered departure times.
- Escort each party to his or her car after the session.
- Adequately train yourself and your staff to spot and properly intervene in potentially violent situations.

Party Comfort

To make parties comfortable, the mediator should consider many aspects of the physical environment: sounds (both pleasant, like music, and irritating), lighting, temperature control, wall color, carpet texture, the smell of the room and outside areas, and the shape of the room. Madonik takes an interesting approach to this topic by analyzing these elements from the perspective of persons with different information absorption preferences: verbal (reading), visual (charts and images); aural (listening); and kinesthetic (movement).⁷

Coffee service invites people to mingle and engage in small talk and “sets up a strong kinesthetic, visual, and auditory welcome message for many parties.”⁸ Parties with visual preferences will appreciate nice artwork on the walls of the main room and caucus rooms.⁹ They will also prefer a neat, dust free, and organized environment. Interestingly, visually-oriented people need a clean space in front of them to literally visualize and analyze the information they receive in the mediation.

Persons with auditory preferences will be easily distracted by noises. Yet, they need to listen carefully to the mediator and the other parties. They will prefer rooms free from phone interruptions, noisy conversations in adjacent rooms, ticking clocks, buzzing fax machines, or outside traffic and construction noises. People with kinesthetic preferences will like soft carpeting, comfortable chairs, and cozy rooms still large enough to allow them to get up and move around.

Madonik also recommends that the mediator carefully consider the color of the walls in the main room and caucus rooms. Reds may elicit unease and aggression. Yellows may make parties feel physically warmer, but they also may elicit feelings of diligence or envy. Blues and greens evoke feelings of safety and tranquility. But, these colors also may make parties feel physically cooler.

Windows allowing natural light will make a room feel more spacious, but the mediator should be able to control any glare and distractions with curtains or blinds. Lighting fixtures should work properly. People with auditory and visual preferences will be distracted by buzzing or blinking fixtures.

Madonik also recommends that the main room and caucus rooms have adjustable temperature controls. The mediator may set the temperature higher in the morning and lower it after lunch when parties may feel more lethargic.

Amenities

I have already mentioned the subtle nonverbal messages conveyed by something as simple as coffee service. Several scholars have mentioned the importance of food in mediation to build rapport, to energize parties, and to show respect for their needs.¹⁰

Most mediators will remember to bring flip charts, markers, calculators, and notepads for the parties. They will make available phones, fax machines, laptop computers, and printers. Madonik recommends that the mediator also make tissues available. “On-site tissues relieve [emotional] parties of embarrassment and tension. They communicate a clear nonverbal message that crying is an acceptable and normal event that happens during this stressful time.”

She also suggests that mediators make available helpful props. For instance, in a mediation involving a vehicle accident, the mediator may have toy cars and trucks available. “The miniature size diminishes fear, puts things in a new perspective for parties, and allows people with a kinesthetic preference to communicate effectively about the accident.”

At one training session I attended, two Texas mediators suggested that the mediator install Nerf basketball hoops and other toys in the caucus rooms. Parties waiting for the return of the mediator could work off some

nervous energy, keep from getting too bored, and think through the issue last posed to them, especially if they had a kinesthetic preference.

If I had more space, I would tell you how my students applied these principles to a specific dispute involving a claim of medical malpractice. For those of you interested in that analysis, a longer version of this article will soon appear on the mediate.com website. I will say that most of my students showed great creativity and emotional intelligence in picking a location for that mediation. The lesson I take from their work is that lawyers representing parties in mediation should consider the factors outlined above. While the mediator's conference room may offer an easy and inexpensive location for the mediation, it may not always provide the best negotiating environment. Even in less desirable environments, control what you can to elevate party emotions, build trust, and engender a problem-solving atmosphere.

¹ Paula M. Young is an associate professor at the Appalachian School of Law located in Grundy, Virginia teaching negotiation, certified civil mediation, arbitration, and dispute resolution system design. She received in 2003 a LL.M. in Dispute Resolution from the repeatedly top ranked program in the U.S. She has nearly 1500 hours of alternative dispute resolution training. Missouri and Virginia have recognized her as a mediator qualified to handle court-referred cases. You can reach her at pyoung@asl.edu.

² HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS* (NITA 2004).

³I have mediated in the tiny attorney-client consultation rooms of several local courthouses. The rooms typically have rectangular tables with uncomfortable wooden chairs. Often the locks on the doors do not work and so it is impossible to ensure confidentiality. In one courtroom, several people walked from an adjacent room through the mediation room on their way back into the courtroom. In one courthouse, inmates had laid a new floor in the one decently sized conference room the court had available for mediations. They had installed stone tiles that caused sounds in the room to reverberate. The lighting in these rooms is almost always florescent. And the rooms do not have any windows or access to natural lighting. So, I don't think much of that recommendation. At the same time, mediators must make do with the resources available.

⁴An excerpt of this discussion appears at <http://www.mediate.com/articles/madonik.cfm>. I am not providing pin-point citations to her materials.

⁵This recommendation reminds me of a running joke we had in my former law firm. One of my partners, a big guy with a muscular build, supposedly "wound down" the chairs in our conference room every time he had a deposition or negotiation there. He then sat in a chair that was "wound up" to place him taller than the other parties. He, of course, denied the behavior. But it seemed that at every partners' meeting held in that room most of us had our chins resting on the table top when we sat in the chairs. While this "hard-bargaining" tactic may have served his purposes as an advocate, it could prove disastrous in a mediation environment.

⁶He tells this story in the context of asking whether a mediator could be held liable for not providing parties a safe environment.

⁷For more on this topic, see M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student*, 25 Seattle U. L. Rev. 139 (2001).

⁸At an advanced mediation training class I attended, Lela Love asked the participants to share a "master move." One woman mediator mentioned that she bakes chocolate chip cookies right before parties are expected to arrive at her office. The air is filled with the scent of this childhood treat.

⁹For articles discussing the role of artwork or office décor in building rapport with clients, see Jill S. Chanen, *Hispanic-Owned Firm Wants Office's Look to Reflect its Success – and its Client Base*, 91-JUN A.B.A.J. 54 (June 2005); Jill S. Chanen, *Upholstered Chairs and Framed Art Add Welcoming Touches to a Sterile Office*, 92-JUN A.B.A.J. 60 (June 2006).

¹⁰Sharon Press, Director of the Florida Dispute Resolution Center, tells the story of a woman who filed a complaint against a Florida mediator for failing to provide a meal even though she suffered from low-blood sugar that interfered with her ability to think clearly. After an investigation, the grievance committee learned that the mediator had provided a meal. It was just not a very good meal in the opinion of the complaining party. See also Carol B. Liebman, *Mediation as Parallel Seminars: Lessons from the Student Takeover of Columbia University's Hamilton Hall*, 16 NEG. J. 157 (April 2000) (discussing the importance of food in a student-administration dispute).

Upcoming Events

April 29, 2008ADR Commission Meeting
AOC Office, Nashville

July 29, 2008ADR Commission Meeting
AOC Office, Nashville

October 28, 2008ADR Commission Meeting
AOC Office, 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 Andrea Ayers at andrea.ayers@tncourts.gov.