



ADR NEWS

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Supreme Court Appoints New ADR Commissioner

Harold D. Archibald

The Supreme Court has appointed Mr. Harold D. Archibald to serve on the Court's Alternative Dispute Resolution Commission. Mr. Archibald resides in Memphis and has been listed as a Rule 31 general civil mediator since 2000. He is currently a dual listed Rule 31 general civil/family mediator having received his cross-over training and family listing approval in 2008.

Mr. Archibald is a licensed Tennessee attorney in good standing and has been in private practice in Memphis since 1979 at Archibald & Halmon, P.C. Prior to going into private practice, Mr. Archibald was the Assistant Shelby County Public Defender and served as coordinator of the Capital Defense Team that was involved solely in the defense of homicide cases. He also worked as the supervising attorney for a branch office of the Memphis and Shelby County Legal Services Association.

* *Check Your Email!* *

Due to the continuing growth of the use of mediation throughout Tennessee, there are over 1,000 listed Rule 31 mediators. To conserve paper and postage and to ensure that listed mediators are up-to-date on all ADRC issues, we will be using email to communicate important information, including, but not limited to, the announcement of upcoming events, the quarterly newsletter, and renewal information. To ensure that you receive these updates, please set your email account to accept emails from both of the following:

Anne-Louise Wirthlin, Programs Manager

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Mediation Reporting Requirement & Statistics

Rule 31 Mediator Reporting Requirement

Section 18(e) of Supreme Court Rule 31 provides a mandatory reporting requirement for Rule 31 listed Mediators. Section 18(e) is as follows:

In addition to compliance with Section 5 of this Rule, Rule 31 Mediators shall be required to submit to the ADRC reports of any data requested by the ADRC consistent with the requirements of Section 19(a)(8) as to any mediation conducted by a Rule 31 Mediator, including those mediations which are not subject to Rule 31. The report forms will be available on the AOC website and from the AOC.

The ADRC adopted a policy, further explaining the reporting requirement:

Effective January 1, 2008, all mediators listed pursuant to Supreme Court Rule 31 will be required to submit reports as prescribed by the Commission, regarding any mediation beginning on or after January 1, 2008, except as to matters pending in state courts outside of Tennessee and the Federal Court System. Mediators will have 15 calendar days from the date of the last mediation session to submit the report to the AOC. This policy does not affect any other reporting obligation required of a Rule 31 listed mediator.

Mediator reporting is done online on the AOC website. You can file a mediator report by going to the following website, <http://www.tncourts.gov/Rule31Report.htm>. You should have received a letter in November 2007, or shortly after you were initially listed if approved later than November 2007, informing you of your assigned user name and password. If you need this information sent to you again or have any questions, please contact Anne-Louise Wirthlin at 615-741-2687 or at Anne.Louise.Wirthlin@tncourts.gov.

2008 Mediator Reporting Statistics

Of the 6,472 mediations reported, 3,308 (51.11%) were conducted in domestic relations disputes. Of the 3,308 domestic relations disputes, divorce cases with children was the highest category type with 1,446 mediations, which account for 43.71% of the domestic relations disputes and 22.34% of the overall mediations. The second highest category type of domestic relations disputes was divorce without children with 682 mediations, which account for 20.62% of the domestic relations disputes and 10.54% of the overall mediations. The highest non-domestic relations dispute type category was personal injury with 1,437 (22.20%) followed by worker's compensation with 640 (9.89%). All of the issues reported were categorized as: All Issues Resolved, Issues Partially Resolved, or No Issues Resolved, with 3,968 (61.31%), 903 (13.95%), and 1,601 (24.74%), respectively.

Circuit court mediations were the majority of the overall mediations with 3,637 (56.20%). Chancery court mediations were the second highest with a total of 2,006 (31.00%) mediations. A standard fee was applied to 88.47% of the mediations. Other fees that were applied to mediations consisted of: voluntary pro bono with 6.04%, reduced fee with 3.96%, and pro bono by court order with 0.35%.

★ *These statistics are based solely on the data that has been 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.* ★

Learn About & Support the Supreme Court's Access to Justice Campaign

The Supreme Court announced its access to justice campaign on December 5, 2008, at a press conference attended by more than 100 leaders from the bench, bar groups, and court agencies. The audience included mediators, lawmakers, public officials, and business and civic leaders from across the state. The campaign is designed to help meet the urgent legal needs gap in Tennessee, a gap that is only growing in the current economic situation as Tennessee's indigent and working poor families face new and more urgent legal problems. The Chief Justice has made it clear that she sees mediation, both pro bono mediation and reduced fee mediations through community mediation centers and other organizations, as a critical element to helping meet this legal needs crisis.

As part of its access to justice campaign, the Court is conducting a series of meetings in public libraries across the state in early 2009 to educate and attract new supporters and participants; and to help guide the Court in developing creative strategies to address the legal needs gap. Mediators are encouraged to attend these meetings.

The Court is also asking the judiciary, bar associations, access to justice organizations, and those in the mediation field, to join the Tennessee Bar Association and the Supreme Court in promoting and publicizing the Statewide Public Service Day which will be held on April 4, 2009. This TBA initiative, called "4/4," will feature sponsored events providing pro bono assistance in communities around the state. At this point, no purely mediation oriented events have been planned, but there is still time.

Finally, as a kind of keystone to its access to justice campaign, the Court is creating a statewide Access to Justice Commission. It is anticipated that this new Commission will work closely with the ADR Commission on better utilizing mediation services to help meet the legal needs crisis.

The year of 2009 promises to be a very exciting year as the Court and the entire judiciary assume this new leadership role on access to justice issues. We welcome and need the creativity and experience of the ADR community to help meet the growing legal needs crisis in Tennessee. For more information on the Court's access to justice campaign, please contact the AOC Access to Justice Coordinator, Becky Rhodes, at Rebecca.Rhodes@tncourts.gov.

The Americans with Disabilities Act Amendments Act: Challenges for Tennessee Mediators

*by Joseph G. Jarret, Esq.**

Background. The Americans with Disabilities Act Amendments Act, or the ADAAA, was signed into law by President Bush and takes effect on January 1, 2009. This Act makes significant changes to the Americans with Disabilities Act (ADA) of 1990, which will pose challenges to employers in avoiding and defending claims of disability discrimination. These challenges will likewise translate into unique challenges for Tennessee mediators. By way of a refresher, the ADA was designed to protect qualified individuals from discrimination on the basis of disability in all aspects of the employment process, including recruitment, hiring, rates of pay, upgrading, and selection for training. The Act also required a covered employer to provide reasonable accommodations that will allow disabled individuals to perform the essential functions of their job unless it can show that by doing so it would suffer an undue hardship. The ADA Amendments Act of 2008 (**ADAAA**) provides broader protections for disabled workers and turns back the clock on Supreme Court rulings that Congress deemed too restrictive of disabled employees' rights.

Changes in the Law. Because of the technical aspects of the Act, coupled with the lack of interpretive case law, mediators are well-advised to read the Act before attempting to mediate claims founded on the Act. For instance, the term "disability" is defined under the ADA to mean

"a physical or mental impairment that substantially limits one or more major life activities." Although the ADAAA did not change the definition, it added language that will require courts to interpret the term "disability" differently—and more broadly—than it was interpreted in the past. Further, the ADAAA also outlines with specificity what activities constitute "Major Life Activities."

Previously, the ADA did not identify what activities were and were not major life activities. Instead, such identification was left to the courts. Pursuant to the ADAAA, however, major life activities include the following: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The ADAAA also provides that a major life activity includes the operation of a major bodily function, including functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. In a nutshell, the days of employers looking askance at "disabilities" for which there were mitigating factors such as prosthetic devices, or medication, are over. In fact, it will be easier for ADA plaintiffs to prove that they are disabled. Whether more plaintiffs will prevail at trial remains to be seen; however, with the lack of case law to guide legal counsel, mediation will, in all probability, prove to be a most attractive alternative.

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The Disabled Party. One of the more obvious challenges to ADAAA mediation is the presence of a party with a disability that may translate into diminished capacity to fully participate in the mediation process. If a party's capacity to mediate is unclear, the mediator should determine whether a disability is interfering with the capacity to mediate and whether an accommodation will enable the party to participate effectively. If so, either the employer or the mediator should offer such an accommodation. Further, the mediator should determine whether the party can mediate with support from a third party. It is important to note, however, if a representative such as an attorney or support person is present or participating, that the party with diminished capacity remains the decision-maker in any mediated settlement. Another scenario is the disabled person who may be accompanied by a personal assistant (PA) who is supervised by the person with a disability and who provides physical aid or other assistance. The PA should not speak on behalf of the person with the disability or assist with his or her communication, unless requested to do so by that individual.

A Word About Disability Awareness. The mediator should be, and remain, cognizant of "disability etiquette," i.e., appropriate terminology and ways to interact with people who have disabilities. This awareness may require the mediator to address one's own biases about persons with disabilities as well as biases of the opposing parties. Further, when talking with someone who has a disability, the mediator should speak directly to him or her, rather than through a companion who may be along. In the event the mediator determines that a party with a disability requires assistance, the mediator should ask if he or she needs it before acting, as well as listen to any instructions the person may want to give.

Summary. By reviewing the specific requirements of the ADAAA, while also remaining alert to common disabilities and their impact on everyday functioning and aware of the accommodations necessary for a disabled person to fully participate in the mediation, the mediator will go a long way in insuring her or his credibility as well as in being able to conduct an unimpeded mediation session.¹

¹ For a comprehensive review of other steps the mediator can take when faced with mediating an ADAAA claim, see, *ADA Mediation Guidelines* published by Mediate Resolution Solutions, on the web at www.mediate.com.

**Joseph G. Jarret is a Rule 31 listed general civil mediator and an attorney. He has lectured across the country on various mediation issues and is a member of the Tennessee Valley Mediation Association, Tennessee Association of Professional Mediators, Tennessee Bar Association, and the ADR Section of the Knoxville Bar Association. Joe 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. 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.*

Important ADRC Dates

April 3, 2009 Rule 31 Mediator Applications Deadline
for ADRC Review on 05/05/09

May 5, 2009 ADR Commission Meeting
Administrative Office of the Courts, Nashville

Upcoming Events

February 12 – 13, 2009

Nashville Conflict Resolution Center's 2009 Annual Mediation Celebration

The Nashville Conflict Resolution Center is celebrating volunteer and pro bono mediation in Nashville and Middle Tennessee! The Celebration includes two free lectures, one at Vanderbilt Law School and the other at the Institute for Conflict Management at Lipscomb University, and a dinner fundraiser. Dr. Mari Fitzduff, a native of Northern Ireland and an international conflict expert, is the featured speaker. She is the director of the M.A. program in Coexistence and Conflict at Brandeis University. To view the full details of the Celebration and register, please go to http://www.nashvilleconflict.org/conflict_resolution_education_programs/2009_annual_mediation_celebration.

Last day to register February 6

The ADR Commission does not sponsor nor endorse any events unless explicitly stated in the event announcement. The views and opinions expressed by the event organizer and/or featured presenters are their own and do not represent those of the ADR Commission.

If your organization has an upcoming event that you want included in the ADR newsletter, please forward the event information to Anne-Louise Wirthlin at Anne.Louise.Wirthlin@tncourts.gov. Please note that the *ADR News* is distributed quarterly, therefore information and events such as monthly meetings will not be included in the newsletter.

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.