

ADR NEWS

A publication of the Tennessee Alternative Dispute Resolution Commission

Winter 2018 Volume 18, Issue 1

TENNESSEE ALTERNATIVE DISPUTE RESOLUTION COMMISSION

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By Linda Nettles Harris, Esq., ADR Commission Member

IMPORTANT NEWS

A mediator who has not renewed his/her listing on or before January 31, 2018 has been placed on inactive status as of February 1, 2018, and therefore cannot conduct court ordered mediations.

The renewal form and fees information for late renewal can be found on the AOC website: <http://www.tncourts.gov/programs/mediation/resources-mediators/policies>

A list of approved CME courses can be found at:

<http://www.tncourts.gov/programs/mediation/resources-mediators/continuing-meditation-education>.

FAST STATS

Are you reporting your mediations??

Pursuant to Rule 31, Section 18(e) Mediators shall be required to submit to the ADRC reports of any data requested by the ADRC.



For mediations reported between January 1 through December 31, 2017:

A total of **311 mediators** reported a total of **6,400 mediations** Of the 6,400 total mediations reported, the range was 1 mediation to 304 mediations reported per mediator.

The statistics were compiled from reports submitted by Rule 31 listed mediators per ADRC Policies 10 and 22. All statistics can be found at: <http://www.tncourts.gov/programs/mediation/resources-mediators> in the "Submit Rule 31 Report" section.

NEW COMMISSIONER

Welcome to new Commissioner Stephen L. Shields!

STEPHEN L. SHIELDS, JD, LLM is the founding member of Alternative Dispute Resolution Institute. He is a Tennessee Supreme Court Alternative Dispute Resolution Rule 31 General Civil Mediator as well as Rule 31 General Civil Mediation Trainer. He is a Listed Mediator in the Mediator Profile Directory of the United States District Court Western District of Tennessee. Mr. Shields is a partner in the Memphis law firm of Jackson, Shields, Yeiser & Holt. Mr. Shields is a frequent speaker and author regarding alternative dispute resolution topics. He is also a founding member as well as the Chair of the Mid-South Community Justice and Mediation Center (CJAM). He is the current President of the Tennessee Association of Professional Mediators. He is an adjunct professor at the Cecil C. Humphreys School of Law at the University of Memphis where he is the Director of the Mediation Clinic. In 2015, Mr. Shields was chosen as the recipient of the prestigious Grayfred Gray Public Service in Mediation award.



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 in the *ADR News*. 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 possible publication in the *ADR News*, please contact the AOC Programs Manager at (615) 741-2687.

NEWS AND EVENTS



IMPORTANT ADR DATES

March 2, 2018-Rule 31 Mediator Applications Deadline
for ADRC review on April 24, 2018
April 24, 2018 – ADR Commission Meeting, AOC Office, Nashville



UPDATED AOC RESOURCES

Rule 31 Listed Mediators can find many resources on the AOC website. Resources include forms, 2018 Renewal form, Rule 31 mandatory reporting forms, and information on CME online courses:

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

Also on the AOC website are ADRC policies, ADR Ethics Advisory Opinions, AG Opinions on mediation issues, information about the ADRC Commission, and Trainer information.

Check out the AOC website to find great resources to help you in your mediation practice:

<http://www.tncourts.gov/programs/mediation>

!!NEW!! COMMUNICATION PATH FOR COMMENTS, QUESTIONS, CONCERNS

For prompt consideration and/or response send all correspondence to:

ADR Programs Manager
Administrative Office of the Courts
511 Union Street, Suite 600
Nashville, TN 37219-1768
Phone: 615-741-2687
Fax: 615-741-6285
Email: Patricia.Mills@tncourts.gov



Correspondence will be reviewed and/or forwarded to the appropriate body for review and response.

SUMMARY OF ADR OCTOBER 2017 COMMISSION MEETING

During the January 23, 2018 quarterly meeting, the ADR Commission considered 54 new mediator applications and reviewed Committee reports. The meeting focused on discussion of the continued comprehensive review of Rule 31 and proposed revisions.

CONGRATULATIONS TO THE FOLLOWING NEWLY LISTED RULE 31 MEDIATORS! THESE MEDIATORS WERE APPROVED FOR LISTING AT THE ADRC QUARTERLY MEETING ON JANUARY 23, 2018

Family

Jason H. Arthur
Benjamin T. Barnett*
Stacy N. Beaulieu-Fawcett
Amy H. Cannon
Alexander W. Clark
Lisa C. Cothron
Tarsila R Crawford
Andrew S. Cunningham
Jeremy A. Davis
Caitlin F. Elledge
Cindy Ettingoff
Ann M. Goade*
James L. Gordon
Natalie Hurley Harden
Emily M. Hastings
Christina R. Mincy
Johnathan A. Minga
G. Michael Pilcher*
Lindsey A. Ralston
Robert L. Richter, Jr.*
Byron R. Simpson
Amanda M. Stofan
Timothy Woodard

General Civil

Stephanie G. Berish
Lasandra A. Brown Jefferson
Beverly A. Conner
Paul A. Daugherty
Renee C. Gray
Andrew T. Helton
Kia Jarmon
Janet S. Kelley
Holly A. Lee
Lisanne Dunavant Marshall
Justin E. Mitchell
DeAnne Priddis
Michael A. Robinson
George P. Robinson
Thomas J. Seeley, Jr.
Michelle L. Sprouse
William N. Thomas, III
Lane S. Whitehead

General Civil/Family

Lee A. Denton*
Sonya C. Green*
Brandi L. Heiden
Rachel Hiatt*
Michael U. King
Carol A. Tate*
J. Neil Thompson*
Nakeshia A. Walls*

**Designation as
“Specially Trained in
Domestic Violence Issues”*

PRINCIPLE: FAIRNESS

BY LINDA NETTLES HARRIS, ESQ., ADR COMMISSION MEMBER

During an ADRC meeting, held the day preceding the ADRC's annual advanced CME training seminar on October 13, 2017, ADRC Commissioner Mary Ann Zaha, the Communication Committee Chair, asked her fellow commissioners to voluntarily submit one of six quarterly articles on the principles identified in Tennessee Supreme Court Rule 31's ethical guidance contained in Appendix A.1(C) of the rule - namely, 1) the needs and interests of the participants; 2) fairness; 3) procedural flexibility; 4) privacy and confidentiality; 5) full disclosure; and 6) self-determination. I eagerly volunteered to submit this third article in the series, covering the principal of fairness; because, I would like to think I am a fair mediator. On the evening of the assignment, I considered I would logically begin this article by defining fairness and then discussing what it meant to be a "fair" mediator from my perspective.

However, during the ADRC's annual seminar, David Shearon presented "The Psychology of Conflict and How to Deal With It." After hearing his lecture, I was reminded that fairness in our profession should not be determined by how "fair" a mediator thinks she or he conducts mediation; because, as Mr. Shearon informed us, "fairness is a perception." Stated differently, I was reminded that it is our clients' perceptions of fairness of the mediation process that matters. Most scholarly articles on the principal of fairness identify two types of fairness, or justice, when discussing mediation: procedural fairness, which relates to the mediation process and substantive fairness which relates to the outcome of the mediation.¹ While both procedural and substantive fairness are equally important, this article primarily focuses on procedural fairness. During his presentation, Mr. Shearon emphasized that mediators must strive to serve their clients in a manner which leaves them with the perception the mediator helped them resolve their matter in an impartial and just manner, without favoritism or discrimination towards the parties or towards their positions. An article on procedural fairness written by Nancy Welsh, Associate Professor of Law and Associate Director, Center for Dispute Resolution, The Dickinson School of Law, Pennsylvania State University, further reflects that mediation participants' perceptions of procedural fairness influence their perceptions of substantive fairness.² Similar to Shearon, Welsh's research reflects there are four procedural elements which leave mediation participants with a heightened perception of procedural fairness, "the opportunity for disputants to express their voice, assurance that a third party considered what they said, and treatment that is both even-handed and dignified."³

Omer Shapira, Senior Lecturer, Faculty of Law, Ono Academic College, has opined that mediators are generally perceived to have acted fairly when mediations are conducted according mediation codes of conduct, which he states covers factors such as mediators' competency to conduct certain mediations; avoidance of conflicts of interests; impartiality; evenhandedness; allowing parties meaningful opportunities to articulate their concerns, needs and interests, and to be heard; and prohibition of undue influence on the part of mediators.⁴ Shapira acknowledges the "perception theory" of procedural fairness; however, he states there are three different types of perceptions of procedural fairness in mediation, which he defines as psychological perception - as discussed by Shearon and Welsh; personal perception; and public perception.⁵ Shapira suggests that even when mediations are conducted in textbook perfect, procedurally fair manners, there will inevitably be instances when mediation will be viewed as unfair based on participants' personal perceptions - particularly in instances

¹ Jonathan M. Hyman, *Swimming in the Deep End: Dealing with Justice in Mediation*, 6 Cardozo J. Conflict Resolution 19 (2004).

Omer Shapira, *Conceptions and Perceptions of Fairness in Mediation*, 54 S. Tex. L. Rev. 281, 286 (2012).

² Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, Journal of Dispute Resolution, Issue 1, Vol. 12, at 179 (2002).

³ *Id.* At 185.

⁴ Shapira, *supra*, at 284-85, 290-91.

⁵ *Id.* at 299-304.

where there are power imbalances, a lack of informed consent, and/or parties waive the opportunity to actively participate in the mediation process for any reason.⁶ In addition, Shapira stresses that it is important for the public to view the practice of mediation as fair, and he states that public trust is dependent on both the procedural process and mediation outcomes.⁷ Shapira correctly stresses that the concept of mediation fairness must also include outcomes which respect our society's legal and moral rules.⁸ This necessarily means that, with regards to the substantive mediation process, a fair mediation satisfies the following conditions: "1) the outcome must have been accepted by parties who have exercised self-determination, (2) the outcome does not jeopardize the institution of mediation by reducing public faith and confidence in mediation, (3) the outcome is not illegal, and (4) the outcome is not immoral."⁹

So, what is fairness in mediation? In the words of Mr. Shearon, "fairness is a perception." Thus, to be fair mediators, we must always strive to ensure the mediation process is procedurally fair. We must be willing to honestly self-examine our own biases prior to beginning a mediation session. We must self-reflect and be honest with ourselves about whether we are competent to handle the subject matter presented in any given mediation and whether we can remain impartial. Once a mediation session begins, we must ensure all parties are given an equal opportunity to present their viewpoints during the mediation and we cannot be confused by our own emotions. This includes ensuring that all parties are allowed a meaningful opportunity speak and to be heard, and treating all parties' viewpoints as equally important. We must not substitute our values for the parties' values. We must always remember to treat mediation participants with dignity and respect. We should critique each mediation we conduct, and honestly consider how we were perceived by the parties to the mediation. However, I add that we should do more than just critique our own fairness, we should routinely survey our clients and receive their feedback regarding their perceptions of fairness. Finally, fairness in mediation also commands that we adhere to mediation ethical rules and codes of conduct, which ensure outcome fairness. A fair mediator must never hesitate to terminate a mediation session when continued mediation would result in a settlement that is not based on a voluntary and informed decision; is not the product of a party's self-determination; is immoral and/or is illegal.

⁶ *Id.* at 296-99, 304-10.

⁷ *Id.* at 302-04.

⁸ *Id.* at 327-31.

⁹ *Id.* at 334.