

**MEDIATION:
IMPLICATIONS OF CASE LAW**

**Presented By:
Stephen L. Shields
sshields@jsyc.com**

**17th Annual
Advanced Mediation Techniques**

October 11, 2019

ABOUT MR. SHIELDS

STEPHEN L. SHIELDS, JD, LLM is the founding member of Alternative Dispute Resolution Institute and a Partner in the Memphis law firm of Jackson, Shields, Yeiser, Holt, Owen & Bryant. He is a Tennessee Supreme Court Alternative Dispute Resolution Rule 31 Listed General Civil Mediator as well as Rule 31 General Civil Mediation Trainer. Mr. Shields was recently appointed for a three-year term as a Tennessee Supreme Court Alternative Dispute Resolution Commission Commissioner. He is a Listed Mediator in the Mediator Profile Directory of the United States District Court Western District of Tennessee. 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 Past-Chair of the Tennessee Bar Association Alternative Dispute Resolution Executive Council as well as Past-Chair of the Memphis Bar Association Alternative Dispute Resolution Section and Past-President of the Tennessee Association of Professional Mediators. In 2015, Mr. Shields was chosen as the recipient of the Grayfred Gray Public Service in Mediation Award. 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. He has been listed in Best Lawyers since 1991.

DISCLAIMER

Although I am a Rule 31 Listed Mediator and an ADR Commissioner, I am not here in my role as an ADR Commissioner. I will not be speaking on behalf of the ADR Commission, nor are any of my remarks to be regarded as authoritative statements about ADR Commission policy or Rule 31. If you have any questions or comments that need to be directed to the ADR Commission as a whole, please submit those in writing to the Programs Manager at the AOC who will distribute them to the appropriate Committee. If warranted, the ADR Commission Chairperson may place the topic on the agenda for an ADR Commission Meeting. In addition, the information provided during this training is not to be considered legal advice or the rendering of professional services.

I. USE OF AND ACCESS TO ALTERNATIVE DISPUTE RESOLUTION

Parties must mediate when ordered by the court to do so, and may also mediate on their own initiative prior to, during or subsequent to litigation. See *Rule 31 Section 3(a) and (b)*.

II. WHEN IS A MEDIATION A RULE 31 MEDIATION?

Rule 31, Section 2(i) provides:

- (i) A "Rule 31 Mediation" is an informal process in which a Rule 31 Mediator conducts discussions among the parties that is designed to enable them to reach a mutually acceptable agreement among themselves on all or any part of disputed issues: 1) in or related to an Eligible Civil Action; or 2) in any civil dispute in which the Rule 31 Mediator and the parties have agreed in writing that the mediation will be conducted pursuant to Rule 31.

III. IS THE MEDIATOR'S AGREEMENT AN ENFORCEABLE CONTRACT?

A. Contract Law

Courts have shown a willingness to enforce the mediation agreement. In *Deluca v. Allied Domecq Quick Serv. Restaurants*, No. 03-CV-5142(JFB)(AKT), 2006 WL 1662611, at *5 (E.D.N.Y. June 13, 2006), the court stated: "That the parties were aware of the confidential nature of the proceedings is clearly established by their execution of the Mediation Agreement and the separate Confidentiality Agreement. The latter agreement plainly states that 'all matters discussed during the mediation are confidential, unless otherwise discoverable, and cannot be used as evidence in any subsequent administrative or judicial proceeding.' "

See also *Batoff v. Charbonneau*, 130 F. Supp. 3d 957 (E.D. Pa. 2015)). The court applied traditional contract law establishing that if each element could be met, the mediation agreement was a contract. The court stated that there must be: 1) the existence of a contract by setting forth its essential terms; 2) a breach of duty imposed by the contract; and, 3) result in damages.

B. Remedy For Breach Of Mediation Agreement

1. See *Higbie v. United States*, 113 Fed. Cl. 358 (2013), *aff'd*, 778 F.3d 990 (Fed. Cir. 2015). Plaintiff alleged that the United States breached the confidentiality

provision of an “Agreement To Mediate” and sought \$500,000.00 in compensation for the alleged breach. The court held that the mediation agreement did not contemplate money damages. It only contemplated that any such evidence would be excluded from any judicial proceeding.

2. See *Paranzino v. Barrett Bank*, 690 So. 2d 725 (Fla. 4th Dist. Ct. App. 1997). The court dismissed plaintiff’s case with prejudice finding that plaintiff and her attorney willfully and deliberately breached the confidentiality provision in a mediation agreement. After attending, the court ordered mediation at which the parties did not settle. The plaintiff and her attorney disclosed to a newspaper the settlement offer that had been made during their mediation conference. The court stated:

“The confidentiality of the mediation negotiation should remain inviolent until a written agreement is executed by the parties.”

IV. OBLIGATION TO NEGOTIATE IN “GOOD FAITH”

- A. In *McKnight v. McKnight*, No. 67232 (Tenn. Ch. Madison Cty. Jan. 31, 2012), there was a Motion for Contempt and Sanctions filed against an attorney for failure to mediate in good faith. The moving lawyer argued that the court should imply the obligation to mediate in good faith. The court rejected the argument and stated it declined to take the opportunity to set such a standard. It was clear to the court that there was no obligation under Rule 31 to mediate “in good faith.”
- B. See *N.D. Mgmt., Inc. v. Hawkins*, No. 3:18-CV-00890, 2019 WL 266715 (M.D. Tenn. Jan. 18, 2019) The court states under Tennessee law a duty to negotiate in good faith is only actionable if derived from an enforceable contractual agreement.
- C. See ADRC Decision on grievance filed January 3, 2006. A lawyer sent a letter to judge stating “Lastly, I found that the ... did not mediate in good faith.” The Commission held that providing this letter to the judge with the language as described constitutes a violation of Rule 31, Section 5 which provides:

“At the conclusion of a Rule 31 Mediation in an Eligible Civil Action, the Rule 31 Mediator shall submit a final report to the Court by filing same with the clerk of the court. The final report shall state only: (i) which parties appeared and participated in the Rule 31 Mediation; (ii) whether the case was completely or partially settled; and (iii) whether the Rule 31 Mediator requests that the costs of the Rule 31 Mediator's services be charged as court costs. The report shall be submitted within the time

specified by the Court in the Order of Reference. In the event there is no Order of Reference or the Order of Reference does not specify a deadline, the final report shall be submitted within 60 days of the conclusion of the Rule 31 Mediation or within the time period specified by the Court.”

- D. Federal ADR Plans – U.S. District Court Western District of Tennessee § 5.1, “All parties and counsel are expected to participate in mediation in good faith.” See also, Workers Compensation Rules and Regulations.

V. MEDIATION PROCESS - TOGETHER OR APART?

- A. Mediation is a flexible process. However, caucus-style mediation carries with it the potential for one additional issue, that is, the other side’s voice being mistaken as the mediator’s voice. This misidentification of voice is highlighted in the case of *Rodriguez v. Hiday & Ricke, P.A.*, No. 14-CV-61509, 2015 WL 1470513 (S.D. Fla. Mar. 31, 2015). The court stated as follows: “Having considered all the evidence, the (court) finds that the circumstances support the conclusion that Plaintiff mistook (the mediator’s) communication of defense counsel’s posturing to be that of the mediator’s own words.”
- B. How many voices?

VI. WHEN DOES A MEDIATION BEGIN AND END?

- A. Rule 31, Section 2(i) – A "Rule 31 Mediation" is an informal process in which a Rule 31 Mediator conducts discussions among the parties that is designed to enable them to reach a mutually acceptable agreement among themselves on all or any part of disputed issues
- B. Rule 31, Section 7 – Evidence of conduct, information disclosed, or any statement made in the course of a Rule 31 Mediation is confidential to the extent agreed by the parties or provided by other law or rule of this State.
- C. See *BDO Seidman, LLP v. Kirschner*, No. 09-162, 2009 WL 2168765 (W.D. Pa. July 16, 2009) The court stated that issues in dispute did not arise in connection with the performance of the engagement letters. Instead, “they arose in connection with ‘post mediation’ conduct.”

VII. WHO ARE THE "PARTIES"?

See *Cassel v. The Superior Court of Los Angeles County*, No. S178914, 244 P.3d 1080 (S. Ct. Calif. 2011):

"The obvious purpose of the expanded language is to ensure that the statutory protection extends beyond discussions carried out directly between the opposing parties to the dispute, or with the mediator, during the mediation proceedings themselves. All oral or written communications are covered, if **1091 they are made "for the purpose of" or "pursuant to" a mediation. (§ 1119, subds.(a), (b).) It follows that, absent an express statutory exception, all discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself, are protected from disclosure. Plainly, such communications include those between a mediation disputant and his or her own counsel, even if these do not occur in the presence of the mediator or other disputants."

VIII. APPEARANCE AT MEDIATION

Whether a party, representatives or attorney needs to appear at mediation depends on the court order or rule. The Western District of Tennessee ADR Plan has a detailed provision regarding attendance at the mediation. See, Section 5.8.

IX. DOES MEDIATION TOLL THE RUNNING OF THE STATUTE OF LIMITATIONS?

- A. Is the limitation period tolled by the mediation session? See *Weidow v. Uninsured Employers' Fund*, 359 Mont. 77 (2010), holding that the doctrine of equitable tolling applied in the circumstance of this case.
- B. Tolling occurs in the context of a court exercising its equity powers and the best practice would be to request a tolling well before the statute of limitations has run. See *Stewart v. Memphis Hous. Auth.*, 287 F. Supp. 2d 853 (W.D. Tenn. 2003)

X. WHY IS IT IMPORTANT TO HAVE A WELL WRITTEN SETTLEMENT AGREEMENT?

A. *See G.G. Marck & Assocs., Inc. v. Peng*, No. 18-3399, 2019 WL 460404 (6th Cir. 2019), where Judge Julius Smith Gibbons described the matter as follows:

“On October 19, 2005, G.G. Marck & Associates reached an oral settlement agreement with James Ping and his companies. For the next eight years, however, the parties argued over the term of the agreement. A District Court twice vacated a settlement and reopened the case in the 6th Circuit which twice vacated the District Court’s reopening and instructed the District Court to put the settlement back in place.”

EIGHT YEARS!!

XI. SETTLEMENT AGREEMENTS - TN CONTRACT LAW

A. State Law

1. *See Myers v. Greene Cty. Bd. of Educ.*, No. 2:16-CV-00096, 2018 WL 6031325 (E.D. Tenn. Nov. 15, 2018). Comprehensive discussions by the court detailing issues pertaining to contract issues. (Pamela L. Reeves, US District Judge) The court held that “a contract may be formed even if parties obligate themselves to subsequently memorialize the agreement so long as the parties have agreed to the terms they planned to incorporate into the final writing and have definitely agreed that the final writing will contain those terms and no others. Tennessee law makes clear that ‘agreement’ shall have been expressed on all essential terms that are to be incorporated into the document.”
2. *See Adkins v. Morgan Cty., Tennessee*, No. 3:16-CV-525, 2018 WL 2187444 (E.D. Tenn. May 11, 2018) The court stated the court looks to state law of contracts to resolve disputes as to the enforcement of settlement agreements.

B. Term Sheets

See In re John Bruce Wilson Separate Prop. Tr., No. 3:15-CV-0520, 2018 WL 1033190 (M.D. Tenn. Feb. 23, 2018). In this case, the Plaintiff asked the court to find that “the parties entered into a valid agreement when the parties signed the ‘term sheet.’” The court held that it is clear that the term sheet itself is not a binding agreement. Under Tennessee law, a contract must result in a meeting of the minds of the parties. Here the court held that although the term sheet memorialized the parties settlement, everyone involved understood that details would need to be discussed and incorporated into a

more formal document and anticipated that conflicts over those details would possibly arise.

C. Tennessee Supreme Court

1. *Ledbetter v. Ledbetter*, 163 S.W. 3d 681 (Tenn. 2005)

The issue was whether the law precludes enforcement of oral mediation agreements.

“Generally, agreements need not be in writing to be enforceable.² *Bill Walker & Assocs., Inc. v. Parrish*, 770 S.W.2d 764, 771 (Tenn.Ct.App.1989) (citing *Rodgers v. S. Newspapers, Inc.*, 214 Tenn. 335, 379 S.W.2d 797, 800 (1964)). Thus, we must determine whether the law precludes enforcement of oral mediation agreements. We first look to the rule dealing with mediation, Tennessee Supreme Court Rule 31. Section 7 of that rule provides that evidence of statements made in the course of mediation are inadmissible. Tenn. R. Sup.Ct. 31(7) (2004). Further, section 10(d) prohibits the mediator from disclosing information obtained during the mediation without the consent of the parties. Tenn. R. Sup.Ct. 31(10)(d) (2004). Based on the language in Rule 31, it would appear that a mediator may not present evidence of an oral mediation agreement. As additional support, we look to Tennessee Rule of Evidence 408, which provides that evidence of conduct or statements made in compromised negotiations is not admissible to prove liability for or in validity of a civil claim. Based on those rules, we conclude that the agreement involved here, made during the mediation and not reduced to a signed writing, is not an enforceable contract. Accordingly, we affirm the judgment of the trial court.”

2. *Barnes v. Barnes*, 193 S.W. 3d 495 (Tenn. 2006)

In a divorce action, the court stated:

“Recently, this Court addressed the issue of whether a marital dissolution agreement, reached through mediation but not reduced to a signed writing, was enforceable after one of the parties withdrew consent. *Ledbetter*, 163 S.W.3d at 682. We affirmed the trial court's ruling that the agreement was unenforceable, holding:

[W]e conclude that because Mr. Ledbetter repudiated the terms of the agreement prior to its presentation to the court, the trial court lacked authority to enter a judgment on the agreement. Further, because the agreement had not been reduced to writing and signed by the parties, it is not an enforceable contract.

Id. at 683. The Court in *Ledbetter* determined that the agreement was not enforceable as a contract because it had not been reduced to writing and, based on evidentiary provisions in Supreme Court Rule 31 (regarding mediation)^[3] and Rule 408 of the Rules of Evidence,^[4] the agreement should not be enforced as an oral contract. *Id.* at 685-86.”

D. Email – A Written Agreement?

A Florida court held a written agreement is not required to enforce a settlement of all essential terms necessary for a settlement were already agreed upon through email. *Warrior Creek Development, Inc. v. Cummings*, 56 So. 3d 915 (FL 2d DCA 2011).

XII. CONTRACT DEFENSES

A. *Lovell v. Children's Corner Daycare*, No. 117CV01039JDTEGB, 2018 WL 1476096 (W.D. Tenn. Jan. 23, 2018), *report and recommendation adopted sub nom. Lovell v. Union City Police Dep't*, No. 17-1039-JDT-EGB, 2018 WL 1470262 (W.D. Tenn. Mar. 26, 2018)

The court stated there is no dispute that a settlement agreement was reached in this case. The parties agreed in writing via two documents labeled “Mediated Settlement Agreement” and “Confidential Settlement Agreement and Release To Dismiss The Case In Exchange For \$2,500.00.” Plaintiff asserted that one of the agreements mentioned an incorrect term. However, the magistrate judge finds that the error was not material to the agreements. The court found that Plaintiff and Defendant had reached an agreement on material terms. The court went on to state that most of Plaintiff’s claims center around after-the-fact sentiments. After-the-fact sentiments do not invalidate an otherwise binding settlement agreements. Settler’s remorse is not a sufficient reason to invalidate an enforceable agreement to settle a case.

B. Material Change In Circumstances

See Dishon v. Dishon, No. M201701378COAR3CV, 2018 WL 3493159 (Tenn. Ct. App. July 20, 2018). In *Dishon*, a husband and wife contracted in the mediation agreement that alimony payments shall cease upon wife’s cohabitation with a

person of the opposite sex. She did. The court determined that the wife remained the economically disadvantaged spouse as a result of the divorce and continued husband's alimony obligation albeit modifying the terms of the alimony upon finding a material change in circumstances. The court determined the trial court erred by failing to terminate the husband's alimony obligation.

C. Interest Of Justice

Concerns about justice also tend to compromise mediation confidentiality. For example, in *Glover v. Torrence*, 723 N.E.2d 924 (Ind. Ct. App. 2000), an Indiana Court of Appeals ruled that public interest in ensuring that children receive adequate child support justified introduction of mediation communications to determine if a father had submitted a fraudulent child support worksheet.

D. Conduct of Participants

1. Attorney conduct

Lack of preparation for mediation. See *Vazeen v. Sir*, No. M201800333COAR3CV, 2018 WL 6419134 (Tenn. Ct. App. Dec. 5, 2018). Plaintiff alleged his lawyer "just sat there and didn't have any input. He did not have any offers prepared." Plaintiff alleges damages for his lawyer's "failure to negotiate a better settlement."

2. Mediator Conduct

One of Rule 31's aims is to protect the right of self-determination by imposing restraints on mediator coercion, etc. Perhaps one novel approach involving a claim of duress occurred in *In re Patterson*, 93 Wash. App. 579 (1999) where a party to a mediation claimed that the mediator coerced him into settling stating to the party that if the party "did not sign the agreement (the plaintiff) would ruin (the mediator's) record of always being able to settle the case."

3. Party Conduct

Party wrongdoing also provides a basis for setting aside mediation agreements. See, *Cooper v. Austin*, 750 So. 2d 711 (Fla. 5th Dist. Ct. App. 2000). During mediation, a wife handed her husband a note which read, "If you cannot agree to this, the kids will take what information they have to whomever to have you arrested, etc. Although I would get no money if you were in jail, you would not also be living freely as you did nothing wrong." Settlement was reached but then the husband sought relief. The court set aside the agreement based upon the wife's "note" to her husband.

E. Lack of Authority

See *Allen v. Am. Yeast, Inc.*, No. W201700874COAR3CV, 2018 WL 4846364 (Tenn. Ct. App. Oct. 4, 2018), *appeal denied* (Feb. 22, 2019). An injured party granted her mother power of attorney. She was present during the mediation. The mother signed via the power of attorney. However, the injured party alleged that she expressed her rejection of the settlement terms. Despite that expression, her mother signed on her behalf. She alleges that the agreement should not be enforced because she had not agreed to the settlement. The trial court held that the mother had legal authority and held it was enforceable.

F. Mistake of Law

Johnson Marcraft, Inc. v. W. Sur. Co., No. 3:15-1482, 2018 WL 928198 (M.D. Tenn. Feb. 15, 2018) The court held that the settlement was unequivocally accepted when the plaintiff through its attorneys agreed that the additional language posed “no problem.” However, the plaintiff, in attempting to set aside the settlement agreement, wanted to avoid by making the argument that there was a mistake of law. The court stated, however, mistake of law is not grounds for avoiding a contract. The court also stated, “Given that verbal agreements can be enforced, it follows that lack of signatures are generally not fatal to the binding force of an agreement.”

G. Mediation Agreements May Not Violate The Law

Although parties (with their attorneys) may decide matters that judges and juries would not and may be creative in crafting resolutions unique to their needs, there are some decisions the parties (and their attorneys) are not authorized to make. See, *Tennessee Board of Responsibility Op. 2018-F-166* discussing confidentiality clauses that place restrictions upon an attorney’s right to practice law.

XIII. IS THE MEDIATOR AN AGENT OF THE COURT?

A. In *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 (Fla. Dist. Ct. App. 2001), the court stated that a contractor’s settlement may not be set aside on the basis of duress or coercion unless the improper influence emanated from one of the contracting parties. The actions of a third party will not suffice. In this case, the allegation was that the mediator coerced the wife into settling. The court stated, “During a court ordered mediation, the mediator is no ordinary third party but is for all intent and purposes an agent of the court carrying out an official court order function. We hold that the court may invoke its inherent power to maintain the integrity of the judicial system and its processes by invalidating a court ordered mediation settlement

agreement obtained through violation and abuse of the judicially-prescribed mediation procedures.

B. Is A Mediator A “Tribunal” Under The Board of Professional Responsibility Rules?

Rules of Professional Conduct 1.0 provides tribunal denotes a court which will render a binding legal judgment.

XIV. RULE 31 - MEDIATION CONFIDENTIALITY/PRIVILEGE

A. Rules

SECTION 7. Confidential and Inadmissible Evidence

Evidence of conduct, information disclosed, or any statement made in the course of a Rule 31 Mediation is confidential to the extent agreed by the parties or provided by other law or rule of this State. Such evidence shall be inadmissible to the same extent as conduct or statements are inadmissible under Tennessee Rule of Evidence 408. No Rule 31 Mediator may be compelled to testify by deposition or otherwise regarding such conduct, information, or statements. A written mediated agreement signed by the parties is admissible to enforce the understanding of the parties.

SECTION 10(d)

(d) The Rule 31 Mediator shall not be called as a witness in any proceeding to enforce any terms of the resulting mediation agreement.

SECTION 12. Privilege and Immunity

Activity of Rule 31 Mediators in the course of Rule 31 Mediations shall be deemed to be privileged and the performance of a judicial function and for such acts Rule 31 Mediators shall be entitled to judicial immunity.

APPENDIX A - Section 7. Confidentiality

(a) Required. A Neutral shall preserve and maintain the confidentiality of all ADR Proceedings except where required by law to disclose information.

B. *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F. 3d 976 (6th Cir.)

The court found that there is a settlement privilege and also stated the settlement privilege is also necessary because permitting third party discovery of negotiation communications would lead to other undesirable results. In general, and in this case, there is no transcript of the settlement talks and it is unlikely that there exist any written notes alleging Goodyear's alleged attempt to bribe Chiles. Thus, in order to obtain or refute any evidence the parties would have to depose each of the persons present at the negotiations. In this instance, that includes not only the representatives but the parties' lawyers and the District Court Judge himself.

XV. IS A MEDIATOR'S FEE "COSTS"?

See *Reed v. Wally Conard Const.*, No. 03A01-9807-CH-00210, 1999 WL 817528 (Tenn. Ct. App. Oct. 13, 1999). The court held that Rule 54.04(2) defines discretionary costs which are allowable as "reasonable and necessary court reporter, expenses for depositions, trials, reasonable and necessary expert witness fees for depositions or trials, guardian *ad litem*" The court went on to state, "While an award for the cost of mediation is not expressly authorized under Rule 54.04(2), we find that such an award is permitted under Section 7 of Rule 37 of the Rules of Supreme Court."

XVI. ENFORCEMENT "OPTIONS"

Once a settlement is established, the non-breaching party usually has the right to elect a remedy, either seek specific performance of the terms of the settlement or reinstate the original claim. See, *Dankes v. Defense Logistics Agency* 693 F. 2d 13 (1st Cir. 1982).

XVII. LEGAL ADVICE

RULE 31, SECTION 10(b)(3):

(b) During Rule 31 Mediations, the Rule 31 Mediator shall:

- (3) Refrain from giving legal advice, while serving as a Rule 31 Mediator, to the parties in the Rule 31 Mediation. However, while a Rule 31 Mediator should not offer a firm opinion as to how the Court in which a case has been filed will resolve the case, a Rule 31 Mediator may point out possible outcomes of the case and may indicate a personal view of the persuasiveness of a particular claim or defense.

See *Tennessee Supreme Court Access To Justice Commission: General Guidelines For Distinguishing Legal Information From Legal Advice*.

XVIII. CAN MEDIATION BE A CONDITION PRECEDENT TO LITIGATION OR ARBITRATION?

- A. See *Bill Call Ford, Inc. v. Ford Motor Co.*, 48 F.3d 201 (6th Cir. 1995). Typically the courts will enforce a pre-existing obligation to engage in ADR where required in the parties' dispute resolution contract. See also *Mullales v. Aspen Am. Ins. Co.*, No. 18-23661-CIV, 2018 WL 6270974, at *2 (S.D. Fla. Nov. 30, 2018) ("where the parties' agreement requires mediation as a condition precedent to arbitration or litigation, the complaint must be dismissed.") (quoting *3-J Hosp., LLC v. Big Time Design, Inc.*, No. 09-61077-CIV-MARRA, 2009 WL 3586830, at *2 (S.D. Fla. Oct. 27, 2009)); *Tattoo Art, Inc. v. Tat Int'l, LLC*, 711 F. Supp. 2d 645, 651 (E.D. Va. 2010) (collecting cases and explaining that "[a] number of courts have found that when parties to a lawsuit have elected not to be subject to a court's jurisdiction until some condition precedent is satisfied, such as mediation, the appropriate remedy is to dismiss the action.")
- B. Internal Procedures. In *White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869 (6th Cir. 2012), Baptist Memorial Hospital – Desoto, Inc., the court dismissed an FLSA claim for failure of the plaintiff to follow Baptist's internal reporting procedures.
-

A MEDIATOR'S GUIDE
TO RULE 31

Standards And Procedures
Applicable At Each Stage Of
The Mediation Process

PODA²*

By:
Stephen L. Shields
(901) 754-8001
sshields@jsyc.com

ABOUT MR. SHIELDS

STEPHEN L. SHIELDS, JD, LLM is the founding member of Alternative Dispute Resolution Institute and a Partner in the Memphis law firm of Jackson, Shields, Yeiser & Holt. He is a Tennessee Supreme Court Alternative Dispute Resolution Rule 31 Listed General Civil Mediator as well as Rule 31 General Civil Mediation Trainer. Mr. Shields was recently appointed for a three-year term as a Tennessee Supreme Court Alternative Dispute Resolution Commission Commissioner. He is a Listed Mediator in the Mediator Profile Directory of the United States District Court Western District of Tennessee. 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 past-Chair of the Tennessee Bar Association Alternative Dispute Resolution Executive Council, the past-President of the Tennessee Association of Professional Mediators and a past-Chair of the Memphis Bar Association Alternative Dispute Resolution Section. In 2015, Mr. Shields was chosen as the recipient of the Grayfred Gray Public Service in Mediation Award. 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. He has been listed in Best Lawyers since 1991.

ABOUT THE GUIDE

Although I am an ADR Commissioner, this guide was compiled solely by me. It is not a publication of the Alternative Dispute Resolution Commission nor should it be construed as such.

Nothing contained in this guide should be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This guide is intended for educational and informational purposes only.

For this version of the Guide, I have left in the redline showing revisions to Rule 31 effective October 2018.

PODA²

PRIOR, ORIENTATION, DURING, AGREEMENT, AFTER

I. PRIOR

SECTION 2. Definitions

(i) A "Rule 31 Mediation" is an informal process in which a ~~neutral person~~ Rule 31 Mediator conducts discussions among the ~~disputing~~ parties that is designed to enable them to reach a mutually acceptable agreement among themselves on all or any part of the ~~issues in disputed~~ disputed issues: 1) in or related to an Eligible Civil Action; or 2) in any civil dispute in which the Rule 31 Mediator and the parties have agreed in writing that the mediation will be conducted pursuant to Rule 31.

SECTION 10. Obligations of Rule 31 ~~Neutrals~~ Mediators

(a) Before the commencement of any Rule 31 ~~ADR Proceeding, Mediation, the~~ Rule 31 ~~Neutrals~~ Mediator shall:

(1) Make a full and written disclosure of any known relationships with the parties or their counsel which may affect or give an appearance of affecting the ~~Rule 31 Neutral's~~ Rule 31 Mediator's neutrality.

(2) Advise the parties regarding the ~~Rule 31 Neutral's~~ Rule 31 Mediator's qualifications and experience.

(3) Discuss with the parties the rules and procedures that will be followed in the Rule 31 Mediation.

APPENDIX A –Sections 2(a)(1) and (3)

(a) General. Integrity, impartiality, and professional competence are essential qualifications of any Neutral. A Neutral shall adhere to the highest standards of integrity, impartiality, and professional competence in rendering their professional service.

(1) A Neutral shall not accept any engagement, perform any service, or undertake any act which would compromise the Neutral's integrity.

(3) A Neutral shall decline appointment, withdraw, or request technical assistance when the Neutral decides that a case is beyond the Neutral's competence.

APPENDIX A – Section 4(c)

(c) Avoidance of Delays. A Neutral shall plan a work schedule so that present and future commitments will be fulfilled in a timely manner. A Neutral shall refrain from accepting appointments when it becomes apparent that completion of the dispute resolution assignments accepted cannot be done in a timely fashion. A Neutral shall perform the dispute resolution services in a timely and expeditious fashion, avoiding delays wherever possible.

APPENDIX A - Section 6

(a) Impartiality. A Neutral shall be impartial and advise all parties of any circumstances bearing on possible bias, prejudice, or impartiality. Impartiality means freedom from favoritism or bias in word, action, and appearance. Impartiality implies a commitment to aid all parties, as opposed to an individual party conducting ~~Rule 31~~ ADR ~~processes~~Proceedings.

(3) A Neutral shall not give or accept a gift, request, favor, loan, or any other item of value to or from a party, attorney, or any other person involved in and arising from any ~~Rule 31 process~~ADR Proceeding. (See, Advisory Opinion 2010-0001)

(b) Conflicts of Interest and Relationships; Required Disclosures; Prohibitions.

(1) A Neutral must disclose any current, past, or possible future representation or consulting relationship with any party or attorney involved in the ~~Rule 31 proceeding~~ADR Proceeding. Disclosure must also be made of any pertinent pecuniary interest. Such disclosures shall be made as soon as practical after the Neutral becomes aware of the interest or the relationship.

(2) A Neutral must disclose to the parties or to the ~~court~~Court involved any close personal relationship or other circumstance, in addition to those specifically mentioned earlier in these standards, which might reasonably raise a question as to the ~~mediator's~~Neutral's impartiality. All such disclosures shall be made as soon as practical after the Neutral becomes aware of his or her candidacy as a ~~Rule 31~~ Neutral in a given proceeding or becomes aware of the interest or the relationship. (See, ABA SODR 2015-02)

(3) The burden of disclosure rests on the Neutral. After appropriate disclosure, the Neutral may serve if all parties so desire. If the Neutral believes or perceives that there is a clear conflict of interest, he or she should withdraw, irrespective of the expressed desires of the parties.

APPENDIX A – Section 9(e)(6)

(6) When a Neutral is contacted directly by the parties for dispute resolution services, the Neutral has a professional responsibility to respond to questions regarding fees by providing a copy of the basis for charges for fees and expenses.

PODA²

II. ORIENTATION

APPENDIX A – Section 4(a)

(a) **Orientation Session.** On commencement of the ~~Rule 31~~ ADR ~~proceeding~~ Proceeding, a Neutral shall inform all parties that settlements and compromises are dependent upon the consent of the parties, that the Neutral is an impartial facilitator, and that the Neutral may not impose or force any settlement on the parties.

APPENDIX A - Section 6(b)(6)

(6) A Neutral shall refrain from the appearance of serving as a legal advocate for one or both parties to an ADR Proceeding. A Neutral shall explain to the parties to the ADR Proceeding that the Neutral is not the advocate for either party nor is the Neutral the advocate for both parties.

PODA²

III. DURING

SECTION 3(d)

(d) ~~(e) The Order of Reference shall direct that all Rule 31 ADR Proceedings be~~ All Rule 31 Mediations shall be concluded as efficiently and expeditiously as possible given the circumstances of the case.

SECTION 10(b)

(b) During Rule 31 ~~ADR Proceedings, Mediations, the~~ Rule 31 ~~Neutrals~~ Mediator shall:

(1) Advise the ~~court before~~ Court in which the proceeding is pending if the ~~ADR proceeding~~ Rule 31 Mediation is, or is likely to become, inappropriate, unfair, or detrimental in the referred action.

(2) Maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias in favor of or against any party, issue, or cause.

(3) Refrain from giving legal advice, while serving as a Rule 31 Mediator, to the parties ~~to~~ in the Rule 31 ~~ADR Proceeding in which the Neutral is participating~~ Mediation. However, while a Rule 31 ~~Neutral~~ Mediator should not offer a firm opinion as to how the ~~court~~ Court in which a case has been filed will resolve the case, a Rule 31 ~~Neutral~~ Mediator may point out possible outcomes of the case and may indicate a personal view of the persuasiveness of a particular claim or defense. ~~Moreover, an "Evaluation" pursuant to a Case Evaluation, an "award" pursuant to a Non-Binding Arbitration, or an "advisory verdict" pursuant to a Summary Jury Trial will not be considered to be "legal advice" for purposes of this Rule.~~

SECTION 10(c)(1)

(c) During and following Rule 31 ~~ADR Proceedings~~ Mediations, Rule 31 ~~Neutrals~~ Mediators shall:

(1) Refrain from participation as attorney, advisor, judge, guardian ad litem, master, or in any other judicial or quasi-judicial capacity in the matter in which the Rule 31 ~~ADR Proceeding~~ Mediation was conducted.

APPENDIX A – Section 1(b)

(b) Neutral's Role. In dispute resolution proceedings, decision-making authority rests with the parties. The role of the Neutral includes but is not limited to assisting the parties in identifying issues, reducing obstacles to communication, maximizing the exploration of alternatives, and helping the parties reach voluntary agreements.

APPENDIX A – Section 4(b)

(b) Continuation of a Rule 31an ADR Proceeding. A Neutral shall not unnecessarily or inappropriately prolong a dispute resolution session if it becomes apparent that the case is unsuitable for dispute resolution or if one or more of the parties is unwilling or unable to participate in the dispute resolution process in a meaningful manner.

APPENDIX A – Section 5(a) thru (e)

Section 5. Self-Determination

(a) Parties' Right to Decide. A Neutral engaged in mediationan ADR Proceeding shall assist the parties in reaching an informed and voluntary settlement. Decisions are to be made voluntarily by the parties themselves.

(b) Prohibition of Neutral Coercion. A Neutral shall not coerce or unfairly influence a party into a settlement agreement and shall not make substantive decisions for any party to a Rule 31an ADR Proceeding.

(c) Prohibition of Misrepresentation. A Neutral shall not intentionally nor knowingly misrepresent material facts or circumstances in the course of conducting a Rule 31an ADR Proceeding.

(d) A Balanced Process. A Neutral shall promote a balanced process in Mediationan ADR Proceeding and shall encourage the parties to conduct the mediationproceeding in a nonadversarial manner.

(e) Mutual Respect. A Neutral shall promote mutual respect among the parties throughout the dispute resolution process.

APPENDIX A – Section 6(b)(4)

(4) A Neutral shall not provide counseling or therapy to either party during the dispute resolution process, nor shall a Neutral who is a lawyer represent any party in any matter during the dispute resolution proceeding.

APPENDIX A – Section 7(b)

(b) When Disclosure Permitted. A Neutral conducting ~~a Rule 31 Mediation~~ an ADR Proceeding shall keep confidential from the other parties any information obtained in individual caucuses unless the party to the caucus permits disclosure.

APPENDIX A – Section 8(b) and (c)

(b) Independent Legal Advice. When a Neutral believes a party does not understand or appreciate how an ADR Proceeding or resulting agreement may adversely affect legal rights or obligations, the Neutral shall advise the participants to seek independent legal counsel.

(c) When Party Absent. If one of the parties is unable to participate in ~~a Rule 31 process~~ an ADR Proceeding for psychological or physical reasons, a Neutral should postpone or cancel the proceeding until such time as all parties are able and willing to resume. Neutrals may refer the parties to appropriate resources if necessary (social service, lawyer referral, or other resources).

APPENDIX A – Section 10(b)(1) and (2)

(b) Without Agreement.

(1) *Termination by Participants.* The Neutral shall not require a participant's further presence at ~~a mediation~~ an ADR Proceeding when it is clear the participant desires to withdraw.

(2) *Termination by Neutral.* If the Neutral believes that the participants are unable to participate meaningfully in the process, the Neutral shall suspend or terminate the ~~Rule 31—ADR proceeding~~ Proceeding. The Neutral should not prolong unproductive discussions that would result in emotional and monetary costs to the participants. The Neutral shall not continue to provide dispute resolution services in an ADR Proceeding where there is a complete absence of bargaining ability.

PODA²

IV. AGREEMENT

SECTION 10(c) Obligations Of Rule 31 Mediators.

~~(e) The Neutral may assist~~(5) Assist the parties in memorializing the terms agreement of the parties' settlementparties at the end of the mediation. Rule 31 Mediators may assist the parties in filling out the Parenting Plan Forms maintained by the Administrative Office of the Courts pursuant to T.C.A. 36-6-404, the Marital Dissolution Agreement as approved by the Tennessee Supreme Court under Tenn. Sup. Ct. R. 52 and any other forms approved under Tenn. Sup. Ct. R. 52 for use by self-represented parties in memorializing their agreement.

APPENDIX A – Section 10(a)

(a) With Agreement.

(1) The Neutral shall request that the terms of any settlement agreement reached be memorialized appropriately and shall discuss with the participants the process for formalization and implementation of the agreement. The Neutral may assist the parties in filling out the Parenting Plan Forms maintained by the Administrative Office of the Courts pursuant to T.C.A. 36-6-404, the Marital Dissolution Agreement as approved by the Tennessee Supreme Court under Tennessee Supreme Court Rule 52 and any other forms approved under Tenn. Sup. Ct. R. 52.

(2) When the participants reach a partial settlement agreement, the Neutral shall discuss the procedures available to resolve the remaining issues.

(3) The Neutral shall not knowingly assist the parties in reaching an agreement which for reasons such as fraud, duress, overreaching, the absence of bargaining ability, or unconscionability would not be enforceable.

PODA²

V. AFTER

SECTION 10(c)

(c) During and following Rule 31 ~~ADR—Proceedings~~Mediations, Rule 31 ~~Neutrals~~Mediators shall:

(1) Refrain from participation as attorney, advisor, judge, guardian ad litem, master, or in any other judicial or quasi-judicial capacity in the matter in which the Rule 31 ~~ADR~~ProceedingMediation was conducted.

(2) Provide a timely report as required under ~~section~~Section 5 of this Rule.

(3) Avoid any appearance of impropriety in the ~~Neutral's~~Rule 31 Mediator's relationship with any member of the judiciary or the judiciary's staff with regard to the Rule 31 ~~ADR~~ProceedingsMediation or the results of the Rule 31 ~~ADR~~ProceedingsMediation.

~~(d) Rule 31 Neutrals shall preserve~~(4) Preserve and maintain the confidentiality of all information obtained during the Rule 31 ~~ADR—Proceedings~~Mediation and shall not divulge information obtained by ~~them—the Rule 31 Mediator~~ during the course of the Rule 31 ~~ADR—Proceedings~~Mediation without the consent of the parties, except as otherwise may be required by law.

Appendix A - Section 6(b)(5)

(b) Conflicts of Interest and Relationships; Required Disclosures; Prohibitions.

(5) A Neutral shall not use the dispute resolution process to solicit, encourage, or otherwise incur future professional services with either party.

APPENDIX A – Section 7(a)

(a) Required. A Neutral shall preserve and maintain the confidentiality of all ~~dispute resolution—proceedings~~ADR Proceedings except where required by law to disclose information.

AFTER - REPORTS

SECTION 5

Section 5. Reports in Rule 31 Mediations Conducted in Eligible Civil Actions

(a) At the conclusion of a Rule 31 Mediation in an Eligible Civil Action, the Rule 31 Mediator shall submit a final report pursuant to Rule 5.06, Tenn. R. Civ. P., to the Court by filing same with the clerk of the court ~~at the conclusion of the Rule 31 ADR Proceeding.~~ The final report shall state only: (i) which parties appeared and participated in the Rule 31 ~~ADR Proceeding~~ Mediation; (ii) whether the case was completely or partially settled; and (iii) whether the Rule 31 ~~Neutral~~ Mediator requests that the costs of the ~~Neutral's~~ Rule 31 Mediator's services be charged as court costs. The report shall be submitted within the time specified by the ~~court~~ Court in the Order of Reference. In the event there is no Order of Reference or the Order of Reference does not specify a deadline, the final report shall be submitted within 60 days of the ~~initial meeting with conclusion of the parties,~~ Rule 31 Mediation or within the time period specified by the ~~court.~~ Court.

SECTION 15(d)

(e(d) Reports Required of Rule 31 Mediators. 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 1916(a)(8) of this Rule~~ as to ~~any~~ all mediations* conducted by a Rule 31 Mediator, including those mediations which are not ~~subject to Rule 31. court ordered.~~ Rule 31 Mediations. The report forms will be available on the AOC website and from the AOC. Such reports are confidential, not subject to disclosure for inspection or copying and will be maintained by the AOC for statistical compilation and analysis purposes only.

* The asterisk is mine. See:

Section 2

(i) A "Rule 31 Mediation" is an informal process in which a ~~neutral person~~ Rule 31 Mediator conducts discussions among the ~~disputing~~ parties that is designed to enable them to reach a mutually acceptable agreement among themselves on all or any part of ~~the issues in disputed~~ disputed issues: 1) in or related to an Eligible Civil Action; or 2) in any civil dispute in which the Rule 31 Mediator and the parties have agreed in writing that the mediation will be conducted pursuant to Rule 31.

AFTER - FEES AND EXPENSES

SECTION 8. Costs

(a) The costs of any Rule 31 ~~ADR Proceeding~~Mediation, including the costs of the services of ~~the~~ Rule 31 ~~Neutral~~Mediator(s) may, at the ~~Rule 31 Neutral's~~ request, ~~of the Rule 31 Mediator(s)~~, be charged as court costs. The request to charge the costs of the services of the Rule 31 ~~Neutral~~Mediator(s) should be submitted to the ~~Court by filing same with the clerk of the~~ court ~~as set forth in Section 5 of this Rule.~~ If ~~an appeal of the case is filed,~~ the parties ~~shall appeal to the appellate court(s),~~ the parties may advise the ~~appellate~~ court in their ~~appellate~~ briefs whether the Rule 31 ~~Neutral~~Mediator(s) requested that the cost of the Rule 31 ~~Neutral's~~Mediator's services be included in the court costs.

(b) The ~~court~~Court may, in its sound discretion, waive or reduce the costs of a Rule 31 ~~ADR Proceeding~~Mediation.

SECTION 13. Compensation

~~Rule 31 Dispute Resolution Neutrals~~Rule 31 Mediators are entitled to be compensated at a reasonable rate for participation in ~~court-ordered alternative dispute resolution proceedings~~Court-Ordered Mediations, except pro bono proceedings pursuant to ~~Section 18~~ Section 15 of this Rule.

APPENDIX A – Section 9 Fees and Expenses

(a) **General Requirements.** A Neutral occupies a position of trust with respect to the parties and the courts. In charging for services and expenses, the Neutral must be governed by the same high standards of honor and integrity that apply to all other phases of the Neutral's work. A Neutral must endeavor to keep total charges for services and expenses reasonable and consistent with the nature of the case. If fees are charged, a Neutral shall give a written explanation of the fees and related costs, including time and manner of payment, to the parties prior to the ~~Rule 31~~ADR proceeding. The explanation shall include:

(1) the basis for and amount of charges, if any, for:

(A) ~~Rule 31 ADR~~ sessions held in the ADR Proceeding;

(B) preparation for sessions;

(C) travel time;

(D) postponement or cancellation of ~~Rule 31~~ ADR sessions by the parties and the circumstances under which such charges will normally be assessed or waived;

(E) preparation of any written settlement agreement;

(F) all other items billed by the Neutral; and

(2) the parties' pro rata share of ~~Rule 31 ADR~~ fees and costs for the ADR Proceeding if previously determined by the ~~court~~Court or agreed to by the parties.

(b) Records. A Neutral shall maintain adequate records to support charges for services and expenses and shall make an accounting to the parties or to the ~~court~~Court upon request.

(c) Referrals. No commissions, rebates, or similar remuneration shall be given or received by a Neutral for referral of clients for ~~dispute resolution~~an ADR Proceeding or related services.

(d) Contingent Fees. A Neutral shall not charge a contingent fee or base a fee in any manner on the outcome of the process.

(e) Principles. A Neutral should be guided by the following general principles:

(1) Time charges for a ~~Rule 31 ADR~~ session held in an ADR Proceeding should not be in excess of actual time spent or allocated for the session.

(2) Time charges for preparation should be not in excess of actual time spent.

(3) Charges for expenses should be for expenses normally incurred and reimbursable in dispute resolution cases and should not exceed actual expenses.

(4) When time or expenses involve two or more sets of parties on the same day or trip, such time and expense charges should be prorated appropriately.

(5) A Neutral may specify in advance a minimum charge for a ~~Rule 31 ADR~~ session to be held in an ADR Proceeding without violating this rule.

AFTER – LITIGATION

SECTION 7. Confidential and Inadmissible Evidence

Evidence of conduct, information disclosed, or ~~statements~~any statement made in the course of ~~Rule 31 ADR Proceedings and a Rule 31 Mediation~~ is confidential to the extent agreed by the parties or provided by ~~other proceedings conducted pursuant to an Order of Reference~~law or rule of this State. Such evidence shall be inadmissible to the same extent as conduct or statements are inadmissible under Tennessee Rule of Evidence 408. No Rule 31 Mediator may be compelled to testify by deposition or otherwise regarding such conduct, information, or statements. A written mediated agreement signed by the parties is admissible to enforce the understanding of the parties.

SECTION 10(d)

~~(f)~~(d) The Rule 31 ~~Neutrals~~Mediator shall not be called as a witness in any proceeding to enforce any terms of the resulting mediation agreement.

SECTION 12. Privilege and Immunity

Activity of Rule 31 ~~Neutrals~~Mediators in the course of Rule 31 ~~ADR proceedings~~Mediations shall be deemed to be privileged and the performance of a judicial function and for such acts Rule 31 ~~Neutrals~~Mediators shall be entitled to judicial immunity.

APPENDIX A – Section 7. Confidentiality

(a) Required. A Neutral shall preserve and maintain the confidentiality of all ~~dispute resolution proceedings~~ADR Proceedings except where required by law to disclose information.

RESOURCES

ADR Commission Policies located at:

www.tncourts.gov/programs/mediation/resources-mediators/policies

Advisory Opinions located at:

www.tncourts.gov/programs/mediation/resources-mediators/opinions

Reporting Website (login required):

www.tncourts.gov/programs/mediation/resources-mediators

ABA Ethics Resources

www.americanbar.org/groups/dispute_resolution/resources.html