ADR NEWS

A publication of the Tennessee Alternative Dispute Resolution Commission

VOLUME 15, ISSUE 3 **Summer 2015**

Contacts

Tennessee Alternative Dispute Resolution Commission

- Howard H. Vogel, Esq. Chairperson, Knoxville
- Hon. George H. Brown, Jr. (Ret.) Memphis
- Linda Nettles Harris, Esq. Memphis
- Hayden D. Lait, Esq. Memphis
- C. Suzanne Landers, Esq. Memphis
- D. Tracy Shaw, Esq. Nashville
- Edward P. Silva, Esq. Franklin
- Virginia Lee Story, Esq. Franklin
- I.C. (Jack) Waddey, Jr., Esq. Nashville
- William T. Wray, Jr., Esq. Kingsport
- Mary Ann Zaha Chattanooga

Supreme Court Liaison

- Justice Gary R. Wade

Programs Manager

- Claudia M. Lewis, Esq.

Programs Assistant

- Lara A. Daley

Send questions and comments to:
Tennessee ADR Commission
Administrative Office of the Courts
Nashville City Center, Suite 600
511 Union Street
Nashville, TN 37219-1768
Phone: 615-741-2687
Fax: 615-741-6285
Email: Claudia.Lewis@tncourts.gov
Web: www.tncourts.gov

IMPORTANT NEWS

William T. Wray, Jr., Esq. & Rule 31 listed general civil mediator, is the newest member of the ADR Commission. Mr. Wray was appointed by the Supreme Court on July 24, 2015 and replaces Judge Eddie Lauderback, who is now a Circuit Court Judge in the First Judicial District.

Fast Stats: There were 1,293 mediations reported for 2nd Quarter 2015. Of those, 803 (62.1%) had all issues resolved; 125 (9.7%) had issues that were partially resolved; and 365 (28.2%) had no issues resolved. There were 84 pro bono mediations plus 7 additional court ordered pro bono mediations reported. These mediation statistics were compiled from online mediation reports submitted by Rule 31 listed mediators per ADRC Policy 10.

You can find the online mediation report on the AOC website at: **http://www.tncourts.gov/programs/mediation/resources-mediators**. If you have lost your username and password and are unable to submit an online mediation report, please contact Claudia Lewis at (615) 741-2687 or by email at **claudia.lewis@tncourts.gov**. Because of the sensitive nature of the information, she will fax your username and password to you.

ADRC Chairman Howard Vogel sent a letter to all Tennessee Civil Trial Court Judges on July 21, 2015, informing them of the pro bono service requirement for Rule 31 listed mediators in Rule 31, §18(d). You can find the letter on page 7 of this edition of *ADR News*.

The ADRC adopted Ethics Advisory Opinion 2015-0001 at the July 28, 2015 quarterly meeting. You can find the opinion on page 8 of this edition of *ADR News*.

The ADRC is hosting the Thirteenth Annual ADRC Workshop on Friday, October 16, 2015 at Lipscomb University in Nashville. Please make plans to attend! The Workshop will *always* satisfy the CME requirements for *BOTH* general civil and family listed mediators.

Impasse is a Fallacy

Only those who believe in it fall prey to its trap

By: Lee Jay Berman

I often wonder who invented the concept of impasse. Who first said, "We are stuck. We cannot go any further."? Who decided that we should give it a name, acknowledge its existence, and make it the scapegoat for all that goes wrong with a mediation or negotiation?

My guess is that it was the first mediator who had run out of tools. With imagination exhausted, someone threw their hands into the air and declared the negotiation over and decided it was time to send everyone home, declaring an impasse and deeming the mediation process, not just the session, to have failed.

For negotiators to declare impasse can make sense, if you think about it. The goal in negotiation, after all, is to win. And the threat of impasse can sometimes be an effective tactic in achieving that goal. Commercial mediators, however, are hired to settle cases. In this world, impasse is a bad word. Moreover, I think it is a fallacy.

Achieving resolution, by definition, means either avoiding or breaking impasse. If an impasse can be broken, then it was not really an impasse. It was something else. But mostly, it was a dare. It was a temptation for the mediator to buy into the bluff that things were stopped dead in their tracks and it was time to give up.

Before examining the notion of impasse more closely, it is important to take a step back and realize that reaching successful resolution in mediation (i.e. avoiding impasse) begins at the very beginning of the mediation process, with convening, and continues until the agreement is signed. Furthermore, if a mediator's success can be defined by a successful outcome (which may oversimplify the entirety of the mediator's role, but ultimately is the primary goal in commercial mediation), then the mediator is responsible for managing every step of the process with an eye toward anticipating and avoiding the potential for an impasse later in the mediation.

Convening.

Impasse often occurs because the right people are not in the room. Effective convening by the mediator – asking a lot of questions and being unafraid to push to better understand all of the dynamics of the negotiation – can avoid this reason for impasse.

Mediations can sometimes end abruptly when one participant has a time constraint. This can sound like, "It's 3:30 and I have to pick up my kids" or "I never thought it would last this long." This can be avoided by the mediator communicating to the parties his or her expectation about time availability. Good mediators ensure themselves an ample window of time, and manage the parties' expectations so that they do the same.

Another line that mediators often hear is, "That is all of the authority that I have." This is something that needs to be discovered during convening. Mediators need not be afraid to ask questions about authority and understand as much as possible about which individuals need to be involved in the ultimate settlement of a case. This is also the point in the mediation where arrangements need to be made (negotiated) for telephone availability of any decision makers who will not be in attendance. The common mistake is to try to arrange this at 5:00 p.m. on the day of the mediation as people are leaving their offices for the night. What is worse, is that 5:00 p.m. on the east coast occurs in the mid-afternoon in the western states. It is the mediator's job to work this out, to the greatest extent possible, during the convening stage.

Preparation.

Preparation is critical to avoiding impasse, but in addition to the mediator, the lawyers and the parties must all be adequately prepared in order to reach a settlement. Each person needs to know enough about the case so that they can analyze settlement proposals and make informed decisions. Failure prepare, and failure by the mediator to attempt to ensure that the participants do their preparation, leads to an impasse that ends with, "We just don't know enough."

While informational impasse can be avoided by preparing adequately, and having the mediator facilitate the exchange of information prior to the mediation, it is part of the commercial mediator's role to help the parties stay on a settlement track and continue preparing for a return to mediation, rather than leaving with the idea that the mediation process has failed, and returning to the litigation preparation track.

Should this informational objection occur, the mediator has a responsibility to the parties to help them figure out exactly what critical facts they need to discover or what elements they need to research so that they will know enough to make an informed settlement decision. This level of preparedness varies greatly from defining what discovery is necessary to prepare for arbitration or trial. Sometimes this means a little bit of extra, key written discovery. Other times it means another deposition or two to help figure out what key witnesses or experts will say.

Once these items are agreed upon, then the mediator must turn the discussion to time, and how much time is necessary to complete this specific discovery and process it with decision makers (including insurance claims management, if necessary). The mediator and parties are then ready to agree upon a date to return to mediation to continue their settlement negotiation. The mediator's role never changes, regardless of what stands in the way of agreement. The mediator simply continues to facilitate agreement between the parties with an eye toward eventual settlement.

Communication.

Impasses that simply cannot be explained often occur due to a failure during the communication stage. Simply stated, the mediator may not have discovered or addressed a party's underlying interests. When parties have underlying interests or emotional barriers to settlement, it is common for them not to know what is keeping them from settling. Impasses that result from emotions or unmet underlying interests sound like, "I just don't know. I just know it's not enough." or "I just don't understand why I need to pay that much."

A good mediator knows that this can be the cue to revisit the underlying interests and the emotional resistance – the feelings that are keeping one person from reconciling themselves with the difficult decision that needs to be made. These feelings can be as straight forward as greed, revenge or ill feelings toward or about the other person, or they can be more subtle and complex, such as unwillingness to let go of a conflict and move on with life, unwillingness to let go of a relationship – such as it is – with the other person, or feeling that they are not being made whole for the pain or suffering they experienced (i.e. no amount of money can make them whole or restore what has been lost). These feelings need to be uncovered and addressed by the mediator early in the mediation and dealt with then, in order to avoid them getting in the way of a settlement in the later, more stressful stages. Most people attach emotions to conflict and need to reconcile themselves with letting go of those emotions before they can resolve the dispute.

Another emotional objection to settlement can be inexperienced participants (and even counsel) who fall in love with their cases. The best analogy is when a person sells their home. They love their home and think it is worth a lot of money because they believe it to be special and unique. However, they have to sell it in a marketplace that is well established, and that values it based on how it compares to other, similar houses. And, it never compares as favorably in an objective marketplace as the owner thinks it should. Enter the Realtor, who is supposed to give the seller a more objective opinion of value, but who has the incentive to stretch the valuation more toward the seller's in order to win the competition to list the house and have a happy seller, and ensure that the seller knows that the Realtor is on his or her side. However, in the end, the actual value of the house is only that which a buyer will actually pay for it in a market where there are other comparable houses available.

Lawyers and clients who fall in love with their cases, and who lose the ability to see them through objective eyes have to be reminded of the context in which they are attempting to place a value on the case. The context is an informed marketplace where most cases can be measured objectively, and where comparable cases can anchor their value to a norm which theoretically reflects a value based upon what a judge or jury would do, and what risks there might be at trial. Most mediators can talk about the risks at trial, point out the weak points in a case, and discuss costs of litigation. A good mediator must also bring those people back to reality by reminding them of this objective marketplace in which this negotiation is occurring, and what that market will bear.

Finally, underlying interests can be non-emotional. For example, they can relate to finances or other, more tangible issues. Answers to these concerns, once uncovered, can sometimes take the form of payment terms or structured settlements. The mediation process can become very flexible and creative, but only once the parties' real interests are uncovered. However, creativity in mediation should be purposeful and in direct response to a party revealing an underlying interest.

Negotiation.

Most of the rest of the reasons for impasse occur as a result of the negotiation process. The primary reason for impasse here is the mediator buying into the bluff. When one party says, "That is our bottom line", what they often mean is that they have not yet been convinced, or given enough information, to change that final position. That statement is heard by the seasoned mediator as, "Knowing what I know now, about the case and about the other party(ies), I am not willing to move from this position." It might also simply be a negotiation tactic to attempt to scare their opponent.

The first thing that seasoned mediators know is that the negotiation stage of the mediation begins during the convening stage, as we negotiate together who will attend, when and where the mediation will be held, and what authority will be needed in the room to bring about a complete settlement, and the negotiation continues until agreement is signed. Experienced mediators see every demand by a party, even as early as the convening stage, as a negotiation strategy.

What can be learned from this perspective is that a "bottom line" is usually just another strategy in the negotiation process. This is not to say that people are not being truthful when they announce a bottom line. Sometimes they are. This is not to say that mediators should not believe people when they say that a particular number is a bottom line or best and final offer. The seasoned mediator knows that this means that this is how they are evaluating the case *under the present circumstances as they see them.* The key to working through this barrier is to help them see things a different way.

While everyone in the room may be responsible for knowing, understanding and discussing the facets of the case (facts, law, cases, legal climate, and settlement marketplace), there is only one person in the room who is responsible for the big picture. That is the mediator.

The reason that the mediator is in sole charge of this is simple: behaviorists would say that the other participants are in a state of conflict. When people are embroiled in a conflict, their stress level is high and they tend to put blinders on, looking at nothing but the conflict. They can lose their peripheral vision which would otherwise allow them to see how this litigation or conflict fits into their everyday lives, their time, their budget, and their stress level. In days of old, attorneys were removed enough to give their

clients this perspective. Today, some still are. But today's legal marketplace can demand that attorneys become just as embroiled in the case as their clients are.

What some lawyers gain in intimate knowledge, passion and advocacy effectiveness, they can lose in their ability to remain detached and able to see the big picture. The mediator is hired to be the one who is not in a state of conflict, and who is charged with remaining clear and mindful of the big picture, and helping the participants remain that way, too. Some mediators call it going to the balcony. I think one needs a larger perspective than that. A good mediator needs the ability to see the big picture of the case, the negotiation, and the big picture of the parties' lives and how this case impacts them, their families and their businesses. Injecting this perspective is one way that a case can be made to look different.

The key to the mediator helping the parties avoid most negotiating impasses is for the mediator to see them coming. This is the other reason it is critical for the mediator to have a perspective of the negotiation that more resembles that of a helicopter at 5,000 feet. If the negotiation steps by each party are not going to lead to a point of intersection or agreement, the mediator has to see this by the third or fourth move and help to choreograph the negotiation to foresee the potential for impasse and avoid it well in advance.

Mediators can only do this if they understand the science of the math in a negotiation. Each number telegraphs a message. While the mediator should be carrying more than just a number from one caucus room to the other, there is still much more going on in the mediator's mind – namely calculating whether the parties are on track to get to an agreement. The mediator must have his or her eye on the finish line at every moment of the process. That finish line, of course, is an agreement containing all parties' signatures. Remember, the deal is not done when there is agreement on a number. The negotiation must include all of the settlement terms, including payment terms, confidentiality (if applicable), and other terms that are important to the parties.

This requires the mediator to be multi-tasking. The mediator must be compassionate and a good listener, while also rising high above the conflict to see the big picture of the negotiation strategies, and higher yet to question whether the present conversation is going to help everyone get to the finish line. The mediator must be calculating and extrapolating the progress of the negotiation numbers, as well as understanding the impact of the non-economic terms that need to be discussed, when to bring those terms into the discussion, and what impact they will have on the negotiation. The mediator must also be mindful of each parties' big picture – their real life and the rest of their business outside of this case, and when to bring those perspectives into the conversation.

Knowing that this bottom line objection may occur is what occasionally prompts some experienced mediators to keep a key case fact in their back pocket. Holding back a useful piece of information in anticipation of such a moment can help to overcome the, "I need more information" and the, "Knowing what I know now", and, "The way the case looks to me right now" objections. It is an old adage that people do not change their minds, but given new information, they are free to make a new decision. This is another way of allowing people to save face and back down from that "final offer" statement by helping them have a legitimate reason to move a little further.

Another negotiation impasse that can occur is one I call "Looking Sideways." This occurs when participants in the negotiation are paying more attention to what another party is getting, than whether an offer is in their own best interest. This frequently occurs when there are multiple parties on one side of the table – either multiple plaintiffs who will divide a settlement in some fashion, or multiple defendants, such as in construction defect and product liability claims where there can be dozens of defendants contributing to a global settlement. In this instance, one co-defendant will stake out a position that is completely dependent on another co-defendant's offer. For example, one subcontractor will say, "I will pay whatever so-and-so pays, but not a penny more." Or one co-plaintiff will object to a global settlement offer from the defendant(s) because it provides more money for another co-plaintiff than for them.

Looking sideways can also describe when a defendant becomes more concerned with the windfall to a plaintiff, rather than whether the settlement makes sense for them. This can sometimes be remedied by paying part of a settlement to a third party, such as a non-profit organization.

When parties are looking sideways, instead of at their own best interest, the mediator has to use an "above the fray" perspective to help that party keep their eye on the ball and decide whether their individual share results in a fair settlement to them, without regard for what others are doing. For example, if a single family construction defect case is settling for a global settlement of $300,000, and one subcontractor with mid-sized exposure is contributing $30,000 to the settlement, they can become more focused on whether another mid-sized subcontractor is contributing $25,000 or $35,000. The mediator's question to them, keeping the big picture in mind, is whether they are satisfied with a contribution of ten cents on the dollar of the global settlement. Chances are that setting the contribution in this context may make it seem fair and make sense to them, allowing them to explain it to others, if necessary.

The Agreement.

Threat of impasse can also come about when the parties are writing the terms of the settlement agreement. One reason to be sure to write a settlement agreement at the end of the mediation, even over the parties' predictable resistance after hours of difficult negotiation, is because the exercise of writing the agreement forces the attorneys, in particular, to focus on the details of the agreement. If a mediator has not inquired in advance about potential deal points such as confidentiality, payment terms, release language and who will be released, then this exercise can be like a ticking time bomb. Too often, deals blow up at the end where all parties think that they have reached agreement, only to find out that when they are tired and wrung out, frustrated and anxious to be done, there is a problem with a deal term.

Problems at this stage of the mediation are generally met with rock-solid positions, ultimatums, and emotional parties ready to walk away from the pending agreement unless they get their way, or "win", on this newly raised term. Experienced mediators have seen parties ready to walk away from a hard fought, yet fragile settlement over disagreement of a week or two in the time the settlement payment will be made. Emotions run high at this stage in the process, and the mediator owes it to the parties to anticipate this and gently raise and negotiate these deal points along the way, when the parties are still in the middle stage of their negotiation, and there is still a willingness to give-and-take.

In short, if a mediator can anticipate common causes for impasse, such as these, the mediator can help the parties to avoid the potential for impasse all together, and find their way directly to a successful resolution.

Finally, if it sounds like the author has all of the answers to avoiding impasse and settling cases, the fact is that even this mediator only settled 92% of the cases he mediated last year. And all of this learning comes from mediating over 1,000 cases over 12 years, and making every one of these mistakes. Learning, of course, comes from making mistakes and looking back to see, with the benefit of hindsight, what caused it and how to avoid it the next time. Mediators learn by experience – by time in the chair at the head of the table. And hopefully by reading articles that help them avoid such problems by knowing in advance where to look for these bumps in the road. Hopefully, readers will remember the next time they are staring at a situation that looks like a potential impasse, that they are simply not finished yet, and there is more to do. This just means that it is time to dig down deeper into their toolbox and find the right tool.

About the Author

Lee Jay Berman *is a full-time mediator and trainer based in southern California. He is a Distinguished Fellow with the International Academy of Mediators and a Diplomat with the California and National Academies of Distinguished Neutrals. He is the founder and President of the American Institute of Mediation, offering world class training for the complete mediator. He can be reached at 310-478-5600 or leejay@mediationtools.com. He will be the featured speaker at the ADR Commission's 13th Annual Advanced Mediation Techniques Workshop on Friday, October 16, 2015.*

Chairperson
Howard H. Vogel, Esq.
O'Neil, Parker & Williamson, PLLC
7610 Gleason Drive, Suite 200
Knoxville, TN 37919
865-546-7190
hvogel@opw.com

Programs Manager
Claudia M. Lewis, Esq.

Programs Assistant
Lara A. Daley

Tennessee Supreme Court

ALTERNATIVE DISPUTE RESOLUTION COMMISSION
Nashville City Center, Suite 600
511 Union Street
Nashville, TN 37219
615-741-2687 Fax 615-741-6285

July 21, 2015

Re: Tennessee Supreme Court Rule 31 – Pro Bono

Dear Tennessee Judge:

The Alternative Dispute Resolution Commission supports the great work of the Court's Access to Justice Commission, formed in April of 2009.

Our policies encourage our Rule 31 listed mediators to volunteer for pro bono service; community mediation center committee and board participation; and related teaching.

Tennessee Supreme Court Rule 31, Section 18 (d) provides as follows:

> Pro Bono Service. As a condition of continued listing, each Rule 31 Mediator must be available to conduct three pro bono mediations per year, not to exceed 20 total hours. At the initiation of a mediation, the court may, upon a showing by one or more parties of an inability to pay, direct that the Rule 31 Mediator serve without pay. No Rule 31 Mediator will be required to conduct more than three pro bono proceedings or serve pro bono for more than 20 hours in any continuous 12-month period.

You can find the list of general civil or family Rule 31 listed mediators in your jurisdiction by visiting the AOC website at: http://www.tncourts.gov/programs/mediation/find-mediator. You can also contact Claudia Lewis, Programs Manager at the AOC, and she will be happy to create a current list of the Rule 31 mediators in your jurisdiction for you. Her number is 615-741-2687, x1320, and her email address is Claudia.lewis@tncourts.gov.

As you consider the issuance of orders of reference in cases, which would warrant the consideration, please keep the pro bono option in mind.

Thank you for your service for justice in our state.

Best wishes,

Howard H. Vogel
Chair, Tennessee Alternative Dispute Resolution Commission

HHV:sb

cc: Justice Gary R. Wade
ADR Commission Members

IN THE TENNESSEE ALTERNATIVE DISPUTE RESOLUTION COMMISSION

Advisory Opinion No.: 2015-0001

The Commission received three questions from a Tennessee Rule 31 listed attorney/neutral. The questions have been modified for purposes of response within the context of Rule 31. For further guidance, the opinion of the Board of Professional Responsibility might be sought for comment concerning the applicability of RPC Rule 2.4.

Question 1 – May another attorney in the office of an attorney/mediator accept employment by a participant in a former mediation, conducted by the attorney/mediator?

Rule 31 speaks to the circumstances where the neutral might become involved in the matter that was the subject of the mediation. Section 10 (c) (1) directs the neutral to 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 was conducted.

The other members of the neutral's firm are not addressed by Rule 31.

For further guidance, the opinion of the Board of Professional Responsibility might be sought for comment concerning the applicability of RPC Rule 2.4.

Question 2 – Does TSC Rule 31, Appendix A, Section 6, (b)(5) prohibit the neutral from accepting employment as a lawyer when requested by a former mediation participant?

The answer to this question is better addressed by a focus upon Section 10 (c)(1), as noted above.

Question 3 – May another member of the neutral's firm bring an unrelated legal action against a person or entity that was a participant in a mediation?

This is not specifically addressed by Rule 31. However, the mediation information made known to the neutral must remain confidential. Section 10 (d) provides that Rule 31 Neutrals shall preserve and maintain the confidentiality of all information obtained during Rule 31 ADR Proceedings and shall not divulge information obtained by them during the course of Rule 31 ADR Proceedings without the consent of the parties, except as otherwise may be required by law.

Date: June 30, 2015

Tracy Shaw, Chair of the TADRC Ethics Advisory Opinion Committee

Linda Nettles Harris

Virginia Story

UPCOMING ADRC APPROVED CONTINUING MEDIATION EDUCATION (CME) OPPORTUNITIES

September 14, 2015.....Mediation: Approaches, Strategic Options and Process Tips, Knoxville, TN
For more information, email: tsharpe@knoxbar.org

September 15, 2015.....The Digital Marketplace, Knoxville, TN
For more information, email: rbrown2456@aol.com

September 17, 2015.....Estate Planning 2015, Knoxville, TN
For more information, email: bill.morris@ubs.com

September 24, 2015.....Rule 31 Mediation, Memphis, TN
For more information, email: contact@affordablecletn.com

September 29, 2015.....How to Improve Your Success in Domestic Mediation, Nashville, TN
For more information, email: judy.phillips@nashvillebar.org

October 5, 2015.....The State of Mandatory Arbitration in Tennessee After Berent v. CMH Homes, Knoxville, TN
For more information, email: tsharpe@knoxbar.org

October 9, 2015.....Mediation or Hobby, How to become a "Professional Mediator" in TN, Chattanooga, TN
For more information, email: tapm@tennmediators.org

October 13, 2015.....Ethics and Domestic Violence in the Courts, Nashville, TN
For more information, email: sara@nashvilleconflict.org

October 16, 2015.....The 13th Annual ADRC Workshop, Lipscomb University, Nashville, TN
For more information, email claudia.lewis@tncourts.gov ,call: (615) 741-2687

October 17, 2015.....Beyond Models and Toolboxes: Building Excellence in Your Practice, Knoxville, TN
For more information, email: rbrown2456@aol.com

October 29-31, 2015.....A World Class View of Dispute Resolution: Professional Skills Program
Pepperdine School of Law/Lipscomb University Institute for Conflict Management, Nashville, TN
For more information, visit www.law.pepperdine.edu/straus, call: (310) 506-6342

November 2, 2015.....Preparing for a Successful Mediation, Knoxville, TN
For more information, email: tsharpe@knoxbar.org

November 11, 2015.....Mental Health Law, Nashville, TN
For more information, email: tstarling@mhamt.org

November 19, 2015.....Worst Divorces of 2015, Knoxville, TN
For more information, email: bill.morris@ubs.com

For approved internet training courses and more information on the courses above, go to: **http://www.tncourts.gov/programs/mediation/resources-mediators/continuing-mediation-education**

~ Roll Call ~

Congratulations to the following Newly Listed Rule 31 Mediators! These mediators were approved for listing at the ADRC Quarterly Meeting on July 28, 2015.

Mrs. Brenda W. Alexander, General Civil
Mr. Dustin L. Baker, Family
Mrs. Beverly W. Bell, Family/DV
Mrs. Julie G. Brown, General Civil
Mr. H. Eric Burnette, General Civil
Mr. Nathan D. Caldwell, General Civil
Mr. Robert V. Cornish, Jr., General Civil
Mr. Matthew Z. Daniels, General Civil
Mr. Robert L. Daumiller, General Civil
Mr. Ronald B. Deal, Jr., General Civil
Mr. Steven F. Dobson, General Civil
Mr. Todd Dockery, General Civil
Ms. Nancy A. Dunsmore, Family
Mr. Daniel L. Ellis, General Civil/Family
Mr. Timothy G. Embody, General Civil
Ms. Denee' M. Foisy, General Civil
Ms. Lizabeth D. Foster, General Civil
Mr. Danny C. Garland, Family
Mrs. Patricia M. Greer, General Civil
Ms. Amy E. Gentle Grubb, General Civil
Ms. Bailey M. Harned, Family
Ms. Brandi L. Heiden, General Civil
Ms. Sondra E. Holder, Family
Ms. Debra G. Kennedy, General Civil
Mr. Steven E. Kramer, General Civil
Mr. George Leroe, General Civil
Mrs. Stacie L. Longmire, General Civil
Mrs. Melody S. Luhn, Family
Mr. Matthew R. Macaw, Family
Mrs. Elizabeth T. McFadden, Family
Mrs. Haley E. Medley, Family
Ms. Rebecca H. Miller, General Civil
Ms. Tara S. Moore, General Civil
Mr. William N. Ozier, General Civil
Mrs. Claudia R.F. Padfield, General Civil
Ms. Alicia M. Page, General Civil
Ms. Amy B. Pedigo, Family
Ms. Carla R. Pollard, General Civil/Family/DV
Mr. Scott A. Rhodes, General Civil
Mr. James T. Ritt, General Civil
Ms. Liza V. Rubin, General Civil/Family
Ms. Kathryn L. Sands, Family/DV
Mr. David M. Shippert, Family
Mrs. Anne W. Smith, General Civil/Family
Mr. Shawn D. Snyder, General Civil
Ms. Judith E. Soffiantino, General Civil
Ms. Steffanie M. Speck, General Civil
Mr. Andrew P. Taylor, General Civil/Family
Ms. Courtney A. Thompson, General Civil/Family
Mrs. Heather L. Thompson, Family/DV
Mr. Jimmie D. Turner, General Civil
Ms. Lisa P. Webb, General Civil/Family/DV
Ms. Kristyanna M. Wolfe, Family
Mr. Byron A. Wolfe, Family

Important ADRC Dates

October 15, 2015.....ADR Commission Meeting, Holiday Inn Vanderbilt, Nashville

October 16, 2015.....ADRC Mediation Workshop, Lipscomb University, Nashville

We Would Like to Hear From You!

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

ADR NEWS

A publication of the Tennessee Alternative Dispute Resolution Commission

VOLUME 15, ISSUE 2 **Spring 2015**

Contacts

Tennessee Alternative Dispute Resolution Commission

- Howard H. Vogel, Esq. Chairperson, Knoxville
- Hon. George H. Brown, Jr. (Ret.) Memphis
- Linda Nettles Harris, Esq. Memphis
- Hayden D. Lait, Esq. Memphis
- C. Suzanne Landers, Esq. Memphis
- J. Eddie Lauderback, Esq. Johnson City
- D. Tracy Shaw, Esq. Nashville
- Edward P. Silva, Esq. Franklin
- Virginia Lee Story, Esq. Franklin
- I.C. (Jack) Waddey, Jr., Esq. Nashville
- Mary Ann Zaha Chattanooga

Supreme Court Liaison

- Justice Gary R. Wade

Programs Manager

- Claudia M. Lewis, Esq.

Programs Assistant

- Lara A. Daley

Send questions and comments to:
Tennessee ADR Commission
Administrative Office of the Courts
Nashville City Center, Suite 600
511 Union Street
Nashville, TN 37219-1768
Phone: 615-741-2687
Fax: 615-741-6285
Email: Claudia.Lewis@tncourts.gov
Web: **www.tncourts.gov**

IMPORTANT NEWS

The ADRC is developing the agenda for the Thirteenth Annual ADRC Workshop which will be held Friday, October 16, 2015 at Lipscomb University in Nashville. Please make plans to attend! Please note that the Workshop will *always* satisfy the CME requirements for *BOTH* general civil and family listed mediators.

Fast Stats: There were 5,451 mediations reported for 2014. Of those, 3,391 (62.2%) had all issues resolved; 474 (8.7%) had issues that were partially resolved; and 1,586 (29.1%) had no issues resolved. There were 325 pro bono mediations plus 6 additional court ordered pro bono mediations conducted in 2014.

These mediation statistics were compiled from online mediation reports submitted by Rule 31 listed mediators. Per ADRC Policy 10, "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."

You can find the online mediation report on the AOC website at: **http://www.tncourts.gov/programs/mediation/resources-mediators**. If you have lost your username and password and are unable to submit an online mediation report, please contact Claudia Lewis at (615) 741-2687 or by email at **claudia.lewis@tncourts.gov**. Because of the sensitive nature of the information, she will fax your username and password to you.

Per the Supreme Court Order filed February 21, 2015, the Rule 31 amendments adopted by the Supreme Court will become effective July 1, 2015. Rule 31, which can be found on the AOC website at **http://www.tncourts.gov/rules/supreme-court/31**, will be updated on the AOC website at that time.

The European Union's experiment: Mediation without a mediator

By: D. Bruce Shine, Esq.

Author's Introduction

This piece discusses the labor management procedure currently being discussed by Volkswagen and the United Auto Workers of America, AFL-CIO, at the former's Chattanooga facility. While the article was published some years ago, it remains legally accurate and structurally sound. While certain advances (EU Directive 2009/38 EC) have been introduced since initial publication, those changes/improvements are not applicable to the mediation process.

Employment arbitration and mediation in the United States occurs routinely in both union and non-union settings. The European Union, however, is experimenting with a different form of social dialogue, the European Works Councils (EWC). The EWC attempt to achieve many of the same results as those achieved through mediation, except, however, the EWC do not rely on a mediator.

The U.S. approach. Under the aegis of the Mediation Research Education Project, Inc., of Northwestern University Law School, grievance mediation in the United States has been advanced as an alternative to arbitration after all other pre-arbitration steps in the contractual grievance procedure have been exhausted. According to a publication issued by the Chicago-based Project, in excess of 2,500 grievances have been resolved since November 1980. The success rate according to the project has reached 83 percent.

A 1996 survey of Chicago-area labor leaders by Helen Elkiss, University of Illinois at Urbana-Champaign, and Eugenia McAvoy, St. Xavier University, Chicago, in association with the Institute of Labor and Industrial Relations of the University of Illinois, has shown excellent results for participants in grievance mediation. Cost, speed, openness, and introduction of new ideas and flexibility appear from surveyed respondents to be the primary assets of grievance mediation over arbitration.

Early this year, the Equal Employment Opportunity Commission (EEOC) announced a $13 million program for fiscal year 1999 to hire mediation coordinators at every agency district office, to hire core internal and external mediators, and to increase education and training concerning the mediation process.[1] The agency remains opposed to mandatory arbitration, arguing the process would prevent the evolutionary caselaw process in discrimination law.[2]

The EU approach. While the U.S. experiments with using mediation to resolve individual employment disputes, the European Union (EU) has implemented a framework and procedure for resolving structural labor and economic conflicts cross-borders and company-wide. The EU approach is more expansive than any effort in the U.S. and seeks to create a company-wide climate of mutual trust between labor and management by joint goal-setting, information sharing and dispute resolution.

This new approach is in addition to the respective individual dispute-resolution processes utilized or statutorily mandated in each Member Sate comprising the EU. Those undertakings with 1,000 or more employees including at least 150 employees in one of two or more of the EU Member States, are covered by the EWC mandate. The number of undertakings impacted in 1998 was believed to be about 13,000.

---

[1] EEOC Press Release, February 9, 1999; CCH Employment Practices, No. 1014, Report 612, February 19, 1999.
[2] CCH EEOC Compliance Manual, No. 144, January 29, 1998.

Worker participation. Few issues divide European Union management and labor more significantly than the issue of "worker participation" in corporate governance. The divisiveness of this issue has its genesis in the diverse cultural, political and economic traditions of the Member States. It has become even more divisive because critics now argue that the EWC make it more difficult to generate jobs with the same degree of success enjoyed in the past decade and a half by Japan and the U.S. Thus, "worker participation" goals within the EU are perceived to be inconsistent with economic growth scenarios. Many argue that the European Union cannot enjoy significant economic growth and job expansion while at the same time broadening worker rights and entitlements, or simply put, market forces must dominate and take precedence over worker rights.

Given the tortured and diverse history of advancing worker participation within the corporate sector of the EU, this article will examine the evolving and contracting parameters the term has generated as well as the differing degrees of participation within the Member States. The formula ultimately adopted by the EU, which has given rise to its limited success achieved to date, will be discussed. This discussion will explore the decision to facilitate employee participation by embracing the principles of mediation rather than those of collective bargaining. And finally, it will address whether further progress on a broader scale is achievable given both current economic trends and the political, economic and cultural diversity within the EU.

EU level of success

What does the EU mean and intend when it advocates worker information, consultation and participation? The answer to this question changes depending upon when the question was posed because, over time, the Community attitude towards worker participation has grown and evolved. The notion of employee participation has long existed within the Community; the different interpretations of this concept are rooted in the politics and history of the respective Member States.

Before proceeding further, it would be wise first to define the terms "information," "consultation" and "participation," and any "off-shoots" those terms generate within the context of the EU.

Trinity College, Cambridge, EU, employment law scholar Catherine Barnard has written:

> ***Information***: . . . involves the provision of information by management to the workforce. . . . the weakest form of worker participation: it is unilateral and workers have no formal opportunity to respond. ***Consultation:*** . . . does envisage the active involvement of both management and workers representatives . . . . ***Participation:*** . . . can be regarded as a generic term embracing all types of industrial democracy (*footnote omitted*) - ranging from the provision of information, consultant, and collective bargaining to more extensive involvement in the employer's decision-making process . . ."[3] (*emphasis added*).

Employee participation can either be direct, one-on-one, or indirect through representatives of the employee. Examples of the latter include trade unions, workers councils or *ad hoc* groups created by employees having as their primary concern, wages, hours, terms and working conditions for the employee.

A tortured path. As noted previously, the EU has experienced a tortured path toward worker/ employee participation. The conflict has its genesis in the diverse cultural, political and economic heritage of the Member States comprising the Community. For example, the United Kingdom has been among the major Member States at the nadir of statutory worker participation, while France, Germany and The Netherlands are at the opposite end of the spectrum.

[3] Barnard, C., *EC Employment Law*, J. Wiley & Sons, Rev'd. Ed., 1995, at 403-404.

Relying upon a tradition of trade union representation, or as some would term an adversarial relationship with minimal statutory involvement, workers in the United Kingdom have looked to their trade union to protect their job interest. Little regard to involvement with management in terms of long-range corporate planning or corporate governance has been the cornerstone of this relationship, with the worker primarily interested in his[4] wages, hours, terms and conditions of employment.

In a contrary posture, German law since 1972 has mandated a Works Council be formed in every plant with five or more employees, coupled with board of director membership for employee representatives for certain larger corporations.[5] The Netherlands statutorily has granted employee representatives the right to veto nominations to the undertaking's supervisory board, whose task is "to guide and supervise management on behalf of the stockholders and the employees."[6] France, like Holland, has statutorily mandated Works Councils; in France undertakings having at least 50 employees must provide such councils, while Holland's threshold is lower at 35 employees.[7] Each of these structures contemplates an increasingly cooperative, less adversarial relationship between the employees and the employer. Whether this goal actually is achieved in these Member States is another matter.

When discussing labor relations between worker and employer, the issue of economic power and its exercise must be considered. Whether the underpinnings for some of the procedures for employee participation applicable to EU and national undertakings are, as Lord Wedderburn has suggested, "honeyed words" or what "employers will accept," remains to be seen.[8]

During the past three and a half decades, the EU has entertained worker participation with management in a variety of proposals including, but not limited to, employee membership or representation on the boards of undertakings.[9] The initial legislative initiative to provide for worker participation was the Statute of a European Company (Societas Europaea or "SE").[10] Two years after placing the SE's first draft before the Community for discussion, what has become known as the Fifth Directive on the structure of public companies was issued by the Commission.[11] Promulgated in two parts, a Regulation and accompanying Directive, the document was intended to be complimentary to the SE, as well as its own two parts.[12] Under the Regulation, the SE could come into existence in one of four (4) methods:

1. "the merger of existing companies (footnote omitted),
2. the creation of a joint holding company (footnote omitted),
3. the creation of a joint subsidiary (footnote omitted) or
4. the conversion of an existing public limited company."[13]

---

[4] An Equal Rights Note: Wherever in this piece "man," "men," or their related pronouns may appear, either as words or parts of words (other than with obvious reference to male individuals), they have been used for literary purposes and are meant in their generic sense (i.e., to include all human man-kind, both female and male sexes).

[5] Note 3 at 405.

[6] *Id.* At 412.

[7] *Id.* At 418.

[8] Wedderburn, Lord, *Consultation and Collective Bargaining in Europe: Success or Ideology*, (1997) 26 Ind. L.J. 1, at 33 and 32.

[9] Kolvenbach, Cf. W., *EEC Company Law Harmonisation and Worker Participation*, (1990) U. Penn J. of Int'l Bus. L 709, at 764-764.

[10] OJ 1970, C 124/1.

[11] OJ 1972, C 131/49.

[12] COM (89) 268 Final-SYN 218 and 219.

[13] Note 3 at 415.

Worker participation models. Although mandatorily based in one Member State, the SE offered four models for worker participation within either a single or two-tiered board, without employee involvement in its day-to-day management.[14] Those four models were:

1. Utilizing the law of the Member State in which the undertaking was based, one-half to one-third of the supervisory board must be appointed by the firm's employees or representatives and elected pursuant to national law of the Member State in which the firm is based. This proposal is similar to the German model.[15]

2. The supervisory board can be selected by management, but shareholders or employee representatives can nominate at the annual meeting, with veto powers similar to those found under the law of The Netherlands.[16]

3. A two-tiered board, one tier comprised exclusively of worker representatives, separate from the management or second board, with required notification to the worker tier prior to action by the undertaking in five areas directly impacting upon job security and crucial corporate structure and strategy.[17]

4. The last alternative constitutes a potential for modification of each of the above with an administrative board having the ability through collective bargaining to structure a scheme of worker participation by agreement with employee representatives.

In 1980, the Commission concluded that the Fifth Directive would not be adopted, in no small measure due to its requirement for mandatory employee participation in corporate governance. The Commission then issued the "Verdling" Directive,[18] named after its Commissioner of Social Affairs at the time of its issuance, and amended three years later by the "Richard" proposal,[19] which limited Verdling's impact by contracting its application. The 1980 proposal was limited to undertakings and subsidiaries employing 1,000 or more workers with a presence in more than one Member State. Undertakings were to engage in employee consultation with a view to reaching an agreement.[20]

Fearing inequality of treatment between national and transnational undertakings, the employer group Confederation of Industries of the EEC (UNICE) opposed the Verdling proposal. The Commission responded by seeking to correct the perceived inequity with its Richard proposal. The corrective amendment again applied the Directive to undertakings with a minimum of l,000 employees within the Community, irrespective of whether the firm was located in only one Member State. The Richard proposal allowed for the Fifth Directive to provide undertakings a "cafeteria system" of employee participation instead of the limited selection contained in the Verdling proposal.[21]

A detailed structure for the communication of information to employees concerning job security, advance consultation on changes in corporate structure and planning, cooperative efforts, and health and safety issues remained key provisions within the Directive's final but unrealized text.

---

[14] Note 12, Article 2.
[15] *Id.*, Article 4(1).
[16] *Id.*, Article 4(2).
[17] *Id.* Article 5.
[18] OJ 1980, C 297/3, EC Bull Supp 3/80.
[19] OJ 1983, C 217/3, EC Bull Supp 2/83,3.
[20] Note 3 at 421.
[21] OJ 1983, C 240/2.

Supported in principle by the European Trade Union Confederation (ETUC), the Verdling Directive and its amendment, however, still failed to satisfy UNICE.[22] In 1986 the Council, recognizing the divisiveness of its requirement for employee participation, coupled with its scope, decided to postpone until 1989 its further consideration. Today it still languishes without action.

Small but incremental steps. Reluctant to walk away from the goal of employee participation, the Council commended the Commission for its efforts while urging it to come back another day with a proposal on the subject.[23] It was here where the matter remained until the Maastricht Summit and Treaty.

Before, however, jumping into a discussion of the changes wrought by the Maastricht Treaty, it would be helpful to note small but incremental steps toward achieving worker participation within the Community.

The first meaningful and successful step toward employee information, consultant and participation was the Council's 1975 Directive on Collective Dismissals.[24] Introduced under Article 100 of the Treaty,[25] requiring unanimity in the Council, the proposal had its origins in the Social Action Programme of 1974[26] to improve employee living and working conditions during a period when the EU experienced increased mergers, corporate concentrations and worker displacement.

The Directive uses a sliding scale to determine coverage. First, the displacement, or dismissal, must occur during a 30-day period for reasons "unrelated" to the individual worker. Its sliding scale application utilizes work force employment figures, to-wit:

1. 10 affected employees in an establishment employing more than 20 and less than 100;
2. 10% or more of the affected employees out of a work force of at least 100 but less than 300; and
3. at least 30 affected employees in a workforce of over 300.[27]

When the displacement will occur over a 90-day period, the threshold is 20 employees, whatever the number of persons employed.[28] The Directive does not cover, among other exceptions, temporary layoffs for limited periods of time.[29]

Crucial to our discussion is the recognition by the Directive of the role of employee representatives within the process of information and consultation. The employer is to inform employee representatives "in good time with a view to reaching an agreement" once it is "contemplating collective redundancies."[30] The process of consultation seeks to reduce "the number of workers affected."[31] To facilitate consultation, employers are required to provide information to employee representatives in six specific categories.[32] Information also must be provided to the Member State in which the collective redundancies, or layoffs, are to occur. Worker representatives are given an opportunity to "send any comments." Each step of the process is detailed and takes place within a predetermined time frame.[33] No dismissal may occur until 30 days *after* the public authority within the Member State has been notified of the proposed redundancies.[34]

---

[22] Weiss, M., "The European Community's Approach to Workers' Participation", Chapter within A.L. Neal and S. Foyn, *Developing the Social Dimension in an Enlarged European Union*, Centre for European Law, University of Oslo, Issue No. 16 (1995).
[23] V 86/C 203/01, Council Conclusions of 21 July 1986.
[24] 75/129 EEC.
[25] Directive Introduction, Foster, N., *Blackstone's EC Legislation*, 7th ED. (1996), at 281.
[26] Bourn, C., *Amending the Collective Dismissals Directive: A Case of Rearranging the Deckchairs?* (1993) 9 IJCLLIR 227, at 231.
[27] Note 25, Article 1.1.(a).
[28] *Id.*
[29] *Id.*, Article 1,2.(a).
[30] *Id.*, Article 2,1.
[31] *Id.*, Article 2.2.
[32] *Id.*, Article 2,3(b)(i)-(vi).
[33] *Id.*, Article 3 and 4.
[34] *Id.*, Article 4,1.

Displaced workers and their representatives are thus included in a process that allows them to share and comment upon:

- the reasons for their job loss,
- the number to lose their jobs,
- the period over which the job loss will occur,
- the criteria utilized to determine who will lose their job, and
- the redundancy payments to be paid by the employer over and above that to which the worker is statutorily entitled.[35]

Most importantly, this process mandates consultation "in good time with a view to reaching an agreement."[36] Without intervention of a third-party neutral, the process takes on the trappings of mediation without a mediator.

The scope of the Directive was broadened two years later to cover any "transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger."[37] As with the original Directive, notification and consultation with employee representatives remained key ingredients, coupled with providing information giving rise to the transfer/merger.[38] Additionally, where no employee representatives at the work place exist, employees "must be informed in advance when a transfer" is to occur.[39]

The Directive and its amendment constitute an impressive array of rights for workers and their employee representatives to participate in the process of employee consultation, notwithstanding its limited scope of coverage and purpose.

The Social Charter. Having achieved limited success concerning employee participation, the Council never lost sight of its ultimate goal. At Strasbourg in December 1989, 11 Member States (excluding the United Kingdom) adopted the Charter of Fundamental Rights of Workers. The Charter highlighted 12 fundamental social rights.[40] It was a purely political manifesto without legal effect in that it is not a treaty, an amendment to the Treaty, or a convention. Nor are the 12 rights enumerated within its text legally binding or enforceable by those to whom it sought to empower.[41]

The manifesto was not without significance, however. It became known as the Social Charter and in 1990 gave rise to a draft directive on European Works Councils (EWC), opposed with gusto by the United Kingdom.[42]

While the Community sought to develop a progressive social dimension to accompany the drive toward a single economic market following the adoption of The Single European Act in 1986, the United Kingdom opposed its every step. Under Prime Ministers Thatcher and Major, the United Kingdom pursued an anti-labor "de-collectivise" approach in its domestic labor relations from 1979 to May 1997, geared towards reducing the legal posture and impact of the UK trade union movement and freeing employers from the perceived or real restraints trade unions placed upon market forces. The United Kingdom thus positioned itself against the philosophical tide within the European Union.

---

[35] *Id.*, Article 2.3.
[36] *Id.*, Article 2.1.
[37] 77/187/EEC, Article 1.1.
[38] Id., Articles 3, 4, 5, and 6.
[39] Id., Article 6.5.
[40] Reported in "Social Europe" 1/90 at 45.
[41] Note 3, at 61.
[42] COMMA (80) 581 Final. OJC 39/91.

At the Maastricht Summit, the United Kingdom's determination to "go against the flow" was illustrated by its decision to "opt-out" of what became known as the Social Agreement signed by other Member States within the EU. As a compromise, the United Kingdom agreed to a Treaty of European Union amendment that permitted the subsequent adoption of a Directive encompassing the goals of the Social Agreement without the United Kingdom's consent or inclusion.[43]

The somewhat unusual agreement became necessary because the United Kingdom opposed extending the qualified majority voting provisions of Treaty Article 100a in the Council of Ministers to "a range of employment and industrial relations issues including the information and consultant of workers."[44] In essence, the United Kingdom formally opposed making it easier to pass EU legislation restricting employers and empowering workers.

By not entering into the Social Agreement, the United Kingdom ceased to be a player on these issues and accordingly surrendered whatever influence it might have possessed in "watering down" proposals. And, as it turned out, subsequent proposals for employee participation ultimately impacted upon the UK's own transnational undertakings anyway. The decision to "opt out" might well have been politically popular at the annual Conservative Party Conference, but profoundly limited the United Kingdom's role in this essential aspect of long-term employment policy.

Much has been written concerning the nuances surrounding the UK's opt-out and its legal standing within the EU. The victory of the Labour Party in the United Kingdom's parliamentary election of May 1997, however, has rendered much of that discussion moot. Council Directive 97/74 EC of December 15, 1997, extended the European Works Council to Great Britain and Northern Ireland and put the United Kingdom under the EU's Social Agreement.[45] Once again the UK has become a player in this arena of the EU's social dimension. The decision by the United Kingdom was made with the Council on July 24, 1997, prior to its execution of the Amsterdam Treaty.

European Works Council. Armed with the United Kingdom's agreement at Maastricht not to impede its fellow Member States' desire to enhance information, consultation and participation of workers in their place of employment, on September 22, 1994, the Council issued Directive 94/45 EC calling for "the establishment of a European Works Council or a procedure in Community scale undertakings and community-scale groups of undertakings for the purpose of informing and consulting employees."[46] The jurisdictional underpinnings for the Directive require that it have application only to undertakings "employing at least a 1,000 employees on the territory of 'Member States.' "[47]

Thus, the Directive impacted upon and required compliance by numerous United Kingdom undertakings, notwithstanding the "opt-out" provisions of the Social Agreement and the Directive's negotiated non-application in the United Kingdom. Recognizing that denying UK-based employees the Directive's protection enjoyed by co-workers who simply happened to be working in offices or plants located in other Member States might create morale problems, numerous UK undertakings voluntarily included their statutorily opted-out home based employees in their Community-wide EWC's.

---

[43] OJC 244/127, 31.8. (1992).

[44] Lorber, P., *An Attempt to Assess the Curious Impact of the European Works Council Directive on the United Kingdom System of Industrial Relations and Labour Law* (1997) 9 Jagellonian University Yearbook of Labor Law and Social Security 95, at 97.

[45] Concurrently with Directive 97/74, the United Kingdom joined in adopting Council Directive 97/81, which formally bound the United Kingdom to the Community Charter of the Fundamental Social Rights of Workers. Lastly, on that same day, December 15, 1997, Council Directive 97/75 extended coverage to the United Kingdom of Council Directive 96/34, framework agreement on parental leave.

[46] Summary, "Proposals for Council Directive extending Directive 94/45 EC on European Works Councils and Directive 96/34 on Parental Leave," COM (97) 457 final of 23 September 1997.

[47] Note 42 of 98; See also: Directive 94/45 EC, Article 2(1).

Under Article 13 of the Directive, undertakings could remove themselves from its provisions by entering into a voluntary agreement with their employees prior to September 22, 1996, the Directive's deadline for setting up an EWC or an equivalent procedure covering their entire workforce. If an employer did not take itself outside the Directive, then it had two options:

First, the Company's central management could initiate negotiations for the establishment of an EWC,[48] or the process would commence at the "written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States."[49] Upon the occurrence of either option, a Special Negotiating Body (SNB) would be established with a minimum of three and a maximum of 18 members under procedures determined by the Member States from which the membership is elected.[50]

Additionally, where no employee representatives exist, Member States shall provide for the election or appointment of SNB members.[51] Each Member State in which the undertaking has one or more establishments must have at least one SNB member, and representation must otherwise be proportional in terms of the employer's workforce. The precise proportions can be legislated by the Member State.[52] Once management has been informed of the SNB's composition,[53] the parties commence negotiating concerning the scope, composition, functions, and terms of office of the EWC, or implement a "procedure for the information and consultation of employees."[54] The SNB can utilize "experts of its choice" in conducting negotiations leading to an EWC.[55]

Negotiations leading to an EWC can be terminated by a vote of two-thirds of the SNB, and no future action will occur for two years unless the parties negotiate a shorter period.[56] Lastly, the cost relating to the negotiations are to be borne by central management, including the cost of the SNB's expert (typically a trade union official).[57]

"[I]n a spirit of co-operation with a view to reaching an agreement," central management and the SNB are to negotiate toward achieving an agreement that will define the:

- establishments covered by the EWC;
- composition of the EWC, its number and their term of office;
- functions, procedure for information and consultation of EWC;
- venue, frequency and duration of EWC meetings;
- financial and material resources to be allocated to the EWC; and
- duration of the agreement and procedure for its renegotiation.[58]

While the above clearly seems to define the scope and structure of EWC under the Directive, the parties may decide to establish one or more information and consultation procedures to discuss transnational issues affecting workers' interests instead of an EWC. In doing so, the agreement must provide a procedure for the employee's representatives "to meet and discuss the information conveyed to them."[59] Lastly, in accomplishing its multiple tasks, the SNB shall act by majority vote of its members.[60]

---

[48] Directive 94/45,Article 5.1.
[49] *Id.*
[50] *Id.*, Article 5.2.(b) and 2.(a).
[51] *Id.*, Article 5.2.(a).
[52] *Id.*, Article 5.2.(c).
[53] *Id.*, Article 5.2.(d).
[54] *Id.*, Article 5.3.
[55] *Id.*, Article 5.4.
[56] *Id.*, Article 5.5.
[57] *Id.*, Article 5.6.
[58] *Id.*, Article 6.2.(a)-(f).
[59] *Id.*, Article 6.3.
[60] *Id.*, Article 6.5.

Subsidiary requirements. Where central management refuses to commence negotiations within six months of a request or after three years of a request, and the parties have not concluded an agreement, the provisions of the Directive's Annex ("Subsidiary Requirements") come into play.[61] Under the principle of subsidiarity, Member States shall provide for the election or appointment of EWC members; in accordance with the laws of the Member States in which the workers reside, the EWC shall be composed of a minimum of three and a maximum of 30 members. The procedure contemplates the Annex EWC will assume those functions provided within the Directive for negotiated EWCs, with near identical rights, duties and prerogatives to be achieved pursuant to national legislation. Thus central management is faced under the Annex with the proposition of either negotiating the parameters of the EWC or having the Annex EWC imposed upon it under terms mandated by its own national legislature.

Recognizing that information shared with the EWC will often contain items confidential to the undertaking, Member States are empowered to insure its continued confidentiality by those comprising the EWC, even "after the expiry of their terms of office."[62] Member States also are obligated to insure by national legislation that employees or their representatives are free from retaliation in performing their functions. Employee EWC members are to receive their regular wages and expenses while performing their duties.[63] Lastly, the EWC and central management, as with the SNB, shall perform their function "in a spirit of cooperation."[64]

The Directive acknowledges the subsidiarity principle, which means Member States are charged with enacting national legislation that implements EU Directives. In other words, the Member States must enact national legislation that protects the EWC.[65] As with nearly all Directives, a time frame exists for this Directive's review and possible subsequent amendment, depending on experience with its provisions.[66]

In 1997, a plan was put forward by former Belgian Commissioner Etienne Davignon ("Davignon Report") to allow the establishment of pan-European companies. Efforts to agree on a European Company Statute, with worker participation in undertaking governance and decision-making, have been promoted for over 30 years, but an agreement on its terms and conditions is as elusive today as when the efforts commenced.

Work of the Social Partners

The Social Chapter envisages active and cooperative participation by European Union employee and management representatives, collectively known as the "Social Partners." While not designating these Social Partners by name, the entities must be organized at the European level, recognized within the Member States as integral elements within the labor management dialogue, and structured in such a manner as to participate effectively in the consultation process. A number of organizations have achieved that status, including UNICE, CEEP (the public sector employers' association) and ETUC, with others seeking entry into the elite designation.

---

[61] *Id.*, Article 7.
[62] *Id.*, Article 8.
[63] *Id.*, Article 10.
[64] *Id.*, Article 9.
[65] *Id.*, Article 11.
[66] *Id.*, Article 15.

The Social Partners are empowered to implement Community measures at the national level[67] and to develop collective agreements having EU-wide jurisdiction.[68] Three of the Social Partners, UNICE, CEEP and ETUC, in 1991 developed a detailed framework for their consultation. The end result of that process is to produce opinions and recommendations, from employer and employee representatives, which might lead to agreements within their respective sphere of competence.[69]

The process provides for the Commission to seek consultation with the Partners before submitting definitive proposals, with a six-week review period for the Partners. Once the Commission has decided upon the content of its proposal, a second six-week period exists among the Partners for the proposal's review.[70] Conversely, management and labor can advise the Commission of its desire to initiate the process to negotiate Community-level agreements.[71]

Agreements among the Social Partners can be implemented under procedures specific to the parties and the Member States or under national rules for collectively bargained-for agreements.[72]

Resulting Directives. Those matters referred to the Social Partners under Article 2 of the Social Policy Agreement and which result in an agreement can go to the Council for implementation. Without going further into the nuances of the process, two Directives have issued as a result of the efforts of the Social Partners. The Partners entered into a Framework Agreement on Parental Leave on December 14, 1995, which resulted in Directive 96/34 EC on June 3, 1996. Thereafter the Social Partners, in response to a proposal from the Com- mission concerning part-time and temporary work, entered into a Framework Agreement on that issue on June 6, 1997, which resulted in Directive 97/81 issued on December 15, 1997.

The ratio of success for employee participation has not been significant when compared to the number of proposals generated by the Social Partners. Currently the process is under cloud due to the refusal of UNICE to go along with planned new rules to ensure that workers in national undertakings are told about plans for major restructuring. The issue has been highlighted as a result of the Renault company's plant closing (1998) at Vilvoorde, Belgium.[73] The core dispute between EC Social Affairs Commissioner P. Flynn and UNICE concerned whether worker consultation in national companies is unnecessary. UNICE's position, based on the principle of subsidiarity, is that a decision of this nature should be made locally.[74]

Indeed the Renault plant closing in 1998 gave rise to newspaper headlines and editorials proclaiming the whole concept of social dialogue ---- mediation without a mediator ---- within the EU to be in jeopardy due to UNICE's posture.[75] The possibility for the "intransigence of one side" among the Social Partners was raised by EU scholars in "A Manifesto for Social Europe" in mid-1997, which concluded that such an occurrence might give rise to the proposition that the Social Partners' "competence may be exercised at a different level."[76]

---

[67] Social Policy Agreement, Article 2(4).
[68] *Id.*, Article 4(1).
[69] COM (93) 600.
[70] Note 67, Article 3(2) and (3).
[71] *Id.*, Article 4.
[72] *Id.*, Article 4(2).
[73] *European Voice*, "UNICE Defies Deadline on Consultation," January 22-28, 1998, at 5.
[74] Id.
[75] *European Voice*, "Social Dialogue in Jeopardy" and (editorial) "Let the Talking Begin," March 19-25, 1998, at 1 and 13.
[76] Bercussion, Dealkin, et al., "*A Manifesto for Social Europe*," (1997) 3 European LJ 189, at 192.

Conclusion

EU-based trade unions have watched the EWC with hostility, fearing employers will substitute works councils processes for collective bargaining. Many employers have in fact approached the process as a means of circumventing trade unions and going directly to the employee.

Recently, worker consultation plans to strengthen the rights of millions of employees have been quietly shelved under the center-left EU presidency of German Chancellor Gerhard Schroder. The hope, however, is that when the Finnish representative assumes the EU presidency in July 1999, there will be more support for expansive consultation rights.

The question remains-can the parties alone, through a process that occurs outside of collective bargaining, actually change corporate attitudes and governance? Given the diversity in social, economic and political traditions within the current Member States, let alone those awaiting entry into the EU, one must question whether the mediative approach currently being utilized may soon reach its realistic limitations. Will a genuine third-party non-governmental neutral mediator become necessary? The ultimate success or failure of the European Works Councils in jointly setting goals and reducing the frictions natural to the labor/management setting will answer the question.

About the Author

D. Bruce Shine, Esq., is licensed to practice law in Tennessee, New York, and the District of Columbia, though the latter two licenses are inactive. He earned his B.S. degree from Tusculum College, J.D. from Vanderbilt University School of Law, attended Columbia University School of Graduate Legal Studies, and received an LL.M. from University of Leicester (U.K.), and LL.D. (Hon.) from Tusculum College. Mr. Shine is a Fellow of the Tennessee and American Bar Foundations. Mr. Shine is a past chairman of the Tennessee Supreme Court's Alternative Dispute Resolution Commission and was a member of the Commission from 1996-2015. He is approved as both an Arbitrator and Mediator by the United States District Court for the Eastern District of Tennessee, is a Tennessee Supreme Court Rule 31 listed general civil mediator, and is a registered Arbitrator with the Financial Industry Regulatory Authority. Mr. Shine, whose office is in Kingsport, Tennessee, primarily practices in the areas of labor and employment law.

~ Roll Call ~

Congratulations to the following Newly Listed Rule 31 Mediators! These mediators were approved for listing at the ADRC Quarterly Meeting on April 28, 2015.

Mr. Brian N. Bailey, General Civil
Ms. Jennifer Paige Beach, General Civil
Mrs. J. Jill Qualls Baxter, Famiy
Mr. Randall G. Bennett, General Civil
Ms. Kendra T. Biggs, General Civil
Mr. Wade H. Boswell, II, General Civil
Ms. Carolyn Alifragis Boyd, General Civil
Mr. Kirk A. Caraway, General Civil
Ms. Jennifer L. Chadwell, Family
Ms. Christian L. Cld, Family
Mr. Thomas (Toby)W. Compton, Jr., General Civil
Mr. Chris A. Cornaghie, General Civil
Mr. Wade B. Cowan, General Civil
Ms. Loretta Crossing, Family
Ms. Paula B. Davis, General Civil
Mr. Terry L. Dicus, Jr., Family
Mrs. Joanna Douglass, General Civil
Ms. Renee S. Edwards, Family/DV
Ms. Sara H. Evans, Family
Ms. Laura A. Frost, Family
Mr. Charles A. Giannetto, Family
Mr. Morris A. Goldstein, General Civil/Family
Mr. Robert B. Gray, General Civil/Family/DV
Ms. Dominique C. Gutierrez, General Civil
Mr. Marc H. Harwell, General Civil
Mr. Jeremiah A. Hassler, General Civil
Mr. J. Chadwick Hatmaker, General Civil
Ms. Traci Hartley Haynes, General Civil
Ms. Mary E. Henderson, Family
Mr. Frank M. Holbrook, General Civil
Mr. John W. Honeysucker, II, General Civil
Mr. William L. Horn, Family
Mr. Roger D. Hyman, General Civil/Family/DV
Mr. Logan W. Key, General Civil
Mr. Jay W. Kiesewetter, General Civil
Mr. Matthew D. Lavery, General Civil
Ms. Robin K. Littlefield, General Civil
Ms. Yvonne Yee Won Louie-Horn, Family
Mr. T. Ryan Malone, General Civil
Mr. Robert A. Mathis, General Civil
Mr. Neil M. McIntire, General Civil
Mr. Samuel F. Miller, General Civil
Ms. Elizabeth A. Morrow, General Civil
Ms. April Watkins Nemer, Family
Mr. Jacob R. Nemer,Family
Mr. Robert P. Noell, General Civil
Mr. Emmanuel O. Ojo, General Civil
Mr. James R. Omer, Jr., General Civil
Ms. Mariella L. Pachero, General Civil
Mr. Jeffery D. Parrish, General Civil
Ms. Cynthia D. Plymire, General Civil
Ms. Lynn K. Questell, General Civil
Mr. W. Justin Reynolds, Family
Ms. Heather B. Stanford, General Civil
Mrs. Allison J. Starnes-Anglea, Family
Ms. Teresa Ennica Street, General Civil
Ms. Toni L. Stuart, General Civil
Mr. Jimmie D. Turner, Family/DV
Ms. Carol Davis Watkins, General Civil
Mr. John S. Wesson, General Civil
Ms. Nicole C. Wonsey, General Civil/Family/DV

Important ADRC Dates

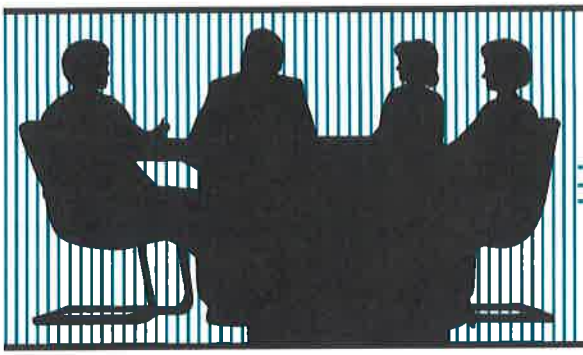
August 20, 2015.....Rule 31 Mediator Applications Deadline for ADRC review on October 15, 2015

October 15, 2015.....ADR Commission Meeting, Nashville

October 16, 2015.....ADRC Mediation Workshop, Lipscomb University, Nashville

We Would Like to Hear From You!

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



ADR NEWS

A publication of the Tennessee Alternative Dispute Resolution Commission

VOLUME 15, ISSUE 1 **WINTER 2015**

Contacts

Tennessee Alternative Dispute Resolution Commission

- Howard H. Vogel, Esq. Chairperson, Knoxville
- Hon. George H. Brown, Jr. (Ret.) Memphis
- Linda Nettles Harris, Esq. Memphis
- Hayden D. Lait, Esq. Memphis
- C. Suzanne Landers, Esq. Memphis
- J. Eddie Lauderback, Esq. Johnson City
- D. Tracy Shaw, Esq. Nashville
- Edward P. Silva, Esq. Franklin
- Virginia Lee Story, Esq. Franklin
- I.C. (Jack) Waddey, Jr., Esq. Nashville
- Mary Ann Zaha Chattanooga

Supreme Court Liaison

- Justice Gary R. Wade

Programs Manager

- Claudia M. Lewis, Esq.

Programs Assistant

- Lara A. Daley

Send questions and comments to:
Tennessee ADR Commission
Administrative Office of the Courts
Nashville City Center, Suite 600
511 Union Street
Nashville, TN 37219-1768
Phone: 615-741-2687
Fax: 615-741-6285
Email: Claudia.Lewis@tncourts.gov
Web: www.tncourts.gov

IMPORTANT NEWS

Welcome New ADR Commission Members!

- Hon. George H. Brown, Jr. (Ret.) - Memphis, attorney and Rule 31 listed family mediator
- J. Eddie Lauderback- Johnson City, attorney and Rule 31 listed general civil mediator
- Edward P. Silva – Franklin, attorney and Rule 31 listed general civil mediator
- I.C. (Jack) Waddey, Jr. – Nashville, attorney and Rule 31 listed general civil mediator

These members were appointed by the Tennessee Supreme Court for a three-year term beginning January 10, 2015.

At the January 27, 2015 quarterly meeting of the Alternative Dispute Resolution Commission, the Commission adopted a new policy. Policy 21 states that an applicant for Rule 31 listing that submits an incomplete application has six (6) months from the date his/her application is received by the Programs Manager to complete his/her application. If an application is not complete after six (6) months, an applicant must submit a new application for Rule 31 listing. No application refund will be given to an applicant for an incomplete application. (Adopted 01/27/15) To see all of the ADRC policies, go to:

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

Mediation and the Transgender Participant

By: Joseph G. Jarret, Esq.

Introduction:

Recently, the United States Department of Justice took the position that the protection of Title VII of the Civil Rights Act of 1964 extends to claims of discrimination based on an individual's gender identity, including transgender status. However, today's professional mediator doesn't need a mandate from the federal government to insure that all parties at the mediation table enjoy dignity regardless of gender, ethnicity, race, class, religion, nationality, sexuality, philosophy, and lifestyle. Nevertheless, this expansion of Title VII protection brings to the forefront people who consider themselves transgender. One of the better definitions of transgender people is offered by the Gay & Lesbian Alliance Against Defamation (GLAAD). GLAAD notes that transgender is the state of one's gender identity or gender expression not matching one's assigned sex. Transgender is independent of sexual orientation; transgender people may identify as heterosexual, homosexual, bisexual, etc; some may consider conventional sexual orientation labels inadequate or inapplicable to them.[1] The United States Office of Personnel Management (OPM) advises federal employees that "transgender individuals are people with a gender identity that is different from the sex assigned to them at birth," and defines "gender identity" as an individual's "internal sense of being male or female."[2] According the American Psychological Association, it is not uncommon for transgender people to be the targets of hate crimes. They are also the victims of subtle discrimination—which includes everything from glances or glares of disapproval or discomfort to invasive questions about their body parts. [3]Further, transgender people routinely lose jobs, homes and families because of their status, and as such, are increasing turning to mediation to resolve their disputes.

Training:

Most mediation certification programs are lacking in transgender diversity training. Consequently, the mediator may have to look towards other resources such as those provided by the not-for-profit entity Human Rights Campaign (HRC). The HRC suggests that "education and training about gender identity can take the form of small, informal discussions, modules that are incorporated into a larger diversity training curriculum, or full-fledged training and educational programs on transgender issues conducted by outside trainers and facilitators." Communication and diversity training regarding gender identity in the mediation setting should be comparable to other training initiatives. For instance, if a mediator decides to take an online harassment training program that incorporates race and sex, she/he should also seek one that incorporates gender identity. [4]

---

[1] http://www.glaad.org
[2] www.opm.gov/diversity/Transgender/Guidance.asp.
[3] http://www.apa.org/
[4] www.hrc.org

Mediator Awareness:

Mediators should take the time to incorporate into their mediation toolkit a basic knowledge of transgender issues, concepts, and concerns. Further, they should educate themselves about gender identity and gender expression especially in terms of persons in transition. Transitioning is the process of changing one's gender presentation permanently to accord with one's internal sense of one's gender. The issue of transitioning most often arises in employment discrimination cases. The OPM reports that gossip and rumor-spreading in the workplace about gender identity is commonplace for employees undergoing transition and that many employers fail to ensure that employees are provided with clear guidance regarding appropriate workplace behavior as well as the consequences of failing to comply with anti-discrimination policies that include gender identity. A mediator can go a long way to provide for an inclusive mediation experience for transgender participants by merely educating her/himself as to the basic terminology, language and concepts of gender variant experiences including the gender transition process.

Summary:

Mediators have a responsibility to insure that gender identity is included in their practice's non-discrimination and non-harassment policies to firmly assert the rights of trans-identified individuals who participate in the mediation process.

About the Author

**Joseph G. Jarret is a Rule 31 Listed General Civil Mediator, a Federal Mediator and an Attorney who lectures full-time for the University of Tennessee, Graduate School of Public Policy and Administration. He has lectured across the country on various mediation issues and is a past-president of the Tennessee Valley Mediation Association, and a member of the Tennessee Association of Professional Mediators, the Tennessee Bar Association, and the ADR Section of the Knoxville Bar Association. Mr. Jarret 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 with service overseas. He holds the Juris Doctorate degree, the Masters in PublicAadministration degree, a Bachelors degree, and a Post-GraduateCertificate in PublicManagement. Joe Jarret can be reached at jgilaw1@gmail.com*

~ Roll Call ~

Congratulations to the following Newly Listed Rule 31 Mediators! These mediators were approved for listing at the ADRC Quarterly Meeting on January 27, 2015.

Ms. Audrey L. Anderson, Family
Ms. Suzan B. Baker, General Civil
Mr. Robert L. Bowman, General Civil
Mr. Aaron E. Bridgers-Carlos, Family
Mr. Edward L. Brundick, III, Family
Mrs. Tonya R. Craft, Family
Mr. Jason C. Davis, General Civil
Ms. Delain L. Deatherage, General Civil
Ms. Dona E. Diftler, Family
Ms. Julie M. Dombrosky, Family
Mrs. Genette E. Dugger, Family
Ms. Christina H. Duncan, General Civil/ Family
Mr. Jerry N. Estes, General Civil
Mr. Michael T. Fort, Family
Dr. Deborah S. Gentry, General Civil
Mr. Steven W. Grace, General Civil
Mr. Darryl D. Gresham, General Civil
Hon. Nolan R. Goolsby, General Civil
Ms. Shawna B. Hembree, Family
Mr. James R. Hickman, Family
Ms. Leah L. Hillis, General Civil
Ms. Michele D. Hodges, General Civil
Mr. Timothy J. Howell, General Civil
Ms. Georgina K. Hughes, Family
Mr. Jeffrey D. Irvine, General Civil
Ms. Jasmine L. Johnson, General Civil/Family
Ms. Karen D. Johnson, Family
Ms. Bonnie C. Jones, General Civil/Family
Mr. Joshua D. Jones, General Civil/Family
Hon. Michael R. Jones, Family
Mr. Leland D. Jordan, General Civil
Mr. Daniel E. Kidd, Family
Mr. Byron K. Lindberg, General Civil
Hon. John J. Maddux, Jr., General Civil
Mr. John E. Mason, General Civil
Mr. Charles W. McElroy, General Civil
Mr. Thomas F. Mink, II, General Civil
Mr. John H. Morris, General Civil
Mrs. Patrice A. Moses, General Civil/ Family
Hon. Buddy D. Perry, General Civil
Ms. Adonia L. Phillips, General Civil
Mr. Patrick L. Rice, Family
Ms. Sherri M. Stinson, General Civil/Family/DV
Mr. Billy J. Stokes, Family
Ms. Lauren G. Strange-Boston, Family
Mr. Gerald Taylor, Sr., Family
Ms. Hannah R. Tippett, General Civil
Mrs. Olivia M. Wann, General Civil
Mr. Timothy L. Warnock, General Civil
Mr. James F. Watson, Family
Ms. Robbie A. Welch, General Civil
Mr. Robert W. Wilkinson, Family
Mr. Gary R. Woodall, Family
Mr. Peter Yakimowich, General Civil
Ms. Katherine A. Young, General Civil

Important ADRC Dates

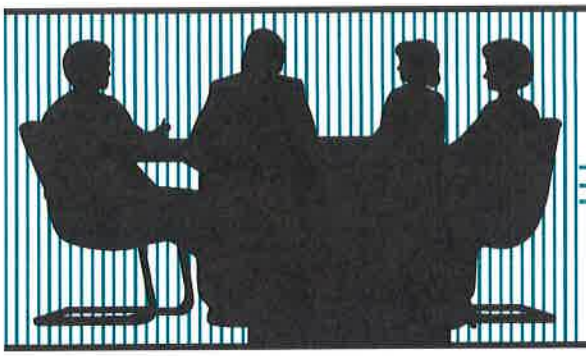
April 28, 2015.....ADR Commission Meeting, Administrative Office of the Courts, Nashville

June 2, 2015.....Rule 31 Mediator Applications Deadline for ADRC review on April 28, 2015

July 28, 2015.....ADR Commission Meeting, Administrative Office of the Courts, Nashville

We Would Like to Hear From You!

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



ADR NEWS

A publication of the Tennessee Alternative Dispute Resolution Commission

VOLUME 14, ISSUE 4 **FALL 2014**

Contacts

Tennessee Alternative Dispute Resolution Commission

- Howard H. Vogel, Esq. Chairperson, Knoxville
- Allen S. Blair, Esq. Memphis
- Linda Nettles Harris, Esq. Memphis
- J. Wallace Harvill, Esq. Centerville
- Tommy Lee Hulse Kingsport
- Hayden D. Lait, Esq. Memphis
- C. Suzanne Landers, Esq. Memphis
- D. Tracy Shaw, Esq. Nashville
- D. Bruce Shine, Esq. Kingsport
- Virginia Lee Story, Esq. Franklin
- Mary Ann Zaha Chattanooga

Supreme Court Liaison

- Justice Gary R. Wade

Programs Manager

- Claudia M. Lewis, Esq.

Programs Assistant

- Lara A. Daley

Send questions and comments to:

Tennessee ADR Commission
Administrative Office of the Courts
Nashville City Center, Suite 600
511 Union Street
Nashville, TN 37219-1768
Phone: 615-741-2687
Fax: 615-741-6285
Email: Claudia.Lewis@tncourts.gov
Web: www.tncourts.gov

IMPORTANT NEWS

(Left to Right: Justice Gary R. Wade, D. Bruce Shine, Tommy Lee Hulse, Allen S. Blair, J. Wallace Harvill, ADRC Chair Howard H. Vogel)

ADR Commission Members D. Bruce Shine, Tommy Lee Hulse, Allen S. Blair and J. Wallace Harvill were recognized by Supreme Court Liasion Justice Gary R. Wade and ADR Chair Howard H. Vogel at the November 6, 2014 ADRC Quarterly Meeting for their dedication and years of outstanding service as ADR Commission members. Their terms expire January 9, 2015.

The link to the Supreme Court Order soliciting written comments to proposed amendments (as modified by the ADR Commission) to Supreme Court Rule 31 can be found on the AOC website. This Order was filed on November 21, 2014. Per the Order, if you would like to comment on the proposed amendments, please submit your written comments to the Clerk on or before Monday, December 22, 2014.
http://www.tncourts.gov/courts/court-rules2/proposed-rules

The deadline for submission of your 2015 Renewal Form is December 31, 2014. ADRC Policies 19 and 20, which set out the renewal fee structure, can be found on the AOC website.
http://www.tncourts.gov/programs/mediation/resources-mediators/policies

---

Mediation Mastery and Improvisation- The Art of Mediating Above What We Know

By: Leigh Ann Roberts, Esq.

What do rappers, surgeons, jazz pianists and master mediators all have in common? Each has learned to harness their skills, creativity, and awareness, including information from both intuitive and unconscious sources, to adapt, adjust and improvise in the heat of the unpredictable moment. The idea of "shooting from the hip" or "winging it" in a complex dispute is likely to make even the most highly trained ADR professionals cringe just a bit. And, while there is comparatively little writing about this kind of risk-taking in mediations compared to other areas of skill development, few mediators would deny its necessity. Let's face it, our training and our skill prepare us for many issues and dynamics in the mediation room, but not all. That's where practicing the skill of improvisation becomes the next tool we sharpen for our ever growing master mediator's toolbox.

Improvisation is defined as generating words or ideas on the spot, where planning and time are limited. Many professionals engage in processes where order, control and predictability are ideal but not always possible. Many of the greats in their fields talk about the role improvisation plays and how the confidence and skill to engage in successful improv, takes time and practice. They say things like "you have to get out of your head"; "I got out of my own way and the solution just came to me"; "Out of the blue, I did something which was totally outside the box but made all the difference." These momentary leaps or "letting go" of the intellect, lead to innovative solutions and the most creative outcomes. Think of the joy of musical improvisation and how master musicians often take a seemingly chaotic collection of notes and effortlessly weave a work of art:

> *If you put a musician in a place where he has to do something different from what he does all the time, then he can do that- but he's got to think differently in order to do it. He has to use his imagination, be more creative, more innovative; he's got to take risks. He's got to play above what he knows- far above it.... I've always told the musicians in my band to play what they know and then play above that. Because then anything can happen and that's where great art and music happens.* – Miles Davis, Renowned Jazz Trumpeter and Band Leader

For those of you who are fascinated by the neuroscience of mediation, fear not. There is well-documented research that lends credence to the need for mediators to engage in well-placed improvisation. When a mediator engages in the creative act of improvisation the dorsolateral prefrontal cortex section shows a reduction in self-censoring, i.e.- worrying about what you will say next, and how it will be received by others-the kind of thought pattern that can effectively halt the creative flow and synthesis of information. The medial prefrontal cortex, on the other hand, shows a large increase in activity during improvisation and this engenders creativity, self-expression, storytelling and connecting seemingly unrelated concepts and opportunities. This means that we as mediators can literally practice and develop intentional strategies to move ourselves and parties "off-script" past inhibiting thoughts, positions and set communication patterns into elegant creativity, even in the most complex scenarios.

Science author Sandra Blakeslee wrote in her new book, The Body Has a Mind of Its Own: How Body Maps in Your Brain Help You Do (Almost) Everything Better, that "our brains are teeming with body maps...even a map that automatically tracks and emulates the actions and intentions of other people around you....These body-centered maps are profoundly plastic-capable of significant reorganization in response to damage, experience or practice." This "self-directed neuroplasticity" is exactly what top mediators are seeking when they opt to balance their advanced mediation training with alternative educational paths such as meditation, improv, stand-up comedy, etc. These practitioners

understand that the information needed in mediation comes from a variety of sources, if we are only able to perceive it and put it to use in the conversation. Whether it is being aware of our own surfacing creativity or simply being more skilled at "divining" the concerns of the participants, practicing improv helps improve mediator presence (or state of mindfulness) in mediation and reduce the knee-jerk need to squash or tamp down "off-script" input or reactions from participants that may contain valuable information. And, as Author Blakeslee points out, this practice will affect our ability to listen not only in professional settings but also with friends, family, colleagues and ourselves.

The Ladder of Learning dictates that as we grow in our practice we move from novices not knowing what we don't know (unconscious unknowing) up several rungs until finally we are at unconscious knowing. This kind of unconscious knowing is what Miles Davis woke up with every morning and what author Malcolm Gladwell talks about achieving after 10,000 hours of practice in his book Outliers. But the perilous side of unconscious knowing is being on "auto-pilot;" a certain departure from the "beginner's mind" that so many artisans and master mediators urge their colleagues to maintain. Several years ago TAPM members enjoyed a wonderful lecture from Texas mediator Eric Galton in which he talked about how he revamps his opening statement at least 3 or 4 times a year so he doesn't get "stale" or sound "robotic" when delivering this important educational and potentially trust-instilling message to mediation participants. Doug Silsbee, author of The Mindful Coach, cautions master coaches about this is a kind of "self-hypnosis that can result when we believe we have mastered something," while promising mindfulness and awareness as the antidote to this potential pitfall. Much in the same way, improvisation training encourages practitioners in our field to approach each mediation with a fresh pair of eyes; to resist the leaning on old scripts; and choose different routes for the sake of avoiding the same dispute resolution road-blocks.

If you practice mediation long enough, you have a story or two or ten about how your own assumptions, attachments or aversions slowed or blocked the resolution process. Improvisation heightens your professional presence and ability to reflect and adjust in the moment of need. You become better able to react and respond to uncharted territory of interpersonal conflict without always trying to take control or limit what appears to be "unhelpful" content. You may find, like so many other experts, that you "get out of your own way", and the way of the parties. I hope you will experiment, mediate above what you know and find yourself on the way to an unscripted and artful solution.

To experiment more with how improvisation skills and tools can improve your mediation practice, Mediator Roberts and local improvisation coach Jackie Schlicker will be hosting an improv training for advanced mediation skills January 17, 2015, in Nashville, Tennessee. Participants will receive CME credits. All approved CME programs can be found on the AOC website at: **http://www.tncourts.gov/programs/mediation/resources-mediators/continuing-mediation-education**.

About the Author

Attorney Leigh Ann Roberts was raised in Jackson, Mississippi and attended undergraduate and law school at the University of Mississippi. Leigh Ann has been a civil mediator for over 15 years and is listed as a Tennessee Supreme Court Rule 31 Civil Mediator. Leigh Ann has mediation, arbitration, facilitation, training, coaching and conflict resolution skills and experience for a wide spectrum of parties and disputes. She is a founding member of the Brentwood law firm of Papa & Roberts, PLLC, and has represented many businesses, corporations, both for and nonprofit, in Tennessee. In addition to having served as an Adjunct Professor of Alternative Dispute Resolution, Mediation and Negotiation at Belmont University's Massey Graduate School of Business and the Belmont University College of Law, Leigh Ann is a frequent lecturer and corporate trainer on topics such as ethics, conflict resolution, mentoring, leadership, organizational coaching, mediation, negotiation, group dynamics, giving/receiving feedback, emotional intelligence, diversity, harassment/employment law issues and other topics related to law, communication and professional development.

~ Roll Call ~

Congratulations to the following Newly Listed Rule 31 Mediators! These mediators were approved for listing at the ADRC Quarterly Meeting on November 6, 2014.

Mrs. Brenda W. Alexander/Family
Mr. Mohammed Almumayiz, General Civil
Dr. Teresa A. Bicknell, General Civil
Ms. Karen T. Boyd, General Civil
Mr. Thomas Boyers, V., Family
Mr. Robert P. Bramlett, General Civil
Mr. Aubrey L. Brown, Family
Mr. David J. Callahan, General Civil
Dr. James M. Clyburn, General Civil
Mr. James H. Conger, General Civil
Mr. Allen R. Daubenspeck, Family
Mr. Bradley M. Davis, General Civil
Mr. Jason C. Davis, Family
Ms. Aisha I. DeBerry, General Civil
Mr. Radford H. Dimmick, General Civil
Mr. Jason R. East, General Civil/Family/DV
Hon. Daniel B. Eisenstein, General Civil
Ms. Mary Katherine Everette, Family
Ms. Gloria D. Giannetto, Family
Mr. Roger R. Graham, Family
Hon. Robert P. Hamilton, General Civil
Mr. Oyama Hampton, General Civil/Family/DV
Ms. Reba M. Hinkle, General Civil
Ms. Brendi E. Kaplan, Family
Ms. Teresa M. Klenk, General Civil
Ms. Nina M. Kumar, Family
Ms. Angela Lawson, General Civil
Ms. Rashidah A. Leverett, General Civil
Ms. Corletra F. Mance, General Civil
Dr. Julia A. McAninch, Family
Ms. Mary A. McCarthy, Family
Ms. Kristen E. Menke, Family
Ms. Jean A. Mezera, Family
Ms. Danielle N. Mitchell, Family
Ms. Melissa A. Morris, General Civil
Ms. Julie E. Myrick, General Civil
Mrs. Haley M. Newton, General Civil
Mr. Carter N. Paden, III, General Civil
Mr. Edricke L. Peyton, General Civil
Dr. Phillip R. Pistole, Family
Ms. Sharon L. Reddick, Family
Mr. David H. Roussea, Family
Mr. John M. Rudolph, Family
Ms. Amanda L. Russell, Family
Ms. Jill M. Sexton, Family
Dr. Anne Simpson, General Civil/Family
Hon. Carol L. Soloman, General Civil/Family/DV
Mr. Keith H. Solomon, General Civil/Family/DV
Ms. Jennifer C. Surber, General Civil
Mr. Karl D. Warden, General Civil/Family
Mr. Joseph P. Weyant, General Civil
Mr. Hoyt (Mark) White, General Civil
Ms. Paula Dee Wilson, General Civil
Mr. Clifford Wilson, General Civl
Hon. Steven L. Wolfenbarger, General Civil
Ms. Bonnie M. Woodward-Weller, General Civil/Family
Ms. Deborah J. Wright, General Civil
Mr. Charles P. Yezbak, General Civil
Mrs. Pamela A. Youngblood, General Civil

Important ADRC Dates

January 27, 2015.....ADR Commission Meeting, Administrative Office of the Courts, Nashville

March 3, 2015.....Rule 31 Mediator Applications Deadline for ADRC review on April 28, 2015

April 28, 2015.....ADR Commission Meeting, Administrative Office of the Courts, Nashville

We Would Like to Hear From You!

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