



ADR

NEWS

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IMPORTANT NEWS

Harold Archibald, an attorney, Rule 31 listed general civil mediator, and ADR Commission member from 2009-2012, passed away in Memphis on November 30, 2012. Our condolences go out to Mr. Archibald's family.



D. Tracy Shaw, an attorney and Rule 31 listed general civil mediator in Nashville, has been appointed by the Tennessee Supreme Court to replace Hon. Ben H. Cantrell, Senior Judge, on the ADR Commission.

Linda Nettles Harris, an attorney and Rule 31 listed general civil and family mediator in Memphis, has been appointed by the Tennessee Supreme Court to complete the remainder of Harold Archibald's term on the ADR Commission.



By Order of the Tennessee Supreme Court on February 12, 2013, Sections 11(b)(6) and 11(b)(12) of Rule 31 have been amended. To see these sections and Rule 31 in its entirety, go to:

<http://www.tncourts.gov/rules/supreme-court/31>

The Best Way to Avoid Impasse: Interdisciplinary Mediation

By: Alan G. Crone & Dr. James Latta

“If they want to pay that, I don’t want it.” “It’s not about the money...it’s about the principle.” “That’s extortion!” “The other side needs to ‘get real.’” “Why do I have to do all the work on this settlement? She has not moved at all since we got here!” “I would rather go to court and lose than take that now.” “I would rather go to court and lose than pay that now.” “I would rather pay you (my lawyer) twice that amount to fight this.” If you are a lawyer or a mediator who has participated in one or more mediations, then you have heard at least one of those statements from your client, the other side, or one of the lawyers. The art of mediation has come a long way, but it still has a way to go when it comes to beating a mediator’s greatest nemesis, impasse.

The classic mediation format of caucus style “shuttle diplomacy” ending in some evaluative arm twisting can be effective, but it does not always work and it can leave all or some of the parties with a bad taste in their mouth for the process, the result and their lawyer. This format generally focuses primarily on the monetary value of the case and can ignore other non-economic factors which affect parties’ motive to settle and satisfaction. If the sole focus of the mediation is money, then when the parties cannot reach agreement on the monetary value of the case, then impasse is soon to follow. A new mediation format, Interdisciplinary Mediation, can provide an alternative path around, over, under or through impasse to resolution.

Simply put, Interdisciplinary Mediation is the use of a team of two or more mediators who have diverse professional backgrounds. For example, Lawyer and Therapist, Lawyer and Financial Expert, Therapist and CPA to help the parties better prepare for mediation and explore the non-economic aspects of their dispute before and during the mediation to help craft creative solutions to seemingly insoluble problems. The combinations are nearly limitless.

Mediation terms are not subject to any control for uniformity. Interdisciplinary Mediation could also be called Team Mediations, Co-Mediation, or other names. The purpose of the inclusion of an additional discipline(s) into a particular mediation process is not only to bring an additional skill set to bear, but to distance the input of the therapist co-mediator from the lawyer mediator. This article focuses on Interdisciplinary Mediation involving a Lawyer/Therapist format.

The therapist mediator brings to the mediation process particular training, skills and experience in facilitating communication between conflicted persons and identifying/addressing the emotional processes that each party to the mediation is experiencing. Applied to the mediation setting these insights maximize conflict resolution and minimize impasse between the parties producing enhanced “buy-in” from all involved.

Another benefit of co-mediators is the broader perspective and brainstorming between the co-mediators. While the lawyer mediator can provide valuable insight into the procedural, substantive, and logistical elements of the litigation or dispute at issue, a therapist mediator can pick up on emotional, psychological, and non-legal signals. As the co-mediators discuss their observations together they can construct better strategies for achieving resolution that might be very difficult or impossible for each one working alone.

Family law practitioners might already be familiar with these concepts and tactics. Other civil attorneys may scoff and say that outside of parenting plans, division of property, custody, and visitation disputes co-mediation is not necessary because business disputes and personal injury cases do not have such emotional or complicated issues beyond the monetary value of the case. Mediators know better. Co-mediation can benefit a wide variety of non-family law cases such as: employment disputes, will contests, disputes between shareholders or business partners, catastrophic personal injury claims, etc.... Often impasse is the result of the mediator, the parties, and counsel's failure to address noneconomic issues or objections. Even when a settlement is reached, no matter how good the result, the parties can be dissatisfied with the process and their lawyers because they felt pressured or coerced into the settlement.

The cost of adding co-mediators is not insignificant. The value added can be immense. The therapist mediator might be the difference between a successful mediation with a settlement and impasse. This savings can be exponential.

Interdisciplinary Mediation can also increase the parties' satisfaction with the outcome and the process. This in turn will increase their opinion and satisfaction with their counsel. How many of our clients walk away from a settlement feeling that at the end of the day their lawyer was not willing to "fight for them" or made them "sell out" even when the lawyer knows that although the result was a compromise given the odds of winning, the transaction costs associated with continued litigation, and other legitimate factors, the settlement was a "very good deal?" Why does this happen? Many times it comes from a lack of preparation of the parties for the intellectual and emotional choices they must make during the mediation.

Lawyer mediators tend to be "evaluative mediators" no matter how facilitative they may try to be. At the end of the day lawyers and parties alike want mediators to be evaluative; in other words, they want the mediator to tell them, "What do you think its worth?" Settlements often come down to a formula involving such variables as: how much is the case worth on a good/bad day; the chances of success; the amount of time it will take to get the desired result; the cost of achieving the desired result; and, other assorted variable depending on the type of case and experience of the lawyers involved. At the end of a mediation session a party can find themselves in a "hot box" situation. If along the way that party is not prepared for that moment both intellectually and emotionally, then impasse or dissatisfaction can be the result. At this pivotal moment in the mediation the therapist mediator could contribute to the positive perceptions of the parties utilizing emotional reframing approaches that lower resistance to the acceptance of change in expectations and realistic appraisal of outcomes.

Therapist mediators can also serve as "mediation coaches" to prepare litigants for the process of mediation. Often parties who have a large emotional investment in a dispute have to take time to unwind the emotional issues and investment from the objective and practical legal outcomes which drive most settlements. A therapist mediator can help to recognize, identify, and chart those emotional drivers before the mediation. They can work with the parties prior to and during the formal mediation session to begin to unpack those emotional drivers and lay the ground work for the party to be able to lay them aside at the appropriate time during the mediation to resolve the case.

Often when counsel tries to do this before or during the mediation this attempt can backfire. While it may be good advice, clients sometimes see this change on the part of their lawyer from adversarial advocate to peacemaker as disloyal. The lawyer mediator acting alone can lose her stature as a neutral if she hits these areas too hard. A therapist co-mediator, while not being clinically therapeutic, can open these issues with a party in a helpful way. This increases the party's satisfaction with the mediation process and her own lawyer.

For example, a corporate decision maker who cannot shake the plaintiff's accusation that she is a racist in a Title VII case has to first deal with that emotional response before she can objectively deal with the business side of the resolution of that case in mediation. A partner in a case involving his business' partnership dissolution may have to reconcile the fact he feels betrayed or rejected by this former partner's desire to break up the business and therefore, refuses to entertain legitimate offers to resolve the case. A plaintiff who is fearful of settling her lawsuit because she sees it as "selling out" may need to explore what she really expects to gain from the lawsuit beyond money. All of these issues and many more are present in commercial and business related disputes

Often these issues are not obvious and lay far beneath the surface. These issues may not be identified or related to the legal and factual issues involved in the dispute. The lawyers, the parties and the mediator may miss them entirely. Therapist co-mediators can and do play a key role in spotting those issues and reducing or eliminating them as agents of impasse.

Not all cases need co-mediators. If the parties are all battle hardened professionals, so experienced, or so objective that there are no emotional aspects to their dispute then adding a therapist co-mediator might not add any value to the process. When, however, one or more of the parties are new to the litigation or mediation process or have serious emotional investment in the issues surrounding the case, then a therapist co-mediator might be helpful to help prepare the parties for mediation. It is often difficult to spot these emotional roadblocks. The issues involved are often deep and seemingly unrelated to the issue or case at hand. Therapist co-mediators can help to unpack and organize the emotional aspects of the dispute to first identify them. Later, they can help to defuse them before or during the mediation session which can lead to the parties' agreement and greater satisfaction with the process and their lawyer(s).

About the Authors:

Alan G. Crone, Esq.

Alan G. Crone, Esq. is an inactive Rule 31 General Civil Mediator. Mr. Crone is an Attorney and focuses his practice on complex business, commercial, and employment related disputes. While he is licensed to practice law in Tennessee and Arkansas, he has represented clients in courtrooms all over the United States. Mr. Crone enjoys cases with complex factual and legal issues and challenges. He has served as lead counsel in class actions and on Steering Committees before the Multi-District Litigation Panel.

Dr. James Latta

Dr. James Latta is a Rule 31 General Civil and Family Mediator. He is a certified and licensed Professional Counselor by the State of Tennessee. He holds a Doctor of Ministry degree in Pastoral Care and Counseling from Louisville Presbyterian Seminary. Dr. Latta's understanding of human interaction and emotions plus his training as a mediator makes him particularly skilled at conducting a mediation between parties with disputes with high emotional content and acting as a therapist co-mediator or a mediator coach.

~ Roll Call ~

**Congratulations to the following Newly Listed Rule 31 Mediators!
These mediators were approved for listing at the ADRC Quarterly Meeting on January 22, 2013.**

Ms. Deborah D. Alsup	General Civil/Family	Ms. Shontell T. Jordan	General Civil/Family
Ms. Nichole M. Arsenault	General Civil/Family	Mr. Thomas D. MacNamara	General Civil
Ms. Danielle W. Barnes	General Civil	Ms. Anne H. McCarroll	Family
Ms. Tracey A. Brewer-Walker	Family	Mr. Wallace A. McDonald	General Civil
Mrs. Tonda L. Brooks	General Civil	Mr. Michael W. Miller	General Civil/Family
Mr. Lee E. Brooks	General Civil	Mr. Zachary P. Morris	General Civil
Mr. David E. Brown	Family	Ms. Hillary A. Pate	Family
Dr. Merriel E. Bullock-Neal	Family	Ms. Mary J. Presley	General Civil
Ms. Yolandra Y. Clark	General Civil	Mr. Adam M. Priest	Family
Mr. Daniel R. Conley	Family	Mr. Thomas C. Quinlen	General Civil
Ms. Chessia A. Cox	Family	Dr. William Respress	General Civil
Mr. Clyde M. Crutchfield	General Civil	Ms. Mary Beth A. Rice	Family
Mr. Brian Cummings	General Civil	Mr. Steven L. Robbins	General Civil
Ms. Julie E. Cummins	Family/DV	Mr. Michael J. Sandler, Sr.	General Civil/Family
Ms. Brandy N. Davis	Family	Mr. Cary Schwimmer	General Civil
Mr. William L. Denami	Family	Mr. David L. Scott	General Civil
Mr. James M. Doran, Jr.	General Civil	Mr. Randall E. Sermons	General Civil
Ms. Rose M. Drake	Family	Ms. Gail R. Sevier	Family
Ms. Pamela Drewry-Rodgers	General Civil/Family	Mr. Matthew W. Sexton	Family
Mr. David M. Dunlap	General Civil	Ms. Machele D. Shields	General Civil
Mr. John C. Duval	General Civil/Family	Mr. Richard G. Stujenske	General Civil
Mrs. Sarah C. Easter	Family	Ms. Sharon L. Terry	General Civil
Mr. James A. Fletcher	Family	Mrs. Heather L. Thompson	General Civil
Ms. Doella L. Gilmer	Family	Mr. Evan A. Walden	Family
Ms. Carla W. Green	Family	Ms. Shannon D. Walker	Family
Mr. Thomas J. Hayes	Family	Ms. Celeste M. Watson	General Civil
Ms. Cheryl M. Hearn	General Civil/Family	Mr. Michael K. Williamson	General Civil
Ms. Willie M. Holbert	Family	Ms. Melanie T. Wilson	General Civil
Ms. Annette L. Jackson	Family	Mrs. Rebecca S. Woods	General Civil
Mr. Chadwick W. Jackson	General Civil		

Important ADRC Dates

April 23, 2013	ADR Commission Meeting, Administrative Office of the Courts, Nashville
June 4, 2013	Rule 31 Mediator Applications Deadline for ADRC review on July 23, 2013
July 23, 2013	ADR Commission Meeting, Administrative Office of the Courts, Nashville
September 3, 2013	Rule 31 Mediator Applications Deadline for ADRC review on October 17, 2013
October 17, 2013	ADR Commission Meeting, 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 for publication 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 publication in the *ADR News*, please contact Claudia Lewis, AOC Programs Manager, at Claudia.Lewis@tncourts.gov.