

**PRESIDENT'S MESSAGE  
STEPHEN SHIELDS  
TAPM President 2012-2013**

**July 2012**

**Inside this issue:**



**PRESIDENT'S MESSAGE**

**Annual Seminar:**

First, I'd like to share some great news about our next annual seminar, which is scheduled for February 21, 2013. Nina Meierding has agreed to be our featured speaker this year! This is exciting because Ms. Meierding's credentials are nothing short of amazing. She has helped resolve thousands of disputes and has conducted training throughout the world including Canada, Sweden, Ireland, England, Scotland, the Netherlands, and India. She has also trained a variety of individuals and groups including court systems, medical agencies, business entities (both small and large), and government agencies in conflict resolution, cross cultural issues, management skills, and negotiation skills. Given the considerable range of Ms. Meierding's experiences and her stellar reputation, I anticipate that her presentation is one that you will want to make every effort to attend.

**Case Update – Duty To Mediate In “Good Faith”:**

From time to time, it is my hope that we will have an avenue for sharing interesting cases with one another, including some that are not of public record and would otherwise escape our attention. For example, I recently obtained a copy of an Order from a Chancery Court in Madison County that is definitely worth a mention. Following a failed mediation, plaintiff's counsel filed a motion against the defendant for contempt and sanctions for failure to “mediate in good faith.” Although plaintiff's counsel conceded that there was no requirement under Rule 31 for the parties to mediate “in good faith,” he nevertheless asserted that the court should take the opportunity to set a new standard demanding as much.

*(President's Message Continued on page 2)*

President's Message	1
Stephen Shields	
Meet the Mediator Kim Burnette	3
Hot Family Law 2012	5
The Ethical Challenges Of Public Sector Mediation	6
By Joseph Jarret	
What Mediators Are Reading	8
Spotlight: Community Mediation Columbia TN	9

*(President's Message Continued from page 1)*

Well, you can probably guess the court's response: The court looked to Rule 31 itself and the fact that it was devoid of any authorization for courts to set forth any standards for "good faith" mediation. The court went on to make a more practical observation about the plaintiff's request as well. Since all evidence of statements made in compromised negotiations is inadmissible, parties are barred from presenting evidence of a failure to mediate in good faith. Plaintiff's counsel had also argued that despite the lack of a requirement to mediate in good faith that the court had "inherent" authority to make and enforce such a requirement. But the court also easily dispatched with this line of reasoning, concluding that "[w]hile the court's inherent authority is extremely broad, it is not without limits and this court declines the invitation to expand on the rules of the Tennessee Supreme Court dealing with the standards for mediation."

This case serves as a vivid reminder for all Rule 31 listed mediators that there is no requirement to "mediate in good faith." But it also illustrates a second crucial point: We must limit the information in our reports to the information set forth in Rule 31. Likewise, remember that Section 7 of Rule 31 specifically incorporates Rule 4.08 of the Rules of Evidence.

This case also demonstrated to me that we should help educate advocates about the parameters of Rule 31, and I hope that TAPM will do so in future seminars.

Lastly, if you have any interesting cases, please share them with us so that we can all benefit. If you would like a copy of the full Opinion in the matter discussed above, email me and I will send it to you.

Thank you.

Stephen Shields  
Jackson, Shields, Yeiser & Holt  
262 German Oak Drive  
Memphis TN 38018  
Office: 901-754-8001  
Cell: 901-412-6970  
Email: sshields@jsyc.com

\*\*\*\*\*



## MEET THE MEDIATOR

**R. KIM BURNETTE**  
**ARNETT, DRAPER & HAGOOD**  
**2300 FIRST TENNESSEE PLAZA**  
**KNOXVILLE, TN 37929**  
**(865)546-7000**  
**KBURNETTE@ADHKNOX.COM**

**Kim Burnette** is a native of Loudon County, and received his J.D. from the UT College of Law in 1985. After serving a one year clerkship with Federal Magistrate Judge John Y. Powers in Chattanooga, he returned to Knoxville and has been in practice since 1986 with Arnett, Draper & Hagood. During the course of that practice, he has tried many cases in Tennessee State and Federal Courts. He has also represented clients in numerous mediations. As a result, he is very aware of the value of mediation in terms of the savings of time, trouble, expense and uncertainty of going to trial. He received his mediation training and has maintained Rule 31 Certification since 2002. Since that time, he has served as a mediator in numerous cases, and currently serves as Chair of the ADR Section of the Knoxville Bar Association.

### **What is in your mediator tool kit? What is your favorite or most used tool?**

I'm not sure that I have a particular tool or tactic that I can point to as a favorite, but what I most bring to mediation is my experience as a trial practice lawyer, now for over 25 years. I was very fortunate to grow up as a lawyer here at AD&H. I had excellent mentor attorneys to learn from, and my practice has always included both plaintiff and defense work, which I believe has given me a good perspective. That experience allows me to identify with the folks on both sides of the mediation table, and I think they in turn have the sense that I am truly there to help everyone, not as an advocate for one party or the other, but as an advocate for a resolution that all of the parties can agree to.

### **One you have been selected as the mediator, what do you do to prepare the attorneys and their clients for the mediation?**

If I actually got to personally prepare the attorneys and their clients for mediation, the process would go very smoothly, and we would have an agreement in very short order. Unfortunately, I don't get to do that. What I do is to send the involved attorneys a letter confirming the date, time and location of our mediation, and I include a short Mediation Agreement that I ask that all attorneys and their respective clients or representatives sign. That agreement spells out in brief form the terms of the engagement. I also suggest, but do not require, that counsel send me

*(Burnette Continued on page 4)*

*(Burnette Continued from page 3)*

anything for review that they believe will be of help to me in helping them, whether it be pleadings, depositions, photos, legal authorities or argument. I much prefer to have those sorts of things in advance of a mediation, so that I will know what the case involves. I also encourage the attorneys to let me know if there is some special issue or problem (for example a very emotional client), so that I can be prepared for that issue before the mediation, rather than be hit with it cold. I also tell the attorneys that any agreement reached will be reduced to writing at the time of the mediation. That way, no one leaves without a clear understanding concerning the terms of any agreement reached.

### **What is your pet peeve in mediation?**

Two things. First, when attorneys (and this happens on both sides of the fence) have given their clients false or exaggerated expectations. Second, when the attorneys issue ultimatums: ~~“We’ll~~ never take less than X+or ~~“We’ll~~ never pay more than Y+.

### **Are you married/do you have kids/pets etc?**

Yes, Elizabeth and I have been together since the time that I started here at AD&H. We actually had our first date the weekend before I started here as a new associate. Between us, we have three wonderful daughters, and now five grandchildren . for which there is no substitute.

### **Why did you become a mediator?**

I started thinking of becoming a mediator at a time when mediation was really in its infancy here in the East Tennessee area. Representing clients in mediations showed me that there was great value in this process, one that saved on the time, trouble, expense, and uncertainty of litigation. As I now tell the parties in every mediation, not even the most experienced of trial attorneys has a crystal ball, and none of us can predict with certainty what a judge or jury might or might not do on a given day. I ultimately took the training and obtained my Rule 31 Certification not quite ten years ago, and have made mediation an important component of my practice since that time.

### **What are you most afraid of in mediation?**

That pride or even spite will sometimes stand in the way of a reasonable agreement being reached. Ego and emotional obstacles can be some of the toughest to overcome.

### **How do you debrief yourself after a mediation?**

Normally, after every mediation, successful or not, I try to sit for a few minutes and reflect on how the mediation progressed, what worked or what didn’t, and will sometimes make notes to that effect, which I keep for future reference. I also solicit feedback from the involved attorneys as to anything I might do differently in the future to provide better service as a mediator.

### **What do you see for the future of mediation?**

The number of civil cases being tried has decreased dramatically over the last ten years or so, and I really don’t see that changing. As a result, alternative dispute resolution, particularly me-

*(Burnette Continued on page 5)*

*(Burnette Continued from page 4)*

mediation, appears to be here to stay. I particularly like the voluntary nature of most mediations, because if parties have agreed to mediate, it suggests that the parties, or at least their attorneys, believe that a potential negotiated settlement may be preferable to litigation.

**Knowing what you now know about life etc., would you choose the same career path? If not, what would you like to do?**

Probably so. The practice of law is a continuing learning experience. That is a big part of its challenge and reward. Of course, the practice of law is at heart a service industry, and I have had the opportunity to serve and help literally thousands of individuals and organizations with their legal issues over the last 25 years. Lawyers are in a very unique position to provide that kind of service, and I feel blessed to have had that opportunity. I have also been extremely fortunate in getting to work with a great group of lawyers here at Arnett, Draper & Hagood . and getting to practice here in East Tennessee. The biggest drawback to the practice of law that I would note is that it can be all-consuming, both in terms of time and energy. It can be a real struggle to be %successful+in your practice and also give sufficiently of yourself to your family. I have certainly not always been successful in doing that, so if I have one piece of advice, particularly to young lawyers starting a family, it would be to give to them the time and attention that they deserve. On balance, while I would certainly try to do some things differently, I believe I would choose the same career path. I would add that the environment in which the practice of law takes place has changed considerably over the last 25 years, but that is a topic for discussion another day.

\*\*\*\*\*

### **TAPM Continuing Education HOT FAMILY LAW 2012**

**As part of its Continuing Education series Steve Cobb, Esquire (lobbyist for TBA) and Helen Rogers, Esquire, of Rogers, Kamm and Shea, presented Hot Family Law 2012, on June 28, 2012, at Harper's Restaurant in Nashville.**

**Steve Cobb updated TAPM on what had happened in the Legislature during the past session.**

**Helen Rogers has been keeping track of "Hot New Cases in Family Law". She covers issues pertaining to alimony, child support, civil procedure, contempt, division of assets, marriage, parenting, prenuptial agreements, and relocation.**

**For a copy of these materials please visit TAPM website page: [www.tennmediators.org/pg99](http://www.tennmediators.org/pg99).**

## The Ethical Challenges of Public Sector Mediation

By: Joseph G. Jarret\*  
 Knox County Law Director  
 Federal & Rule 31 Listed Mediator

Recognizing a marked erosion in the confidence the general citizenry had in the manner in which Tennessee's counties & municipalities conducted the people's business, the Tennessee General Assembly enacted the Comprehensive Governmental Ethics Reform Act (the Act) of 2006. This Act, codified in T.C.A. § 8-17-101 *et seq.*, required local governments to adopt ethical standards related to the acceptance of gifts and disclosure of conflicts of interest by 2007. Despite the aforementioned mandate, as well as similar legislation passed by myriad of states across the country, a recent study released by the nonprofit *Ethics Resource Center*, found that nearly 60 percent of government employees at all levels -- federal, state and local -- had witnessed violations of ethical standards, policy or laws in their workplaces within the last year. The perception that government has lost its moral compass provides unique challenges for the Tennessee mediator handling a dispute between a local government entity and a private citizen.

### The Challenge:

Generally speaking, citizens who seek redress from government for perceived wrongs in tort, civil rights violations, etc., generally come in two categories:

Those who feel you just can't fight City Hall and,

Those who feel as tax payers, come cloaked in an aura of entitlement.

On the government side, you have those public servants who feel that they are the guardians of the public coffers and therefore have a duty not to settle claims at any costs, and those who feel that it really isn't their money, so no settlement offer is not worth serious consideration. Regardless of who is ultimately at the negotiating table, the mediator should be prepared for an emotionally charged session. Consequently, it is worth the mediator's time to obtain at least a basic knowledge about the manner in which the governmental entity conducts its business. Failing to do so can greatly hinder the credibility of the mediator as well as the credibility of the mediation process. This knowledge can be easily obtained by observing a public meeting, reading a county or city's charter or reviewing an entity's code of ordinances. Further, the mediator should be aware of the government's exposure under the Government Tort Liability Act (T.C.A. §29-20-101, *et seq.*). Not every attorney who sues government is aware that, unlike cases in the federal arena, cases filed in the state arena provide the government with a level amount of sovereign immunity, or limits of liability, depending upon the nature of the claim.

### The Ethical Conundrum:

When undertaking a public sector mediation, the mediator is well-advised to presume that there are people who are not at the bargaining table who can influence the outcome of the session.

*(Ethical Challenges Continued on page 7)*

*(Ethical Challenges Continued from page 6)*

For instance, the government's representative will, in all probability, have an elected politic (i.e. city council or county commission) to whom she or he must answer. This body politic may have ultimate settlement authority, albeit may not have one of its members at the negotiation table. Further, depending upon the nature of the claim, the possibility that it has political overtones or media interest, could cause the government's representative to be reluctant to settle, regardless if the outcome would inure to the benefit of his or her client. On the plaintiff's side, not all persons who sue government seek redress in the form of a cash settlement. Rather, they seek changes in how the government does business. Such policy changes generally require the acquiescence of a majority of the body politic, and then only during the course of a duly noticed public meeting. It is suggested that the mediator require the parties to provide confidential mediation statements prior to the first session, and to insist that both parties come to the bargaining table with full settle authority, or the ability to recommend settlement to the body politic.

Another challenge facing mediators concerns the notion of confidentiality. Rule 31 of the Tennessee Supreme Court mandates that mediators 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. The mediator should not presume that the government's attorney and or representative need not be reminded of the rules of confidentiality. Persons employed by the public sector have inculcated in them at outset of their employment and beyond, Tennessee's Open Records and Open Meetings laws, rules and regulations. It is important to assure all parties that they enjoy equally, the confidentiality protections afforded by the Tennessee Supreme Court.

### **Summary:**

In summary, by taking the time to acquire a basic, working knowledge of how the government does business, the culture of the public sector environment, and those sovereign immunity laws and limits of liability upon which the government will rely, the mediator goes a long way in preserving the integrity of the mediation process while increasing the odds of a successful resolution of the dispute at hand.

*\* Joseph G. Jarret is a Federal and Rule 31 listed general civil mediator and an attorney serving Knox County as its Law Director. He has lectured across the country on various mediation issues and is a TAPM member, the 2009-2010 president of the Tennessee Valley Mediation Association, a member of the Tennessee Association of Professional Mediators, Tennessee Bar Association, and the ADR Section of the Knoxville Bar Association. Joe is also an award-winning writer who has published over 85 articles in various professional journals and is a former active duty United States Army Combat Arms Officer and Air Force Special Agent. He holds the juris doctorate degree, the masters in public administration degree, a bachelors degree, and a post-graduate certificate in public management. He is adjunct professor of public administration with the University of Tennessee, Graduate School of Public Administration. Joe Jarret can be reached at: [jjknoxcltd@gmail.com](mailto:jjknoxcltd@gmail.com)*

\*\*\*\*\*

## WHAT MEDIATORS ARE READING!

*Here is the list of books with a brief narrative.*

John Lande, *Lawyering with Planned Early Negotiation*

This guide is focused on lawyers and ADR advocates, but is helpful to mediators as well. It discusses how you can be more successful when you negotiate by using Planned Early Negotiations. The strategies in this book can help you become a more effective negotiator, which can increase your professional satisfaction, generate good will, relieve stress, and increase your effective billing rates with creative fee arrangements. This book is not only about negotiation -- it outlines a general approach to practicing law. It includes a CD with forms. This book will help you: build strong relationships with your clients; choose billing systems that maximize both your interests and your clients' interests; develop effective working relationships with the other side and minimize unnecessary conflict; increase your confidence when you negotiate; manage problems that commonly arise in negotiation; use experts and other professionals effectively; improve your negotiation skills throughout your career.

Andy Little, *Making Money Talk*

Learn how to deal with the peculiar problems of traditional bargaining through proven models and techniques that will help you to: gain a better understanding of the dynamics of money negotiations; identify the recurring problems presented in those cases; acquaint and arm yourself with new tools to handle those challenges; build a model of the mediation process that will serve as a roadmap when traditional bargaining is unavoidable; assist the parties in traditional bargaining in a facilitative, rather than a directive way. The book also includes an appendix comprised of proposals and counter proposals made by Plaintiffs and Defendants in over one hundred court-ordered mediations in the superior courts in North Carolina. The charts provide the reader with a sense of the difficulty in settling a case through traditional bargaining, and the frequency of settlement even when the parties' initial positions are far apart and movement is slow to materialize.

Wayne Brazil, *Early Neutral Evaluation*

This valuable guide is a tool to teach lawyers, litigants, neutrals, judges, court program administrators, and public policy analysts what early neutral evaluation (ENE) consists of, why and under what circumstances it can be used most productively, the difference between it and mediation (in the forms most commonly encountered by litigants and lawyers), and how clients, litigators, and neutrals have been assessed the value of ENE. Written by experts in the field, this handbook will equip lawyers and clients alike to decide more reliably when to use ENE and how to participate in an ENE process most effectively.

Robert Bolton, *People Skills*

It is truly utilitarian insofar as it helps develop your reflective listening skills and teaches techniques for avoiding or overcoming the most common communication barriers. And it also has a section on how to engage in collaborative problem solving. Quite simply, it is thought-provoking yet practical.

Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Detailed discussion about each stage of the mediation process)

Fisher and Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (A classic - remember its injunction, "separate the problem from the people" - should be on every mediator's bookshelf)

**(Reading List Continued on page 9)**

*(Reading List from page 8)*

Galton and Love (Editors), Stories Mediators Tell (A number of firsthand accounts by mediators providing advice on how to handle challenging situations)

Birke, *Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications* (Ohio State Journal on Dispute Resolution) (Birke discusses the application of neuroscience findings to each stage of the mediation process ó best article on the application of neuroscience to mediation I have read so far).

***What Featured Mediators Have Recommended (Provided by Regina Newson)***

Using Divorce Mediation: Save Your Money & Your Sanity by Katherine E. Stoner (Nolo Press, Berkley, 1999)

The Mote In God's Eye (about a society with a permanent class of mediators)

Making Money Talk by J. Anderson Little

The Courage to Confront by Richard Mayer

Getting to Yes

\*\*\*\*\*

**COMMUNITY MEDIATION SPOTLIGHT:**

**THE MEDIATION CENTER OF COLUMBIA**

The Mediation Center of Columbia began in 1995. We are located at 1 Public Square Columbia Tn 38401. Our mission is to help families and individuals achieve a peaceful and just resolution to conflicts.

We accept court and private referrals. We are a Victim-Offender Reconciliation Program provider. Our family mediation services include referrals from Chancery Court and private parties. This program includes mediations for parenting plans and other divorce mediations. We have a sliding scale fee for divorce related mediations.

We have an on-going training program for new volunteer mediators. All training is conducted by Tennessee Supreme Court Rule 31 listed mediators. If you would like more information please contact us.

Our Interim Executive Director is David Boyd and he can be reached at 931-840-5583.



**SAVE THE DATE!**

**Thursday FEBRUARY 21 2013  
6 HR CLE/CME Credit Pending**

**Annual Meeting &  
Advanced Mediation Training**

**NINA MIERDING, MS, JD—Presenter**

Nina Meierding, a national leader in the field of conflict resolution, has been providing training and mediation services for over twenty-eight years. She was the Director and Senior Mediator at the Mediation Center in Ventura, California from 1985-2007 where she mediated over 4,000 disputes. She is now a full-time trainer (Negotiation and Mediation Training Services) and professor. She has taught at Pepperdine University for over 20 years, Southern Methodist University for over 12 years and Lipscomb University for over 5 years. She is the mediation consultant and trainer for the Wisconsin Special Education Mediation System (WSEMS).

She is a former president of the Academy of Family Mediators and served on the Board of Directors of the Association of Conflict Resolution, the Council for Distinguished Advisors at Pepperdine University, the Advisory Board at Southern Methodist University, the Board of Directors of the Southern California Mediation Association and many other organizations. In 2005, she was awarded the John Haynes Distinguished Mediator Award, which is an international award given annually by the Association for Conflict Resolution.

Nina will provide a customized training to TAPM that will include topics of Negotiation and Advanced Negotiation, Mediation Advocacy and Collaborative Law Training.



P. O. Box 150626  
Nashville, TN 37215  
[tapm@tennmediators.org](mailto:tapm@tennmediators.org)  
[www.tennmediators.org](http://www.tennmediators.org)

**TAPM BOARD  
2012-2013**

**Stephen Shields  
President**

**John Blankenship  
President Elect**

**Ruth Hillis  
Secretary**

**Jackie Kittrell  
Treasurer**

**Regina Newson  
Director  
Newsletter Editor**

**Linda Warren Seely  
West TN  
Director**

**Howard Keltner  
Middle TN  
Director**

**Tommy Lee Hulse  
East TN  
Director**

**Joe Jarret  
Director**

**Lisa W. Smith  
TAPM Administrator  
615-383-TAPM**