

# **MEDIATION TN**

## **DEVELOPMENTS IN MEDIATION: MEDICAL DEBT & MORE**

**Presented To:**

**202 TN General Sessions Judges Conference**

**Presented By:**

**Stephen L. Shields**

**Chair**

**TN Alternative Dispute Resolution Commission**

**September 23, 2022**

**TENNESSEE  
SUPREME COURT  
ADR PLAN**

**PLAN FOR ALTERNATIVE DISPUTE RESOLUTION  
IN THE STATE COURTS OF TENNESSEE**

**SECTION 1. INTRODUCTION**

**1.1 Title.**

This is the Plan for Alternative Dispute Resolution (“the ADR Plan”) in Tennessee State Courts.

**1.2 Purpose and Scope.**

- (a) Purpose. The Purpose of the ADR Plan is to offer to civil litigants an alternative to the formal processes associated with litigation and to encourage and promote the use of alternative methods of dispute resolution to provide quicker, less expensive, and potentially more satisfying alternatives to continuing litigation, without impairing the quality of justice or the right to trial.
- (b) Scope. The ADR Plan applies to eligible civil actions pending or commenced on or after the Effective Date. The ADR Plan supplements Tennessee Supreme Court Rule 31 which shall remain in full effect.

**SECTION 2. REFERRAL TO MEDIATION**

**2.1 Referral Process.**

- (a) New or Pending Cases. Judges, in their sole discretion, are encouraged to refer new or pending cases to mediation.
- (b) Referrals. Any judicial referral shall be either: (1) Court-ordered mediation; or (2) Court correspondence encouraging the parties to voluntarily participate in a Rule 31 mediation.
- (c) Selection of Cases. Priority referrals should be given to cases in which one or more parties are self-represented. A Judge may also refer cases to mediation in which all parties have attorney representation.

**2.2 Relief From ADR Referral.**

- (a) Opt-Out Motions. Any party may file a motion to opt out of court-ordered mediation within fifteen (15) days of the date of an Order of Reference.
- (b) Criteria. A trial judge may grant an opt-out motion for good cause shown.



### SECTION 3. MEDIATORS

- (a) Mediators. Judges are encouraged to refer cases (especially self-represented cases) to Community Mediation Centers (“Mediation Center” or “Center”) in the three grand divisions: Mid-South Community Justice & Mediation Center in Memphis, Nashville Conflict Resolution Center in Nashville, and Community Mediation Center of Knoxville in Knoxville. In addition, a Court may continue to refer cases in its jurisdiction to a Center to which it ordinarily refers cases. (List of Centers – Exhibit A).
- (b) Qualification of Mediators. A mediator conducting mediations under the ADR Plan shall be a Rule 31 Listed Mediator currently in good standing with the Alternative Dispute Resolution Commission.
- (c) Change of Mediators. If a Mediation Center selects a mediator and one or more of the parties objects to the mediator selected, the Mediation Center shall provide another mediator. Unless otherwise agreed by the parties or ordered by the Judge, each party may only exercise this option once.
- (d) Private Mediator. The parties retain the right to select by agreement a Rule 31 Listed Mediator. If a case has been referred to a Mediation Center and the parties agree upon a private mediator, they shall notify the Court and the Mediation Center.
- (e) Notice of Recusal. A mediator who discovers a circumstance requiring disqualification shall immediately notify all counsel, self-represented parties, and the Court. If the mediator was chosen by a Mediation Center, he or she shall notify the Mediation Center instead of the Court. A new mediator shall be selected by the process set forth above. In the event the parties are unable to agree upon a mediator, one will be chosen by the Court.

### SECTION 4. MEDIATION PROCESS

- (a) Informal process. A Rule 31 mediation is an informal process in which a Rule 31 Listed Mediator conducts discussions among the parties to enable them to reach a mutually acceptable agreement on all or any part of disputed issues. The mediator has no decision-making authority, but will facilitate the parties’ negotiation leaving the rights of self-determination to the parties.
- (b) Compliance with Rule 31. All persons serving as mediators pursuant to the ADR Plan shall comply with the standards and procedures set forth in Tenn. S. Ct. R. 31 and will be entitled to all of the immunities and protections provided by Tenn. S. Ct. R. 31.



## SECTION 5. CONFIDENTIALITY IN MEDIATION

- (a) Mediation is Confidential and Private. Evidence of conduct, information disclosed or any statement made in the course of a Rule 31 mediation is confidential to the extent agreed by the parties or provided by other law or rule of the State. There shall be no stenographic or electronic recording, audio or visual, of the mediation process. No participant or unauthorized person may make a stenographic or electronic recording, audio or visual, of the mediation process.
- (b) Communication with the Mediator. Once the mediator is assigned, the mediator may, at his or her discretion, discuss the case in confidence and *ex parte* with self-represented parties or counsel for parties. A mediator shall keep confidential from the other party any information obtained in any *ex parte* session unless the party to the *ex parte* session permits the disclosure.

## SECTION 6. COMPENSATION OF MEDIATORS

- (a) Private Rule 31 Mediator's Fee. A mediator's fee shall be shared equally by all parties, unless otherwise agreed by the parties or ordered by the Court.
- (b) Community Mediation Center's Fee. Any fees of a Mediation Center shall be set by each Center.

## SECTION 7. PROCEDURE FOR NOTIFYING PARTIES EITHER BY ORDER OR BY REQUEST

- (a) When a Judge orders the parties to participate in a Rule 31 mediation, the Court shall provide the parties with an Order of Reference. If referred to a Mediation Center, the Court shall send a copy of the Order and any pleadings the Court deems necessary to the Center. (Exhibit B)
- (b) When a Judge encourages the parties to voluntarily participate in a Rule 31 mediation, the Court shall notify the parties and may notify them of an available Mediation Center. The Court shall also send a copy of the referral letter to the Center. (Exhibit C)

## SECTION 8. MEDIATION CENTER'S COMMUNICATION WITH PARTIES

- (a) After a referral is made, the assigned Mediation Center shall notify the parties by letter or email of the opportunity to utilize the Mediation Center's mediation

services. If a mediation is Court-ordered, the Mediation Center will proceed with the assignment of a mediator and notification of the parties by letter or email.

#### **SECTION 9. HOW MEDIATION MAY BE CONDUCTED**

- (a) Mediations may be conducted in person (physically present) or remotely, that is by use of an audio and video conferencing platform or by telephone.

#### **SECTION 10. EVALUATION**

- (a) The confidentiality of information disclosed during mediation does not prohibit or limit: (1) the Court or Mediation Centers collecting information for the purpose of evaluating the ADR Plan; (2) the Mediation Centers' use of such information for purposes of mentoring volunteer mediators; (3) the mediator filing a Mediator Report advising the Court of the outcome consistent with the provisions of Tenn. S. Ct. R. 31.
- (b) Information collected by the trial court or the Mediation Center for the purpose of evaluating the ADR Plan will be used for research and monitoring purposes only. The sources of specific information concerning the communications protected by the confidentiality provisions of Tenn. S. Ct. R. 31 will not be disclosed to the trial court or in any report.

**EXHIBIT A**  
**COMMUNITY MEDIATION CENTERS**

**Community Mediation Center**

912 S. Gay Street, Suite L-300  
Knoxville, TN 37902  
(865) 594-1879  
[info@2mediate.org](mailto:info@2mediate.org)  
<https://2mediate.org/>

**Nashville Conflict Resolution Center**

4732 W Longdale Drive  
Nashville, TN 37211  
(615) 333-8400  
[info@nashvilleconflict.org](mailto:info@nashvilleconflict.org)  
<https://nashvilleconflict.org/>

**Mid-South Community Justice & Mediation Center, Inc.**

262 German Oak Drive  
Memphis, Tennessee 38018  
731-217-8013  
[info@cjammediation.org](mailto:info@cjammediation.org)  
<https://cjammediation.org/>

**Community Mediation Services (CMS)**

P.O. Box 4081  
Oak Ridge, TN 37831-4081  
(865) 463-6888  
[info@cms-tn.org](mailto:info@cms-tn.org)  
<http://www.cms-tn.org/>

**VORP/Community Mediation Center**

584 Highway 70 East  
Crossville, TN 38555  
(931) 484-0972  
[vorp.crossville@gmail.com](mailto:vorp.crossville@gmail.com)

**The Mediation Center (TMC)**

One Public Square, Suite 10  
Columbia, TN 38401  
(931) 840-5583  
[info@columbiamediation.org](mailto:info@columbiamediation.org)  
<https://www.columbiamediation.org/>



**Community Mediation of East Tennessee**

110 Bruce Street, Suite 204

Sevierville, TN 37862

Telephone: (865) 366-5338, ext. 10

**[vicki@mediate-tn.org](mailto:vicki@mediate-tn.org)**

# **EXHIBIT B**

## **Order To Conduct Mediation**

IN THE \_\_\_\_\_ COURT OF  
\_\_\_\_\_ TENNESSEE

\_\_\_\_\_  
Plaintiff(s)

v.

Civil Action No. \_\_\_\_\_

\_\_\_\_\_  
Defendant(s)

---

**ORDER TO CONDUCT MEDIATION**

---

This Court finds that this matter is appropriate for mediation under Tennessee Supreme Court Rule 31 and the ADR Plan approved by the Tennessee Supreme Court. Therefore, within ten days of entry of this Order, the parties are directed to either mutually agree upon a Rule 31 Listed Mediator to conduct the mediation or contact the following community mediation center for assignment of a mediator: \_\_\_\_\_.

Within seven days of the completion of mediation, the Mediator shall provide a Mediator Report pursuant to Rule 31, Section 5.

IT IS SO ORDERED on this \_\_\_ day of \_\_\_\_\_, 20\_.

\_\_\_\_\_  
JUDGE

\_\_\_\_\_  
COURT

DIVISION \_\_\_\_\_

DATE: \_\_\_\_\_



# **EXHIBIT C**

## **Court Mediation Letter**

[Sent on court letterhead] RE: \_\_\_\_\_

Greetings:

The Tennessee Supreme Court has approved a plan to allow judges to use a tool called mediation to help you resolve your case without going to court. Contact a Mediation Center to learn more about how mediation can help you. The Mediation Center will answer your questions about the program.

[Insert Mediation Center contact information]

Here is some helpful information about mediation:

- Mediation is an alternative to court. Mediation is an informal and private meeting. You and the other party will be able to talk about possible solutions to your case.
- You and the other party can agree to try mediation to solve your problem. The Mediation Center can assign a mediator or you and the other party can choose a Rule 31 mediator. The list of Rule 31 mediators is online at <http://www.tncourts.gov/programs/mediation/find-mediator>.
- A trained mediator will lead the mediation meeting. The mediator will help you and the other party see if it is possible to resolve the problem without going to court.
- The mediator will not make any decisions for you but will help you and the other party discuss the problem and agree on a solution.
- You don't have to do the mediation in-person. Mediation can be held remotely over the phone, by email, or by video. This means the mediation can happen at a time that works for you and the other party. This means you won't have any travel costs or have to miss work to go to mediation.
- You and the other party may be able to reach an agreement faster in mediation than if you go to court.
- Mediation is confidential and private, except the mediator is required to file a report to include who appeared and participated and whether the case was completely or partially settled.
- If you decide you do not want to mediate your case, you still have the option to go to court. If you start mediation but decide to stop before it ends, you still have the option to go to court.

- Cases that don't use mediation or cases that aren't resolved in mediation will be heard by this Court when a court date is available.

Contact the Mediation Center identified above for more information.

Thank you for learning more about mediation as a way to resolve your case.



**MEDICAL DEBT**

**TN AOC  
ONLINE DISPUTE  
RESOLUTION  
2022 PILOT PROGRAM**



ADMINISTRATIVE  
OFFICE OF THE  
COURTS



# ONLINE DISPUTE RESOLUTION 2022

PILOT PROGRAM

PRESENTED BY:  
THE TENNESSEE  
ODR STEERING COMMITTEE

Hamilton County General Sessions Judge  
Alexander McVeagh; Chattanooga-Hamilton  
County Hospital Authority ("Erlanger"); Matterhorn;  
Legal Aid of East Tennessee; Volunteer Rule 31  
Mediators.

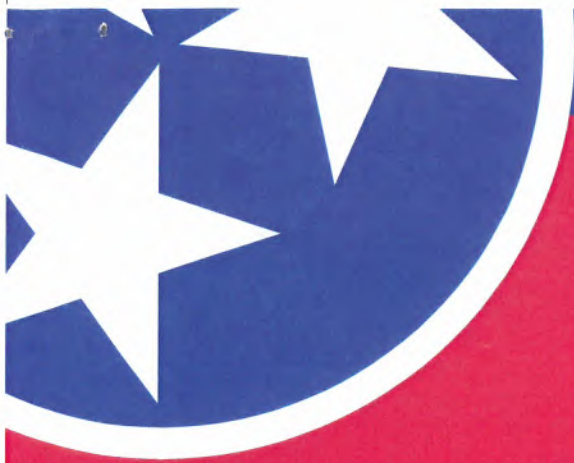




# TABLE OF CONTENTS

<b>Executive Summary</b>	<b>3</b>
<b>Challenge ODR Seeks to Address</b>	<b>4</b>
<b>Original Pilot Goal</b>	<b>6</b>
<b>Phase I Outcome Overview</b>	<b>7</b>
<b>Findings</b>	<b>8</b>
<b>Stakeholder Overview</b>	<b>9</b>
<b>General Sessions Court Report</b>	<b>10</b>
<b>Legal Aid of East Tennessee Report</b>	<b>12</b>
<b>Mediator's Report</b>	<b>13</b>
<b>Provider's Report</b>	<b>15</b>
<b>Pilot Platform Configuration</b>	<b>27</b>
<b>Account Resolutions Summary (Table 1)</b>	<b>32</b>





# EXECUTIVE SUMMARY

## Phase 1 Medical Debt Online Dispute Resolution Pilot

The Tennessee Administrative Office of the Courts (“AOC”) was awarded a State Justice Institute (“SJI”) Technical Assistance Grant (“TAG”) to retain the services of Matterhorn by Court Innovations, Inc. (“Matterhorn”) to assist the AOC with developing and implementing an online platform to resolve medical debt disputes in Hamilton County, TN, before a lawsuit is filed. We are preparing plans to establish similar programs in other areas of the state.

As of December 31, 2021, the AOC has completed Phase 1 of the Pilot known as 20T062.



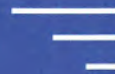


# CHALLENGE ODR SEEKS TO ADDRESS



The Sycamore Institute (a Tennessee based non-partisan “think tank”) reported that 24 % of Tennesseans with a credit report had medical debt on their credit history in 2016 – the 10th highest rate in the country. Many of these collection cases end up in General Sessions Court, where the majority of medical debtors default due to a failure to appear. Default judgments result in additional cycles of negative credit reporting and further burden court resources.





# CHALLENGE ODR SEEKS TO ADDRESS

**93 of the 95 counties in Tennessee have medical debt above the national average.**

**-Sycamore Institute**

Patients and families unable to pay are further damaged in terms of their credit ratings due to credit reporting practices of unsuccessful collection efforts, complaints filed in court, default judgments, garnishments and liens generated by judicial collection efforts. The process generates a vicious cycle of economic disaster that leaves few options for people who would like to address their debt, but have no means of successfully dealing with the judicial process



# ORIGINAL PILOT GOAL



The goal of the Online Dispute Resolution (“ODR”) medical debt pilot is to create an easy-to-understand application using technology, legal assistance, mediation and judicial resources to provide a model for pre-court filing resolution services. Such services would minimize burdens on the courts and enhance access to justice for the state’s citizens in a manner that is asynchronous and available 24/7. If successful, the pilot can serve as a desirable tool for claim resolution across the state in many areas of legal claims in addition to medical debt.





# PHASE I

## OUTCOME OVERVIEW

"In Phase I of this pilot, Erlanger sent 238 email ODR invites to individuals who had completed Erlanger's billing cycle (4 months of statements and phone calls) without responding and had received at least two letters from Erlanger's internal collections department, with at least one letter being directly from an attorney explicitly stating that the next action on the account would be either credit reporting and collections or the initiation of a lawsuit. Of those 238 people who had previously been unresponsive to Erlanger, 66 of them engaged Erlanger as a direct result of that ODR email invitation, resulting in an overall response rate of 28%.

...

Of all patients who engaged, **70% were able to resolve their outstanding debt** through lump-sum payments, payment plans or application of financial assistance."



# FINDINGS



The Tennessee ODR Steering Committee deems these results to be encouraging and worth the significant effort and is grateful for the State Justice Institute's support and financial backing.

The following pages contain reflections from the main stakeholders, lessons learned, and statistics from the first three rounds of invited debtors that the ODR Steering Committee will use as it considers expanding to additional providers and/or new regions of Tennessee. Table 1 provides data collected during Phase 1 of the pilot project. Screen shots of the platform are also provided. To see the live ODR platform and the video created by Hamilton County, please visit these links:

- <https://cii2.courtinnovations.com/TNMEDEBT/>
- [https://youtu.be/\\_abvMsYO9uQ](https://youtu.be/_abvMsYO9uQ)



# STAKEHOLDER OVERVIEW



**Hamilton County General Sessions Judge Alexander McVeagh** serves as the Judicial Sponsor of the Pilot. **Chattanooga-Hamilton County Hospital Authority ("Erlanger")** serves as the Healthcare Provider and uses the platform to invite parties to participate. **Matterhorn** serves as Technical Assistant to create, modify and support the online platform. **Legal Aid of East Tennessee** provides input on both the platform and communications within and considers ways to facilitate and protect debtor rights in the process. **Volunteer Rule 31 Mediators** facilitate settlement discussions, as needed. These stakeholders are represented on the Tennessee ODR Steering Committee.



# GENERAL SESSIONS COURT REPORT

JUDGE ALEXANDER MCVEAGH



The court plays a pivotal role in this ODR pilot project, even though the project is pre-suit. **By publicly signaling its support of the ODR pilot, the court is able to add a layer of credibility and trust to the project.** Debtors and the public can see that the court has approved of and invested time into the project and encourages those who are selected to opt into using the ODR pilot to resolve their medical debt issues. Buy-in from the local court is a key component to the success of the first phase of the pilot project and will be paramount to continued expansion and enhancement across Tennessee.



# GENERAL SESSIONS COURT REPORT

JUDGE ALEXANDER MCVEAGH

Medical debt is an unwelcome burden with lasting repercussions for millions of Americans each year. Hamilton County General Sessions Court is excited to be at the forefront of the ODR medical debt pilot program that gives medical providers as well as those with unpaid medical bills the opportunity to negotiate a better outcome for themselves without ever having to enter a courtroom. The hope is that a just outcome can be reached, potentially in the form of a settlement (with or without the assistance of a third party mediator), that will put those in debt on a path to a more secure financial future, while causing the least amount of disruption to their lives.

Many of those who fall into debt find themselves trapped in an increasingly dire sequence of events. First, they may have a complaint filed against them in court for nonpayment of a debt, which hurts their credit rating. Next, they may default on that debt, which can be followed by a garnishment or a lien. It can be difficult if not impossible for many to recover financially.



Hamilton County General Sessions Court has seen garnishments of wages, evictions, credit card debt suits, credit bureau disputes and even criminal cases flowing from underlying medical and other consumer debt—all negatively affecting creditors, debtors, and a clogged court system. Indeed, the problem is a big one in Hamilton County General Sessions Court. There were around 15,000 civil cases filed in the court in 2019 alone, many of them centered on medical or other consumer debt. That large volume is partially due to the fact that the General Sessions Court handles civil cases for up to \$25,000, which is the highest 'small claims' jurisdictional limit in the country.

While ODR technology has been utilized by other states, this ODR pilot program is unique, as other programs are not committed to finding solutions in the "pre-suit" early stages of a dispute, before anything has been filed in court. By addressing the problem at this stage, those in debt can avoid damage to their credit rating and avoid the disruption that a lawsuit can potentially have in their lives. It also provides them the opportunity to challenge or dispute a debt with the assistance of legal and other resources without the additional time and expense that a traditional lawsuit would bring.



# LEGAL AID OF EAST TENNESSEE REPORT

CATHY ALLSHOUSE AND SHAHEN SALILI

Several stakeholders worked together to develop a platform on which those with outstanding medical bills could settle those debt-related issues with their provider without court intervention. Legal Aid of East Tennessee (LAET) was one such stakeholder. LAET is the only civil legal services provider in East Tennessee, covering a 26-county service area. LAET's mission is strengthening communities and changing lives through high-quality legal services. Our vision is an East Tennessee where justice is a community value, and no one faces a legal problem alone. This ODR project serves that vision.

During conceptual development, LAET acted as a voice for those with medical debt and helped design the process to work for them as much as for the provider. LAET also helped generate a frequently asked questions list that would address likely concerns of those who were asked to engage in this dispute resolution process. LAET focused on maintaining plain language in the public-facing parts of the platform as much as possible. At the start of the project's public rollout, LAET arranged and assisted with two in-person clinics. As it was discovered that there was a lack of interest on the part of participants in this form of technical outreach, we shifted our focus to solely online communications development.

As development moved toward the creation of form settlement contracts, LAET worked with the stakeholders to craft language that did not waive the rights of the medically indebted while again trying to incorporate plain language. LAET focused on clarity in the amount and records of the dispute, as well as in the Agreed Payments option provisions.

LAET also helped test the interface as it came online, giving feedback with a critical eye toward making the process as transparent as possible for those seeking to resolve their debt issues. Our experience working with low-income clients pointed out several issues that the technical team was able to resolve to make a cleaner and more efficient process.

Finally, LAET was involved in troubleshooting issues as the system came online. LAET worked closely with the other stakeholders to ensure that the system was working as intended. LAET provided templates for other volunteers that may eventually be added to the project (e.g. technical navigators).



# MEDIATOR'S REPORT

STEPHEN L. SHIELDS, STEERING COMMITTEE MEDIATOR

## I. Volunteer Mediators

As the program platform was being developed, the Steering Committee sent requests for volunteers to the Tennessee community mediation centers. As a result, we had over one hundred experienced mediators confirm that they would perform the services on a pro bono basis. We prepared a list of those volunteers, and then, because we believed fewer would be sufficient to handle the initial round of invitations to debtors, we selected seventeen to initiate the program. Subsequently, the platform randomly assigned mediators to individual cases.

## II. Conducting Mediations Via Chat

Several mediators inquired whether they could also engage the parties via Zoom or by telephone conference. The committee decided that all communications would be conducted through the platform.

- A. Writing. The initial challenge for mediators was engaging the participants by “writing” as opposed to “talking.” We developed a mediator’s notebook of best practices, specifically, sample “writings,” for using that mode of communication. Additionally, the mediators conferenced by phone numerous times to discuss best “writing” practices and other techniques for using the platform.
- B. Asynchronous. Another challenge for mediators was managing the asynchronous nature of the electronic communications. During our telephone conferences, we addressed the issue of delayed responses by debtors and when and how to close a file because of those delays.





# MEDIATOR'S REPORT

STEPHEN L. SHIELDS, STEERING COMMITTEE MEDIATOR



## III. Debtor Engagement

We inquired about the debtors' responsiveness to providers' invitations to participate via the platform. The providers' feedback suggests the platform was instrumental in obtaining a better response rate than the normal channels of mail and phone calls.

## IV. Conclusions - Going Forward

- Sufficient volunteers are available to provide services free of charge.
- The committee maintains a list of mediators who are familiar with the platform and stand ready to rapidly train others in the event more mediator services are needed.





# PROVIDER'S REPORT

Cherie Knotts,  
Associate General Counsel, Revenue Cycle  
Chattanooga-Hamilton County Hospital Authority



The Chattanooga-Hamilton County Hospital Authority (“Erlanger”) is a safety-net, essential hospital that provides necessary medical care to all individuals, regardless of ability to pay or insurance status. Erlanger serves a disproportionate number of uninsured individuals and those covered by Medicare and Medicaid. Erlanger is also the region’s only Level I trauma center and the area’s tertiary care center, which means it provides the highest level of care for critically ill and traumatically injured patients. Given this patient make-up, acuity mix and Erlanger’s status as both a governmental entity and charitable organization, it considers its patients’ financial needs from the moment of registration.



# PROVIDER'S REPORT

Cherie Knotts,  
Associate General Counsel, Revenue Cycle  
Chattanooga-Hamilton County Hospital Authority



## Billing and Collections Process Overview

Beginning at registration, Erlanger attempts to identify individuals for whom charitable care (financial assistance) would be most appropriate. Erlanger has presumptive charity for the uninsured whose household income is 200% or less of the Federal Poverty Guidelines, as determined by independent reporting agencies. Insured patients, and those whose household income appears to be greater than 200% as reported by those independent agencies, must apply for charitable care and provide supporting documentation; however, the same household guidelines apply.

For patients that Erlanger is able to identify as the neediest while in hospital care, Financial Advocates work with those patients to help navigate the financial assistance process. Additionally, those patients are also screened for eligibility for other governmental programs. After discharge, Erlanger engages a vendor to contact and assist uninsured patients with applying for Medicaid.

Once discharge from the hospital has occurred, and any applicable insurance has been processed, Erlanger sends four monthly statements for any given account. Those statements contain information about payment plans and the availability of financial assistance.

During that four-month billing process, Erlanger, or its vendors, will contact patients about outstanding balances by phone and text, answer any questions about a bill, inquire about any applicable insurance, offer a prompt-pay discount, and verbally inform patients of payment plan options.

After that 120-day billing period, if an account remains unpaid or without payment arrangements, the account is referred to a collections vendor, which includes Erlanger's internal legal collections department. When accounts are referred to the legal collections department, efforts are made to confirm contact information for patients. That department also sends correspondence that details outstanding accounts which may be escalated and provides information about financial assistance and payment plans.

After a period of no less than 45 days, if referred accounts are still outstanding, the legal department sends additional correspondence which indicates that the account will be referred for a lawsuit or sent to a collections agency for reporting and further collection attempts. This correspondence encourages patients to contact Erlanger to discuss potential resolutions.



# PROVIDER'S REPORT

Cherie Knotts,  
Associate General Counsel, Revenue Cycle  
Chattanooga-Hamilton County Hospital Authority



## Online Dispute Resolution Participant Selection and Response

It is from these referred accounts that Erlanger invited individuals to participate in the Online Dispute Resolution program (“ODR”). Patients on referred accounts varied in race, age, socioeconomic, and insured status. From May 1, 2021 to October 15, 2021, Erlanger sent letters to 483 individuals providing information about the ODR process and how to request inclusion in this pilot. Many of the letters also included information about the availability of clinics, should those individuals need technical assistance in registering and using ODR. No individuals responded to the letter invites by requesting an invitation to ODR. Although that language continues to be in legal collections correspondence, to date no one has emailed to request access in response to those letters.

In late April and early May, Erlanger also sent a total of 27 email ODR invites. After those email invitations were sent, two individuals registered for ODR to resolve their outstanding accounts. Seven other individuals contacted Erlanger via phone or email to resolve the accounts for which the email invite was sent. Given the comparative response rate, the ODR steering committee focused on developing the platform to enable file-uploads, rather than the more labor intensive, single-account invitation process that previously existed.

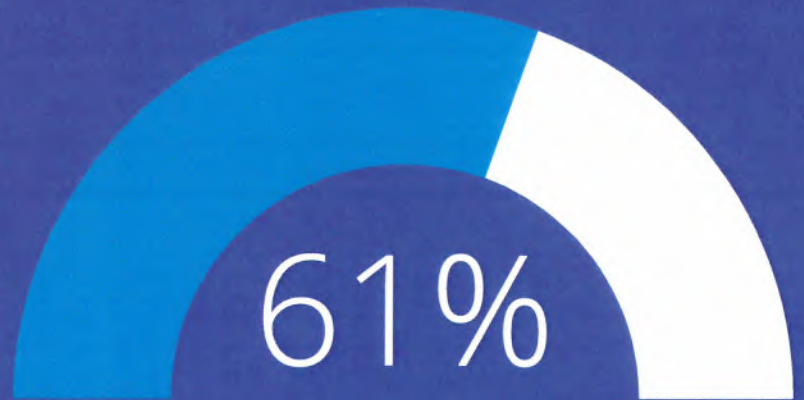
In Phase I of this pilot, Erlanger sent 238 email ODR invites to individuals who had completed Erlanger’s billing cycle (four months of statements and phone calls) and had received at least two letters from Erlanger’s internal collections department, with at least one letter being directly from an attorney explicitly stating that the next action on the account would be either credit reporting and collections or the initiation of a lawsuit. Of those 238 people, all of whom had previously failed to respond to Erlanger, 66 of them engaged Erlanger as a direct result of that ODR email invitation, resulting in an overall response rate of 28%.



## RESPONSE DATA

Out of 238 email invitations, 66 individuals (28%) engaged with Erlanger.

**61% of these respondents engaged through the ODR Pilot Program.**



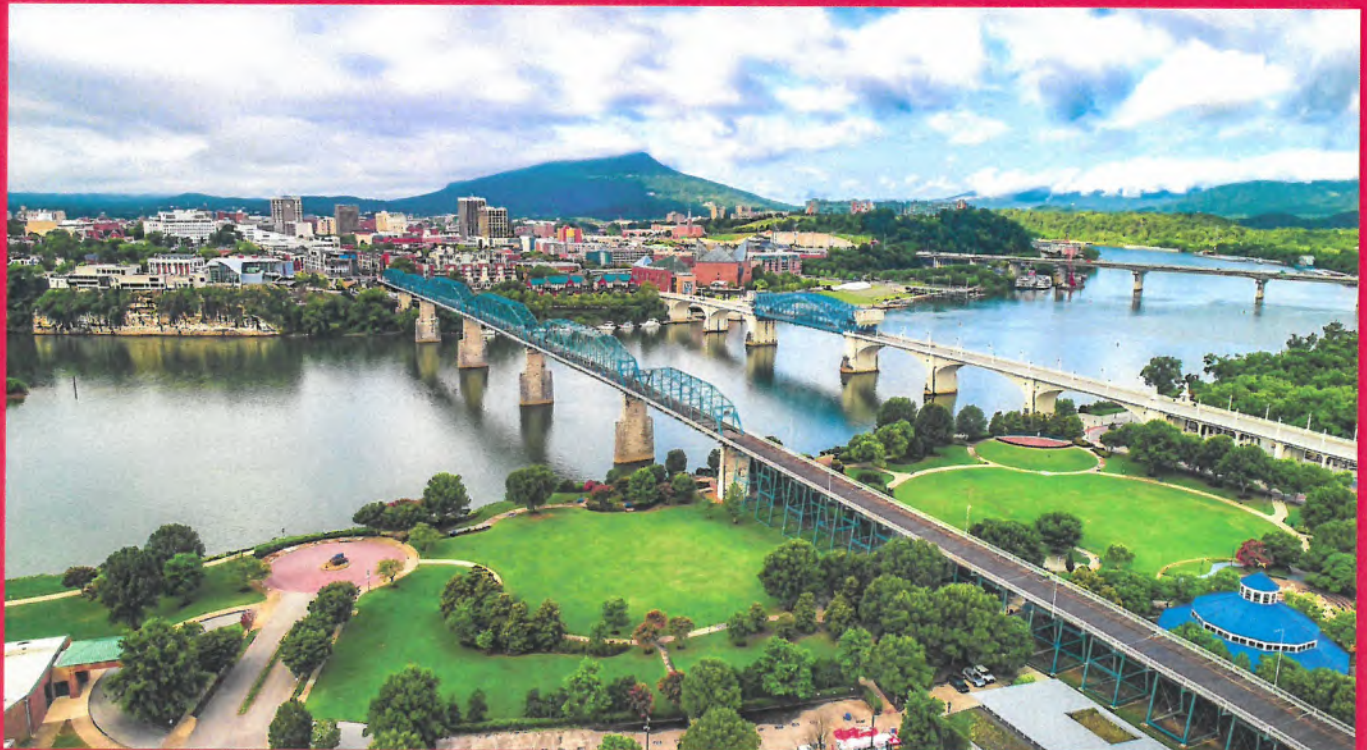
Based on this data, it is clear that **electronic communication is a necessary component of a successful ODR program**. The success of electronic invites is most likely due to a variety of factors, including ease of access, fidelity of email checking versus that of physical mail,\* and the transient lifestyle of some individuals, including those who may be housing insecure.

\*Several respondents admitted to either never opening mail or opening it extremely late.



# ACCOUNT RESOLUTIONS

**Table 1**, appended to the end of this report, summarizes ODR email invites and patient engagement as a result of those invites. Although not every outstanding account was successfully resolved, the data suggests that **the ODR program was successful in allowing Erlanger to engage with patients who were previously non-responsive.** Further conclusions can be drawn from various data points, as discussed below.





# PROVIDER'S REPORT

Cherie Knotts,  
Associate General Counsel, Revenue Cycle  
Chattanooga-Hamilton County Hospital Authority



## Insured Status

Of those who responded to the emailed ODR invite, 88% had insurance, which indicates that those patients are employed. Generally speaking, those with stable incomes are more likely to be pursued in litigation for debt collection because of the ease of collection through garnishment. This suggests that the ODR program was successful in preventing legal action against those who otherwise would have been subject to the most severe form of collection activities. It also allowed those individuals to develop voluntary payment terms that may work best with their budget and other obligations, versus a wage garnishment which can take up to 25% of a person's wage income.

Additionally, the insured status of the respondents indicates that this process was used to resolve outstanding co-pays and deductibles, an area that will remain a point of concern for Tennesseans, despite recent federal regulation, as discussed *infra*. Deductibles and co-pays are also obligations that patients should be aware of prior to seeking medical attention—yet Erlanger found that many individuals did not understand the terms of their own insurance contracts. This program may have assisted those individuals in understanding their insurance obligations, so they can choose more appropriate levels of insurance in the future or budget accordingly.

Erlanger does not find the higher percentage of respondents being insured remarkable because of the terms of the presumptive charity program, which allows the uninsured to be approved for financial assistance without an application or supporting documentation.



Of respondents carried insurance



# PROVIDER'S REPORT

Cherie Knotts,  
Associate General Counsel, Revenue Cycle  
Chattanooga-Hamilton County Hospital Authority



## Type of Engagement

Only 61% of respondents utilized the ODR online platform to communicate about their outstanding medical debt. However, that percentage is not an accurate representation of the success, effectiveness, or efficacy of this pilot. For every three people who utilized the platform, two contacted Erlanger via phone or through email.


As previously discussed, Erlanger makes multiple points of contact with patients during the billing cycle and afterwards through collections, yet these individuals were unresponsive to all of those contact attempts. Only when these individuals were included in an electronic ODR invite did they take active steps to engage with Erlanger to make payment, discuss payment plans or financial assistance. Potential reasons for that engagement include the ease of access of electronic communication, the propensity of individuals to maintain a specific email address longer than a physical mailing address, and the gravitas of receiving the email invite request as an indicator of account escalation.

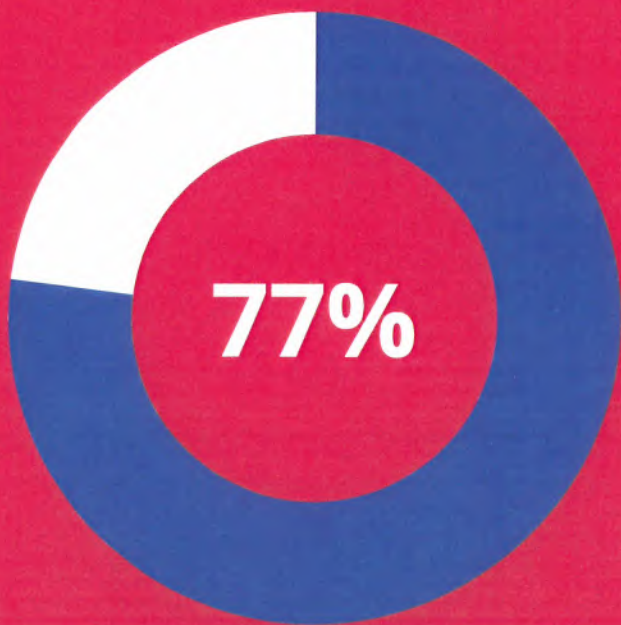
If a percentage of the population will only seek to engage with a provider when account escalation appears imminent—from the provider perspective and the patient perspective—ODR is a better alternative to filing of a lawsuit. ODR saves providers and their collection agents the cost of filing, conserves judicial resources and saves the patient the time, inconvenience, and negative credit consequences of having to appear in court simply to reach a settlement.

Engagement as Direct Result: # Count / %	66	28%
On Platform	40	61%
Other Methods	26	39%



# ACCOUNT RESOLUTIONS: THE NUMBERS

Resolutions	
Amount of Debt Resolved	\$79,775.26
Charity Care Approved	\$20,201.42
Amount of Settlement	\$53,759.63
Percentage Savings to Patients (by Dollar Value)	33%



**Percentage  
Recovery by Dollar  
Value after Charity\***

\*85% of resolutions (by dollar value) include payment plans which have not yet been completed. This percentage assumes 85% compliance (by dollar value) with those voluntary, negotiated plans.



# ACCOUNT RESOLUTIONS: THE NUMBERS EXPLAINED

Matter Resolved	46 (76%)
Platform - No Mediator	13
Platform - Mediator	13
Other Methods	20

The table above identifies the total debt outstanding for accounts that were resolved, the amount of debt that was resolved through financial assistance and the overall savings to patients as well as the percentage of anticipated recovery to Erlanger for non-financial assistance accounts.\* Of all patients who engaged, 70%\*\* were able to resolve their outstanding debt through lump-sum payments, payment plans or application of financial assistance.

\*Once a patient has been approved for financial assistance, the patient does not have any liability for accounts approved. If prior patient payments have been received on the account, once approved, those funds are returned to the patient.

\*\*There are several accounts that are still actively engaged in settlement discussions. 18% of respondents are still classified in the "Pending" category as of the writing date of this report.



# **ACCOUNT RESOLUTIONS: THE NUMBERS EXPLAINED**

Of particular note is the amount of financial assistance Erlanger was able to provide during this process. The ODR program enabled those who had previously been unable or unwilling to complete the financial assistance application to successfully do so. Although many families face financial pressure due to medical debt, the financial assistance identified is a direct benefit to the working poor. Further, those approved for financial assistance are approved for a period of time, so any medically necessary care provided during the approval time period will not result in any patient liability.

By total dollar value, the **ODR program saved patients, on average, 33%**, and Erlanger was able to collect on aged accounts, excluding charitable care, an estimated 77% of outstanding charges. Through direct communication with patients, Erlanger was able to reduce the cost to collect on applicable accounts and pass that cost-savings down to patients, all while reducing strain on the judiciary.

## **\$16,127.70**

**Erlanger Estimated Cost  
to Collect Settlement  
Amount if ODR not  
utilized**





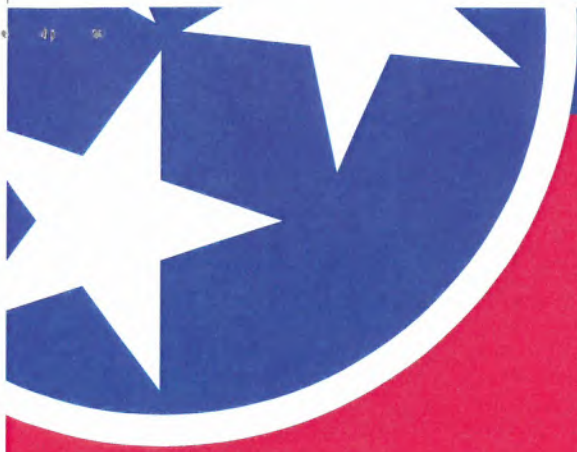
# PROVIDER CONCLUSIONS



The ODR program enabled Erlanger to connect with patients who had previously declined to engage, despite multiple attempts and forms of contact. Once patients were engaged, Erlanger and the patient were usually able to come to a mutually agreeable resolution for outstanding accounts. This positive direct contact reduces Erlanger's reliance on its collection vendors—providing greater control and communication in the collections process—and **reduces costs to collect while improving customer satisfaction.**

Because medical debt is recurring, Erlanger is hopeful that the ODR experience will alleviate patient anxiety about engagement while simultaneously increasing patient knowledge of insurance principles and available resolution options. Long-term, Erlanger hopes to see resolutions of outstanding accounts earlier in the billing and collection cycle.





# PROVIDER CONCLUSIONS:

## Role of the ODR Program in Light of Recent Regulation

In 2020, the federal government passed legislation to reduce patient medical debt. Specifically, it sought to reduce the instances where patients can receive “surprise bills,” which occur when an insured patient unknowingly receives treatment from an out-of-network provider. To reduce unexpected bills for the uninsured, the government has also promulgated regulations that require hospitals to provide uninsured patients with a good faith estimate of the cost of care when services are scheduled at least three days in advance.

In connection with that goal of reducing surprise bills, federal regulations have mandated dispute resolution in certain circumstances. When an insurer and out-of-network provider cannot agree on an appropriate reimbursement rate, they must resolve that dispute through the Federal Independent Dispute Resolution process (“IDR”).

In that instance, patient liability is not implicated, as the cost to the patient is the same regardless of how the dispute is resolved. In either instance, the most the patient will pay is the amount of the patient’s in-network cost-sharing under his or her insurance plan. When an uninsured person receives a bill from a provider that is \$400 or more in excess of the good faith estimate, that patient may also seek dispute resolution through a Selected Dispute Resolution process (“SDR”) to determine the appropriate billable amount. In both IDR and SDR, the patient’s ability to pay is not a consideration.

Although federal regulation seeks to remove unexpected medical bills from patients, none of the federal regulations or dispute resolution processes provide a mechanism by which patients can mediate or negotiate how (or whether) they can pay any amounts owed. The ODR program fills the gap left by this federal regulation—it allows patients to directly engage providers about how to resolve amounts for which the patient might be liable.



# PILOT PLATFORM CONFIGURATION

The following screenshots are from the current state of the application created by Matterhorn. The platform is sponsored by the Hamilton County General Sessions Court and the landing page indicates the court's approval. Eligibility for its use is provided as well as additional instructions and information about the medical debt collection process.





# PILOT PLATFORM CONFIGURATION

The screenshot shows the Hamilton County General Sessions Court Online Dispute Resolution (ODR) platform. The header includes the court's name and logo. Below the header, there are navigation links for Home, About, and PAC. The main heading is "Submit Claim & Invite Debtor(s)". The page contains a form with several sections: a "Case Information" section with fields for Case Number and Case Title; a "Case Description" section with a text area; a "What options for resolving your case and you interested in? Check all that apply." section with checkboxes for "Discontinue claim", "Discontinue short term payment plan", "Long term payment plan", "Be interested in resolving my case (I will settle the claims and/or amount owed)", and "I do not owe anything and do NOT wish to continue this process"; and a "Case Resolution" section with a "Submit" button.

## Online Medical Debt Resolution

You have been invited to resolve a medical debt dispute using Online Dispute Resolution (ODR). Using this site, you can choose to directly negotiate with the other party or request a mediator who will help you both develop options for resolving the matter. You can exchange messages with the other party and/or a mediator, upload/download documents, and to sign agreements and court forms online.

Resolving a dispute here can prevent a conflict from escalating further, and if you reach an agreement, it may also eliminate the need to appear in court. This service is secure, free to use, and is available to you 24/7.

To set your private password and get started for case number "1949102412" - fill out your information below.

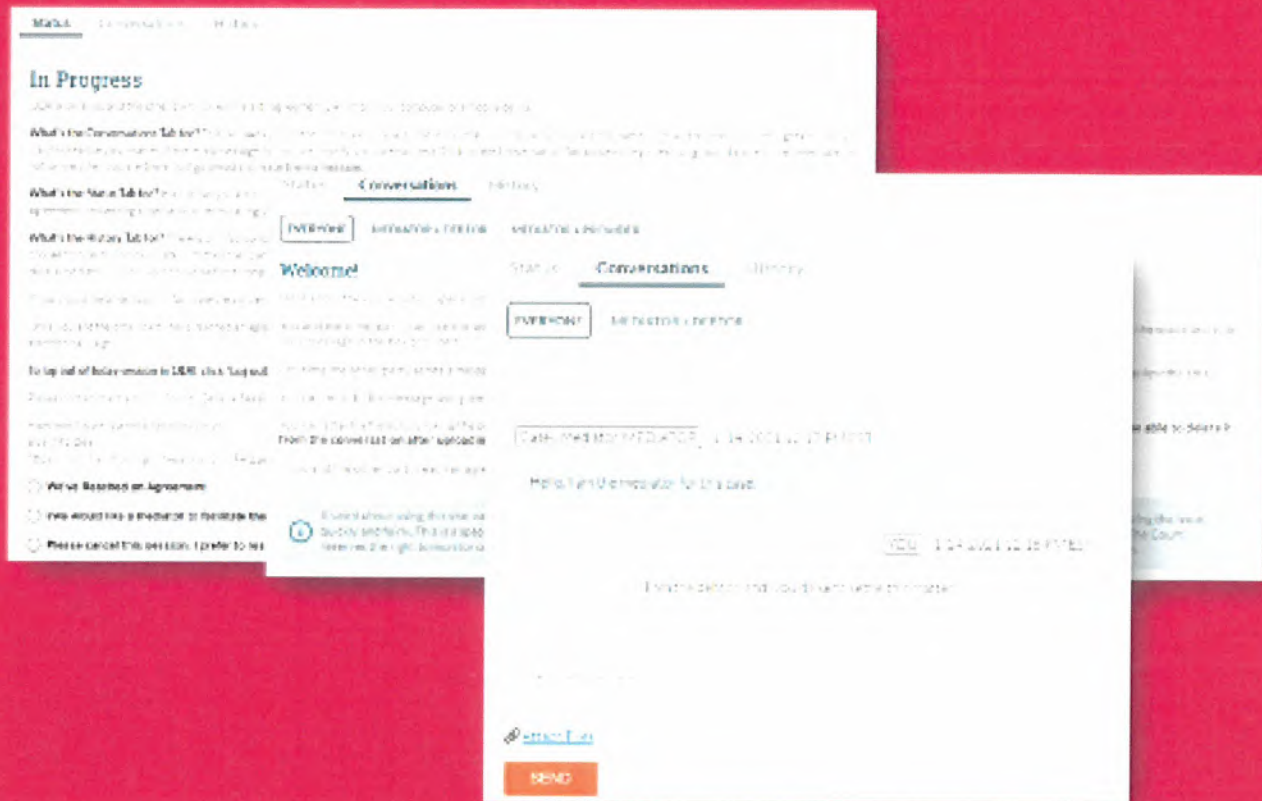
What options for resolving your case and you interested in? Check all that apply.

- Discontinue claim
- Discontinue short term payment plan
- Long term payment plan
- Be interested in resolving my case (I will settle the claims and/or amount owed)
- I do not owe anything and do NOT wish to continue this process.

By clicking "Submit" you are indicating you consent with your opponent to the steps to resolve your dispute with the other party.



# PILOT PLATFORM CONFIGURATION





# PILOT PLATFORM CONFIGURATION

## Provider View

The screenshot shows the Hamilton County General Sessions Court Online Dispute Resolution (ODR) Pilot Platform Provider View dashboard. The header includes the court's logo and name, and navigation tabs for 'Home' and 'Medical Debt Cases'. The main section is titled 'My Dashboard' and features an 'IMPORT CIV FILE' button. Below this is a table of 'Medical Debt Cases' with columns for 'Case Name', 'Count', and 'Oldest'. The table lists five case categories with their respective counts and oldest dates.

Case Name	Count	Oldest
Medical Debt Cases	0	00/00/00
Medical Debt Cases	25	2020-06-25
Medical Debt Cases	34	2020-06-25
Medical Debt Cases	0	00/00/00
Medical Debt Cases	0	00/00/00
Medical Debt Cases	56	2020-06-25
Medical Debt Cases	57	2020-06-25



# PILOT PLATFORM CONFIGURATION

## Provider View



Hamilton County General Sessions Court  
Online Dispute Resolution

Home

Medical Debt Cases



### Case Details

Mediation Type  
Medical Debt

Case Number  
ILC101

Debt Amount:  
\$202.22

Mediation Date  
7 days from 01/31/2022

### Parties

#### PROVIDER

Cherie Knotts

#### DEBTOR

Allentest Abby

#### MEDIATOR

John Jefferson Mediator

### Status

Conversations

History

## Agreement(s) Sent to Parties

The agreement is now ready for the parties to review and electronically sign.

If the agreement does not reflect what the parties have agreed to, either party can reject the rev/isc agreement will be returned to the parties to review again.

By checking this box, I (Provider) am closing the EVERYONE channel.

SUBMIT

### View the rejected form - 2

For comments on why the agreement was rejected, visit the history section.

PROVIDER: Cherie Knotts

DEBTOR: Allentest Abby

VIEW REJECTED SETTLEMENT



# TABLE 1: ACCOUNT RESOLUTIONS SUMMARY

<b>Number Of Email Invitations</b>	<b>238</b>	
<b>Engagement as Direct Result: # Count / %</b>	<b>66</b>	<b>28%</b>
On Platform	40	61%
Other Methods	26	39%
<b>Matter Resolved</b>	<b>46</b>	<b>70%</b>
Platform - No Mediator	13	
Platform - Mediator	13	
Other Methods	20	
<b>Pending / Ongoing as of Jan 18, 2021</b>	<b>5</b>	<b>7%</b>
Platform - No Mediator	1	
Platform - Mediator	2	
Other Methods	2	
<b>Matter Closed / Engaged but Not Resolved</b>	<b>15</b>	<b>23%</b>
Platform - No Mediator	1	
Platform - Mediator	10	
Other Methods	4	
<b>Engaged Persons</b>		
Percent Insured	88%	
Percent Uninsured	12%	

<b>Amount of Debt Resolved</b>	<b>\$ 79,775.26</b>	
Charity Care Approved	\$ 20,201.42	
Amount of Settlement	\$ 53,759.63	
Percentage Savings to Patients (by Dollar Value)	33%	
<b>Erlanger Estimated Cost to Collect Settlement if ODR not utilized</b>	<b>\$ 16,127.70</b>	
Percentage Recovery by Dollar Value after Charity*	77%	
Erlanger Man-hours in Negotiations	87	

\* 50% of resolutions (by dollar value) include payment plans which have not yet been completed. This percentage assumes 85% compliance (by dollar value) with those voluntary negotiated plans.



**A JUDICIAL OFFICER'S GUIDE TO  
TENNESSEE SUPREME COURT  
RULE 31A**

**Standards And Procedures Applicable  
At Each Stage Of The  
Judicial Settlement Conference**

**PODA<sup>2</sup>**



A  
JUDICIAL OFFICER'S  
GUIDE TO  
TENNESSEE SUPREME COURT  
RULE 31A

Standards And Procedures  
Applicable At Each Stage Of The  
Judicial Settlement Conference

PODA<sup>2</sup>

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

Date: July 21, 2021



## ABOUT MR. SHIELDS

**STEPHEN L. SHIELDS, JD, LLM** is the founding member of Alternative Dispute Resolution Institute and a Partner in the Memphis law firm of Jackson, Shields, Yeiser & Holt. He is a Tennessee Supreme Court Alternative Dispute Resolution Rule 31 Listed General Civil Mediator as well as Rule 31 General Civil Mediation Trainer. Mr. Shields is a Tennessee Supreme Court Alternative Dispute Resolution Commission Commissioner. He currently serves as Chair of the Alternative Dispute Resolution Commission for a two-year term which began January 10, 2022. He is a Listed Mediator in the Mediator Profile Directory of the United States District Court Western District of Tennessee. Mr. Shields is a frequent speaker and author regarding alternative dispute resolution topics. He is also a founding member as well as the Chair of the Mid-South Community Justice and Mediation Center (CJAM). He is the past-Chair of the Tennessee Bar Association Alternative Dispute Resolution Executive Council, the past-President of the Tennessee Association of Professional Mediators and a past-Chair of the Memphis Bar Association Alternative Dispute Resolution Section. In 2015, Mr. Shields was chosen as the recipient of the Grayfred Gray Public Service in Mediation Award. He is an adjunct professor at the Cecil C. Humphreys School of Law at the University of Memphis where he is the Director of the Mediation Clinic. He has been listed in Best Lawyers since 1991.

---

## ABOUT THE GUIDE

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

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

Although this Guide primarily references Tenn. Sup. Ct. R. 31A, other Rules have some application, in particular, Tenn. Sup. Ct. R. 10 and Tenn. R. Civ. P. 16. Excerpts from Tenn. Sup. Ct. R. 10 have been highlighted in red.

## PODA<sup>2</sup>

*I developed the acronym - "PODA<sup>2</sup>" - which I have found to be very serviceable. I use it to guide my thinking so that I comply with the rules and standards of Tenn. Sup. Ct. R. 31 at each stage of the mediation process. PODA<sup>2</sup> represents Prior, Opening, During, A<sup>2</sup> = Agreement and After. This Guide utilizes that same approach for Tenn. Sup. Ct. R. 31A.*



## INTRODUCTORY NOTES AND DEFINITIONS

This Guide is to provide information about rule and procedure requirements at each stage of the judicial settlement process.

### A. TENN. R. CIV. P. 16

Tenn. R. Civ. P. 16 provides that a judge has two different roles regarding settlement.

1. The first role is administrative and is based on Tenn. R. Civ. P. 16.03: Subjects To Be Discussed At Pre-Trial Conference, Paragraph (7) – “the possibility of settlement or use of extrajudicial procedures including alternative dispute resolution to resolve a dispute.”
2. The focus of this Guide is on the second role of a judge serving as a settlement neutral. (See, Tenn. R. Civ. P. 16.02: “facilitating the settlement of the case”) The primary Rule establishing standards for this role is Tenn. Sup. Ct. R. 31A. In addition, Tenn. Sup. Ct. R. 10 also has standards applicable to the judge in this role. I reference both Rules - Tenn. Sup. Ct. R. 31A and Tenn. Sup. Ct. R. 10 – and I highlighted Tenn. Sup. Ct. R. 10 provisions in red.

### B. TENN. SUP. CT. R. 31 – NOW TENN. SUP. CT. R. 31 AND TENN. SUP. CT. R. 31A

1. Tenn. Sup. Ct. R. 10 provides that a judicial settlement conference is a mediation conducted by a judicial officer as defined in Tenn. Sup. Ct. R. 31. Tenn. Sup. Ct. R. 31 was amended effective November 1, 2018, so that Tenn. Sup. Ct. R. 31 was separated into two parts: Tenn. Sup. Ct. R. 31 and Tenn. Sup. Ct. R. 31A. Tenn. Sup. Ct. R. 31 addresses the practice of mediators. Rule 31A addresses the practice of using other alternatives to resolve disputes, including judicial settlement conferences. Thus, any reference to Tenn. Sup. Ct. R. 31 in Tenn. Sup. Ct. R. 10 should now be read as a reference to Tenn. Sup. Ct. R. 31A.
2. What is a judicial settlement conference?

Tenn. Sup. Ct. R. 10, RJC 2.6

[4] A judicial settlement conference, as discussed in this Rule, is a mediation conducted by a judicial officer as defined in Tenn. Sup. Ct. Rule 31. (See also Tenn. Sup. Ct. Rule 10, Terminology definition of Judicial Settlement Conference.) A judicial settlement conference does not include scheduling conferences or other pretrial conferences. *See, e.g.,* Tenn. R. Civ. P. 16 and Tenn. R. Crim. P. 17.1.



C. JUDGE CANNOT ASSUME BOTH ROLES - SETTLEMENT NEUTRAL CANNOT BE THE ADJUDICATORY NEUTRAL

Tenn. Sup. Ct. R. 10, RJC 2.6

2. A judge who participates in a judicial settlement conference shall not preside over the trial or any other contested issue in that matter.

3. Tenn. Sup. Ct. R. 31A, Section 16. Judicial Settlement Conferences

Trial courts are authorized to conduct Judicial Settlement Conferences. However, a judge who participates in a Judicial Settlement Conference is precluded from presiding over the trial or any other contested issues in that matter.

4. Tenn. Sup. Ct. R. 10, RJC 3.9. Service as Arbitrator or Mediator

A judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge's official duties unless expressly authorized by law.

[1] .... A judge who participates in a judicial settlement conference is precluded by RJC 2.6 from presiding over the trial or any other contested issues in that matter.

5. Tenn. Sup. Ct. R. 10, RJC 2.11(A)(6)(e). Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(6) The judge:

- (e) previously participated in a judicial settlement conference in the matter. Prior participation in a judicial settlement conference does not prohibit the judge from disposing of any uncontested issues in the matter.

D. SCOPE OF APPLICATION OF THE RULES

Tenn. Sup. Ct. R. 31a, Section 1. Application

The standards and procedures adopted under this Rule apply only to Rule 31A ADR Proceedings and only to dispute resolution neutrals serving pursuant to this Rule. They do not affect or address the general practice of alternative dispute resolution in the private sector outside the ambit of Rule 31A. Pursuant to the provisions of this Rule, a court may order the parties to an Eligible Civil Action to participate in a Rule 31A ADR Proceeding. Rule 31A ADR Proceedings are subject to the supervision of the Court in which the Eligible Civil Action is pending.



Tenn. Sup. Ct. R. 31A, Section 2, Definitions.

- (b) "Court" means any court exercising civil jurisdiction subject to the Tennessee Supreme Court Rules.
- (d) "Eligible Civil Action" includes any civil action filed in a Court in which the Court has continuing jurisdiction, except civil commitments, adoption proceedings, habeas corpus and extraordinary writs, or juvenile delinquency cases. The term "Extraordinary writs" does not encompass claims or applications for injunctive relief.
- (e) "Judicial Officer" serves by election or continuing appointment in a judicial office, such as: 1) a sitting judge in a Court; or 2) a Juvenile Referee, Divorce Referee, Referee, and Special Master.
- (j) "Rule 31A ADR Proceeding" is an alternative dispute resolution proceeding in or related to an Eligible Civil Action, including, but not limited to "Case Evaluations", "Judicial Settlement Conferences", "Mini-Trials", "Non-Binding Arbitrations", or "Summary Jury Trials".
- (k) A "Rule 31A Neutral" is any impartial person, licensed as an attorney, who acts as a guide in a Rule 31A ADR Proceeding. Rule 31A Neutrals are required to be licensed attorneys.

#### E. CONCURRENT STANDARDS

Tenn. Sup. Ct. R. 31A, Appendix A – Section 2(B). Concurrent Standards

- (b) Concurrent Standards. Nothing herein shall replace, eliminate, or render inapplicable relevant ethical standards not in conflict with these rules which may be imposed by the Code of Responsibility with respect to lawyers, or similar sets of standards imposed upon any Neutral by virtue of the Neutral's professional calling.

Tenn. Sup. Ct. R. 10, RJC 1.2[5] - Promoting Confidence in the Judiciary

- [5] Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.



# PODA<sup>2</sup>

## PRIOR, ORIENTATION, DURING, AGREEMENT, AFTER

### I. PRIOR

#### HOW INITIATED - ORDER OF REFERENCE

Tenn. Sup. Ct. R. 31A, Section 2(i)

- (i) "Order of Reference" is a written or standing order of a court entered in or related to an Eligible Civil Action in accordance with Section 3 of this Rule directing the parties to participate in a Rule 31A ADR Proceeding.

Tenn. Sup. Ct. R. 31A, Section 3. Initiation/Order of Reference

- (b) Upon motion of either party, or upon its own initiative, a Court, by Order of Reference, may order the parties in an Eligible Civil Action to participate in a Judicial Settlement Conference. With the consent of the parties, trial courts are also authorized to order the parties to participate in a Case Evaluation.
- (c) Any Order of Reference made on the Court's own initiative shall be subject to review on motion by any party and shall be vacated should the Court determine in its sound discretion that the referred case is not appropriate for a Rule 31A ADR Proceeding or is not likely to benefit from submission to a Rule 31A ADR Proceeding. Pending disposition of any such motion, the Rule 31A ADR Proceeding shall be stayed without the need for a court order.
- (d) Upon motion of a party, or upon its own initiative and with the consent of all parties, a Court, by Order of Reference, may order the parties to participate in Non-Binding Arbitration, Mini-Trial, Summary Jury Trial, or other appropriate alternative dispute resolution proceedings.

#### **TENN. SUP. CT. R. 31A, SECTION 10. Obligations of Rule 31A Neutrals**

- (a) Before the commencement of any Rule 31A ADR Proceeding, the Rule 31A Neutral shall:
  - (1) Make a full and written disclosure of any known relationships with the parties or their counsel which may affect or give an appearance of affecting the neutrality of the Rule 31A Neutral.
  - (2) Advise the parties regarding the Rule 31A Neutral's qualifications and experience.
  - (3) Discuss with the parties the rules and procedures that will be followed in the Rule 31A ADR Proceeding.



**TENN. SUP. CT. R. 31A, APPENDIX A –Sections 2(a)(1) and (3)**

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

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

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

**TENN. SUP. CT. R. 31A, APPENDIX A – Section 4(c)**

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

**TENN. SUP. CT. R. 31A, APPENDIX A - Section 6**

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

(3) A Neutral shall not give or accept a gift, request, favor, loan, or any other item of value to or from a party, attorney, or any other person involved in and arising from any ADR Proceeding.

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

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

(2) A Neutral must disclose to the parties or to the Court involved any close personal relationship or other circumstance, in addition to those specifically mentioned earlier in these standards, which might reasonably raise a question as to the Neutral's impartiality. All such disclosures shall be made as soon as practical after the Neutral becomes aware of his or her candidacy as a Neutral in



a given proceeding or becomes aware of the interest or the relationship. (See, ABA SODR 2015-02)

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

---

## II. ORIENTATION

### TENN. SUP. CT. R. 31A, APPENDIX A – Section 4(a)

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

### TENN. SUP. CT. R. 31A, APPENDIX A - Section 6(b)(6)

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

### TENN. SUP. CT. R. 10, RJC 1.2(3) PROMOTING CONFIDENCE IN THE JUDICIARY

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.



### III. DURING

#### TENN. SUP. CT. R. 31A, SECTION 3(e)

(e) All Rule 31A ADR Proceedings shall be concluded as efficiently and expeditiously as possible given the circumstances of the case.

#### TENN. SUP. CT. R. 31A, SECTION 10(b)

(b) During Rule 31A ADR Proceedings, the Rule 31A Neutral shall:

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

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

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

#### TENN. SUP. CT. R. 31A, SECTION 10(c)(1)

(c) During and following Rule 31A ADR Proceedings, Rule 31A Neutrals shall:

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

#### TENN. SUP. CT. R. 31A, APPENDIX A – Section 1(b)

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

**TENN. SUP. CT. R. 31A, APPENDIX A – Section 4(b)**

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

**TENN. SUP. CT. R. 31A, APPENDIX A – Section 5(a) thru (e)**

**Section 5. Self-Determination**

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

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

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

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

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

**TENN. SUP. CT. R. 10, RJC 2.6 Ensuring the Right to Be Heard**

**(B)** A judge may encourage settlement of disputed matters in a proceeding but shall not act in a manner that coerces any party into settlement.

**COMMENTS**

[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

[2] If a judge participates in the settlement of disputes, he or she should be careful that efforts to further settlement do not undermine any party's right to be heard according to law. Among the factors that a judge should consider when deciding upon an appropriate settlement practice for a case are (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (2) whether the parties and their counsel are relatively sophisticated in legal matters, (3) whether the case will be tried by the judge or a jury,



(4) whether the parties participate with their counsel in settlement discussions, (5) whether any parties are unrepresented by counsel, and (6) whether the matter is civil or criminal.

[3] Information obtained by a judge during a judicial settlement conference is not subject to the safeguards of the rules of evidence and procedure and may place the trial judge in an untenable position as to the motions for new trial; judgment notwithstanding the verdict; additurs and remittiturs; credibility determinations; or other issues in which the judge may not be able to ignore facts that he or she learned during the settlement proceeding. Therefore, it is not appropriate for the same judge to participate in a judicial settlement conference and, if such proceeding does not result in the resolution of the matter, to subsequently preside over the trial of the same matter or participate in any other contested issue in that matter. *See also* RJC 2.11(A)(6).

**TENN. SUP. CT. R. 31A, APPENDIX A – Section 6(b)(4)**

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

**TENN. SUP. CT. R. 31A, APPENDIX A – Section 7(b)**

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

**TENN. SUP. CT. R. 31A, APPENDIX A – Section 8(b) and (c)**

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

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

**TENN. SUP. CT. R. 31A, APPENDIX A – Section 10(b)(1) and (2)**

**(b) Without Agreement.**

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

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

# PODA<sup>2</sup>

## IV. AGREEMENT

### TENN. SUP. CT. R. 31A, APPENDIX A – SECTION 10(A)

#### (a) With Agreement.

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

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

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

---



# PODA<sup>2</sup>

## V. AFTER

### TENN. SUP. CT. R. 31A SECTION 10(C) OBLIGATIONS OF RULE 31 MEDIATORS.

(c) During and following Rule 31A ADR Proceedings, Rule 31A Neutrals shall:

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

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

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

(4) Preserve and maintain the confidentiality of all information obtained during the Rule 31A ADR Proceeding and shall not divulge information obtained by the Rule 31A Neutral during the course of Rule 31A ADR Proceeding without the consent of the parties, except as otherwise may be required by law.

### TENN. SUP. CT. R. 31A, APPENDIX A - SECTION 6(B)(5)

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

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

### TENN. SUP. CT. R. 31A, APPENDIX A – SECTION 7(A)

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

---

# AFTER - REPORTS

## TENN. SUP. CT. R. 31A, SECTION 5. REPORTS

At the conclusion of a Rule 31A ADR Proceeding, the Rule 31A Neutral shall submit a final report to the Court by filing same with the clerk of the court. The final report shall state only: (i) the name of the parties who appeared and participated in the Rule 31A ADR Proceeding; (ii) whether the case was completely or partially settled; and (iii) whether the Rule 31A Neutral requests that the costs of the Rule 31A Neutral's services be charged as court costs. The report shall be submitted within the time specified by the court in the Order of Reference. In the event there is no Order of Reference or the Order of Reference does not specify a deadline, the final report shall be submitted within 60 days of the conclusion of the Rule 31A ADR Proceeding or within the time period specified by the Court.

- NOTES: 1. Section 5 of Rule 31 and Section 5 of Rule 31A (set forth above) strictly limit the information a Rule 31 Mediator or Rule 31A Neutral may provide to the trial judge. See, TN Advisory Opinion No. 2020-0001 which states: "Again, the Committee believes that the specific provision in Rule 31, Section 5, strictly limiting what a Rule 31 Mediator may disclose to the Court controls over the more general language in other Sections. That specific provision in Rule 31, Section 5 does not contain a 'consent of the parties' exception. The Committee does not believe that the parties can, by consent, agree that the Rule 31 Mediator may violate Rule 31, Section 5.*
- 2. There is a significant difference between Tenn. Sup. Ct. R. 31 and Tenn. Sup. Ct. R. 31A as regards to required reports to be filed. Tenn. Sup. Ct. R. 31 also requires a report be filed with the TN Supreme Court Alternative Dispute Resolution Commission. However, Tenn. Sup. Ct. R. 31A imposes no such obligation.*



## **AFTER - FEES AND EXPENSES**

Tenn. Sup. Ct. R. 31A provides that a Neutral may charge for fees and expenses. There are a number of provisions that address a Neutral's compensation and general requirements for what can and cannot be charged (e.g. Section 9, Fees and Expenses). Obviously, these sections are not applicable to a judicial officer and are not set forth in this Guide.

---

## **AFTER – LITIGATION**

### **TENN. SUP. CT. R. 31A, SECTION 7. CONFIDENTIAL AND INADMISSIBLE EVIDENCE**

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

### **TENN. SUP. CT. R. 31A, SECTION 10(d) OBLIGATIONS OF A RULE 31 NEUTRAL**

**(d)** A Rule 31A Neutral shall not be called as a witness in any proceeding to enforce any terms of the resulting agreement.

### **TENN. SUP. CT. R. 31A, SECTION 11. PRIVILEGE AND IMMUNITY**

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

### **TENN. SUP. CT. R. 31A, APPENDIX A – SECTION 7. CONFIDENTIALITY**

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



## **AFTER**

### **TENN. SUP. CT. R. 10, RJC 2.15(B) RESPONDING TO LAWYER MISCONDUCT**

(B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

### **TENN. SUP. CT. R. 10, RJC 1.2[4] AND [6] PROMOTING CONFIDENCE IN THE JUDICIARY**

[4] Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.

[6] A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code.

---

## FINAL NOTES

1. Tenn. Sup. Ct. R. 31A is applicable to Neutrals in other contexts. As a result, the Rule should be applied with some common sense to fit the circumstances of a judicial settlement conference.
2. To avoid distractions, I did not insert ellipses (“...”) to indicate sections not referenced, etc. I think the context will clearly indicate that parts of a section or paragraph have been omitted.
3. Obviously, the Rules prohibit the settlement neutral from serving as the trial judge and limits the information that the settlement neutral may pass on to the trial judge. These two ideas promote confidence in the judicial settlement process.



# RESOURCES

ADR Commission Policies located at:

[www.tncourts.gov/programs/mediation/resources-mediators/policies](http://www.tncourts.gov/programs/mediation/resources-mediators/policies)

Advisory Opinions located at:

[www.tncourts.gov/programs/mediation/resources-mediators/opinions](http://www.tncourts.gov/programs/mediation/resources-mediators/opinions)

ABA Ethics Resources

[www.americanbar.org/groups/dispute\\_resolution/resources.html](http://www.americanbar.org/groups/dispute_resolution/resources.html)