

ETHICS ADVISORY OPINION

ALTERNATIVE DISPUTE RESOLUTION COMMISSION

Issue Presented:

Where a party lodges a complaint of unethical attorney behavior with the Board of Professional Responsibility, do the confidentiality provisions of Rule 31, §10(d) enjoin the mediator from testifying on behalf of the accused attorney?¹

Factual Background:

A small child ingested drugs while in the care of a day care center. The child was hospitalized and incurred significant medical expenses.

Her parents hired an attorney ("*Attorney A*" herein) to pursue a tort claim against the day care center.

After investigation, Attorney A determined that the daycare center ("*Defendant*" herein) would have some interest in a quick resolution to avoid potential adverse publicity. Attorney A selected a mediator and scheduled mediation quickly.

The case was not resolved by mediation. After the unsuccessful mediation, the parties fired Attorney A and filed a complaint with the Board of Professional Responsibility. The parties' co-counsel [who was a personal friend of the parties and a former associate in the firm of Attorney A] also filed a complaint against Attorney A with the Board of Professional Responsibility.

In both complaints, Attorney A is accused of leaving the mediation room to eat lunch in his office and to accept phone calls regarding imminent vacation plans. While there were other allegations leveled in the complaint, the gravamen of the unethical conduct involved Attorney A's non-verbal conduct during the mediation.

Attorney A's attorney wants to submit an Affidavit from the mediator to the Board of Professional Responsibility, which details the conduct witnessed by the mediator during the course of the mediation. The mediator has refused to supply an Affidavit based upon the confidentiality provisions of Rule 31, §10(d).

Attorney A's attorney asked the parties to consent to the testimony of the mediator and the Defendant's attorney. The parties refused to grant this request.

¹ The attorney for accused attorney would also like to secure the testimony of the other attorney present during mediation. This opinion should come from the Board of Professional Responsibility, since Rule 31 addresses the role of the Neutral.

Applicable Rules and Statutes:

Rule 31, §10(d) of the Supreme Court Rules states the following:

“Rule 31 Neutrals shall preserve and maintain the confidentiality of all information obtained during Rule 31 ADR Proceedings and shall not divulge information obtained by them during the course of Rule 31 ADR Proceedings without the consent of the parties, except as may be required by law.”

Rule 31, Appendix A, Section 7(a) of the Supreme Court Rules states the following:

“A Neutral shall preserve and maintain the confidentiality of all dispute resolution proceedings except where required by law to disclose information.”

Rule 31, §7 states the following:

“Evidence of conduct or statements made in the course of Rule 31 ADR Proceedings and other proceedings conducted pursuant to an Order of Reference shall be inadmissible to the same extent as conduct or statement are inadmissible under Tennessee Rule of Evidence 408.”

Analysis:

Attorney A’s attorney maintains that because the parties and their current attorney have placed the mediation events under the scrutiny of the Board of Professional Responsibility, Attorney A has the right to defend himself by calling witnesses on his own behalf, including the mediator. Any other result, according to Attorney A’s attorney, would result in a denial of Attorney A’s fundamental right to call witnesses on his own behalf.

Put differently, Attorney A suggests that the parties have waived their right to mediation confidentiality by placing the events of mediation under scrutiny.

In the case of *McMahan v. McMahan*, 2005 WL 3287475, the Eastern Section Court of Appeals sanctioned a very narrow exception to confidentiality provisions of Rule 31.

In *McMahan*, the parties mediated and memorialized their agreement in a long handwritten document.² Within hours, Mrs. McMahan repudiated the agreement on the grounds that she lacked the mental capacity to make the agreement. She testified that *“she had taken higher than prescribed dosages of a narcotic pain medication and an antidepressant during the course of the mediation. She stated that, during the latter stages of the mediation session, she developed a migraine headache and administered a medicinal injection to alleviate the pain.”* *McMahan*, page 8.

The mediator testified regarding the Mrs. McMahan’s mental capacity. Specifically, she recalled that she did not notice any confusion on the part of Mrs. McMahan or slurred speech. Rather, the mediator testified that Mrs. McMahan participated fully in the process.

² The handwritten document contained 32 discrete paragraphs.

On appeal, Mrs. McMahan argued that the trial court committed reversible error by permitting the mediator to testify with regard to the Wife's mental capacity. Mrs. McMahan argued that the trial court's admission of this testimony was in violation of the provisions of Rule 31, §10(d) and Rule 31, §7.

The Eastern Section Court of Appeals relied on the provisions of Rule 408 of the Tennessee Rules of Evidence to affirm the trial court's decision. Specifically, the Court noted that Rule 408 "*provides that evidence of conduct or statements made in compromise negotiations are "not admissible to prove liability for or invalidity of a civil claim or its amount or a criminal charge or its punishment."* However, Rule 408 "*does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."*" McMahan, page 9.

Since the mediator did not testify as to any confidential statements or assertive conduct, the Court of Appeals held that her testimony was not in contravention of the provisions of Rule 31.

Under the facts presented by this request, it appears that the mediator may testify about the conduct of Attorney A so long as the testimony carefully avoids any confidential statements or affirmative conduct by the parties. By way of example, it would appear that the mediator could testify about whether Attorney A left the mediation room and ate a burrito in his office.

While this result requires careful calibration by the mediator, it does appear to balance the competing interests of confidentiality and Attorney A's right to defend his professional conduct.

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