

IN THE TENNESSEE ALTERNATIVE DISPUTE RESOLUTION COMMISSION

Advisory Opinion No.: 2017-0002

The Alternative Dispute Resolution Commission received a request for an advisory opinion from a Tennessee Rule 31 Listed Mediator. The request has been modified for purposes of response within the context of Rule 31. The Ethics Advisory Committee, consisting of George Brown, Bill Young, and Virginia Story, Chair of the Committee, reviewed the request. The Ethics Advisory Committee presented it to the Alternative Dispute Resolution Commission and issued the following opinion.

Inquiry: Is drafting a Marital Dissolution Agreement or other legal document for presentation to the court by a Neutral in a mediation setting considered “participation as attorney” or is it considered an appropriate memorialization of a settlement agreement under Rule 31?

A Rule 31 Listed Mediator may assist the parties in memorializing the terms of the agreement by preparing a Memorandum of Understanding (“MOU”). A Rule 31 Listed Mediator should not prepare a Marital Dissolution Agreement or other legal document for presentation to the court. If the parties have attorneys, then the attorneys can prepare the paperwork necessary for filing with the court. If the parties do not have attorneys, then the parties can prepare the paperwork necessary for filing with the court.

Rule 31 § 10(c) regarding obligations of Rule 31 Neutrals advises:

“During and following Rule 31 ADR Proceedings, Rule 31 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 31 ADR Proceeding was conducted.”

Rule 31 Appendix A §10 (a)(1) addresses concluding a dispute resolution proceeding by stating:

“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.”

A Rule 31 Listed Mediator’s role can include preparing a Memorandum of Understanding (“MOU”). Rule 31 § 10(e) explains:

“The Neutral may assist the parties in memorializing the terms of the parties' settlement at the end of the mediation.”

A MOU can show that the parties have agreed to certain items in their divorce and the parties expect those items to be made a part of their divorce decree. Following the conclusion of mediation, the parties can then take the MOU to a lawyer and have the lawyer draft a Marital Dissolution Agreement that uses the MOU and includes additional language prepared by the attorney.

If the parties do not have attorneys and/or they choose to fill out the Parenting Plan themselves and submit it to the court for approval, the Mediator may discuss with the parties which categories their MOU agreements pertain to within the body of the Parenting Plan. The parties can review a copy of a Parenting Plan with the Mediator to make sure that it covers the results of the mediation. If both parties agree on all items in the Parenting Plan, then the parties must reduce that Parenting Plan to a formal Order and that Order must be submitted to the court for approval. A Rule 31 Mediator should not prepare legal documents, such as a Parenting Plan, that can be filed with the court for the parties to a mediation that the Mediator conducted.

As a public policy, it is important that the parties understand that the Mediator is not the advocate for either party nor is the Mediator the advocate for both parties. The obligation is on the Rule 31 Neutral to “refrain from participation as attorney” per Rule 31 § 10(c) and ensure this prevailing public policy is explained to the parties.

Date Issued: April 25, 2017