

IN THE TENNESSEE ALTERNATIVE DISPUTE RESOLUTION COMMISSION

Advisory Opinion No. 2020-0001

The Alternative Dispute Resolution Commission (“ADRC”) received a request for an advisory opinion from a Tennessee Rule 31 Listed Mediator. The request has been modified for purposes of a response within the context of Tennessee Supreme Court Rule 31 (“Rule 31”). The Ethics Advisory Opinion Committee, consisting of Frank S. Cantrell, Leslie M. Gattas, and Richard E. Ladd, Jr., reviewed the request and issued the following Opinion.

Background Information:

A set of questions has developed as a result of referrals from a Court to a Community Mediation Center (“Center”). The Court selected a number of *pro se* cases and referred them to the Center to conduct mediations between willing parties.

The Center sought clarification from the Court regarding how the Center should handle “remote filings” of reports and subsequent contacts, if any, by the litigants under certain circumstances (e.g. due to a payment plan being breached).

In response to the Center’s inquiries, one Judge responded in part, “Please send a copy of the signed settlement agreement for our file. Upon receipt of this signed agreement, the Court will either dismiss the case or continue the case, whichever is appropriate.”

A question was raised as to whether it was appropriate for Rule 31 Mediators to file the mediated settlement agreement with a Court, along with the *Rule 31, Section 5* mediation report. The Center’s mediators have not filed mediated settlement agreements pending clarification from the ADRC.

Question 1:

Is the filing, by a Rule 31 Mediator, of a mediated settlement agreement with a Court a violation of Rule 31?

Response:

Yes. The filing, by a Rule 31 Mediator, of a mediated settlement agreement with a Court is a violation of *Rule 31, Section 5. Reports in Rule 31 Mediations Conducted in Eligible Civil Actions.*

The Committee believes that Question 1 is expressly addressed in *Rule 31, Section 5*. According to *Rule 31, Section 5*, a Rule 31 Mediator shall submit a final report to the Court at the conclusion of a Rule 31 Mediation in an Eligible Civil Action and, “*The final report shall state only:(i) which parties appeared and participated in the Rule 31 Mediation; (ii) whether the case was completely or partially settled; and (iii) whether the Rule 31 Mediator requests that the costs of the Rule 31 Mediator’s services be charged as court costs.*” (emphasis added).

The Committee reads the word “only” as a limitation; it restricts the information to be shared with a Court solely to the three listed items. Because a mediated settlement agreement is not one of the three listed items, the filing, by a Rule 31 Mediator, of a mediated settlement agreement with a Court is a violation of Rule 31.

This Opinion is consistent with *In Re James R. Finney*, a Grievance Decision of the ADRC filed January 3, 2006. There the Mediator sent a letter to a Judge after mediation. The letter included the following language: “I experienced some problems in this mediation which I feel the court should be aware of... It is my opinion that [party A] cooperated and acted in good faith. Their settlement offer in light of the evidence presented to me was reasonable. Lastly, I found that [party B] did not mediate in good faith.”

The ADRC suspended the Mediator, finding that “Providing this letter to the judge with the language as described constitutes a violation of Tenn. Sup. Ct. Rule 31(5)(a). This section of the Rule specifically provides that a final report of a mediator to the court shall include only the following information: “(i) which parties appeared and participated in the Rule 31 Mediation; (ii) whether the case was completely or partially settled; and (iii) whether the Rule 31 Mediator requests that the costs of the Rule 31 Mediator’s services be charged as court costs.” The Rule does not permit the mediator to provide any further information to the court.”

Question 2:

Assuming the answer to Question 1 is “yes,” if a Court ordered the mediated settlement agreement to be filed by the Rule 31 Mediator, would doing so be a permitted exception? (See §10(c)(4)).

Response:

No. The Committee does not find any exception to *Rule 31, Section 5* for Orders of a Court in *Rule 31, Section 10(c)(4)* or otherwise.

Rule 31, Section 10(c)(4). Obligations of Rule 31 Mediators provides, as it relates to Question 2, that the Rule 31 Mediator shall, “*Preserve and maintain the confidentiality of all information obtained during the Rule 31 Mediation and shall not divulge information obtained by the Rule 31 Mediator during the course of the Rule 31 Mediation ... except as otherwise may be required by law.*”

Rule 31, Section 7. Confidential and Inadmissible Evidence, provides, as it relates to Question 2, “*Evidence of conduct, information disclosed, or any statement made in the course of a Rule 31 Mediation is confidential to the extent ... provided by other law or rule of this State. ... No Rule 31 Mediator may be compelled to testify by deposition or otherwise,*” regarding such conduct, information, or statements.

Unlike *Rule 31, Section 5*, neither of the Sections quoted immediately above expressly addresses the information to be provided by a Rule 31 Mediator to a Court. The Committee believes that the specific provision in *Rule 31, Section 5*, strictly limiting what a Rule 31 Mediator may disclose to a Court controls over the more general language in other Sections.

The Committee is not aware of any applicable Tennessee law or rule that requires mediated settlement agreements to be filed with a Court upon a Judge's Order in the circumstances presented in the request under consideration. The mediated settlement agreements in the instant request are not marital dissolution agreements or parenting plans.

While a Judge's Order can represent the law of the case and is entitled to the utmost deference and respect, the Committee is of the opinion that the Rule 31 Mediator should not be placed in the position of deciding to comply with a Judge's Order to provide information to a Court beyond the express limitations placed by *Rule 31 Section 5*. Any other interpretation would render *Rule 31, Section 5* superfluous. Further, an Order for a Rule 31 Mediator to file a mediated settlement agreement with a Court would have the same effect as compelling testimony, contrary to *Rule 31, Section 7*. Prior to accepting a Rule 31 appointment from a Court, it is the responsibility of the Rule 31 Mediator to be satisfied that the Rule 31 Mediator will not be required to violate Rule 31.

Question 3:

Assuming the answer to Question 1 is "yes," would the filing, by a Rule 31 Mediator, of the mediated settlement agreement be a violation if the parties voluntarily consent (via the Agreement to Mediate or the Mediated Agreement) to the filing (*See §10(c)(4)*)?

Response:

Yes. The filing, by a Rule 31 Mediator, of a mediated settlement agreement would still be a violation even if the parties, "voluntarily consent [via the Agreement to Mediate or the Mediated Agreement] to the filing."

Rule 31, Section 10(c)(4), as it relates to Question 3, requires the Rule 31 Mediator to, "*Preserve and maintain the confidentiality of all information obtained during the Rule 31 Mediation and ... not divulge information obtained by the Rule 31 Mediator during the course of the Rule 31 Mediation without the consent of the parties*"

Rule 31, Section 7. Confidential and Inadmissible Evidence, as it relates to Question 3, provides that "*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 No Rule 31 Mediator may be compelled to testify by deposition or otherwise regarding such conduct, information, or statements.*"

It should be noted that Tennessee Code Annotated Section 36-4-130 provides a similar exception for domestic mediation: "*(1) When all parties to the mediation agree, in writing, to waive the confidentiality of the written information.*"

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*.

Further, the Committee is particularly concerned with the situation surrounding a Rule 31 Mediator obtaining informed consent on this issue from *pro se* parties, without simultaneously violating the requirement of *Rule 31, Section 10(b)(3)* to “*refrain from giving legal advice.*” Here, the court aptly uses the expertise and skills of mediators to resolve cases in a less adversarial manner. However, it should be recognized that *pro se* parties are particularly susceptible to misunderstanding the short-term—and long-term—legal implication of consenting to filing of a mediated settlement agreement. If the Rule 31 Mediator simply includes the consent to file the mediated settlement agreement in either that document or the agreement to mediate, without providing prohibited legal advice, the consent becomes boilerplate, analogous to an adhesion contract.

This Opinion has no effect on the provision in *Rule 31, Section 7*, that “*A written mediated agreement signed by the parties is admissible to enforce the understanding of the parties.*” The Rule 31 Mediator is not expected to have a role in that process. For example, *Rule 31, Section 10(d)* states, “*The Rule 31 Mediator shall not be called as a witness in any proceeding to enforce any terms of the resulting mediation agreement.*”

References:

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

GENERAL PROVISIONS APPLICABLE TO ALL RULE 31 MEDIATIONS

Section 5. Reports in Rule 31 Mediations Conducted in Eligible Civil Actions

At the conclusion of a Rule 31 Mediation in an Eligible Civil Action, the Rule 31 Mediator shall submit a final report to the Court by filing same with the clerk of the court. The final report shall state only: (i) which parties appeared and participated in the Rule 31 Mediation; (ii) whether the case was completely or partially settled; and (iii) whether the Rule 31 Mediator requests that the costs of the Rule 31 Mediator'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 31 Mediation or within the time period specified by the Court.

Section 7. Confidential and Inadmissible Evidence

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 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 31 Mediator may be compelled to testify by deposition or otherwise regarding such conduct, information, or statements. A written mediated agreement signed by the parties is admissible to enforce the understanding of the parties.

Section 10. Obligations of Rule 31 Mediators

(b) During Rule 31 Mediations, the Rule 31 Mediator shall:

(3) Refrain from giving legal advice, while serving as a Rule 31 Mediator, to the parties in the Rule 31 Mediation. ...

(c) During and following Rule 31 Mediations, Rule 31 Mediators 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 Mediation was conducted.

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

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

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

(5) Assist the parties in memorializing the agreement of the parties at the end of the mediation. Rule 31 Mediators 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 Tenn. Sup. Ct. R. 52 and any other forms approved by the Tennessee Supreme Court.

(d) The Rule 31 Mediator shall not be called as a witness in any proceeding to enforce any terms of the resulting mediation agreement.

**2019 Tennessee Code Title 36 - Domestic Relations, Chapter 4 - Divorce and Annulment
§ 36-4-130. Mediation -- Confidentiality of information and documents. (2019)**

(a) When the parties to a divorce action mediate the dispute, the mediator shall not divulge information disclosed to the mediator by the parties or by others in the course of mediation. All records, reports, and other documents developed for the mediation are confidential and privileged.

(b) Communications made during a mediation may be disclosed only:

(1) When all parties to the mediation agree, in writing, to waive the confidentiality of the written information;

(2) In a subsequent action between the mediator and a party to the mediation for damages arising out of the mediation;

(3) When statements, memoranda, materials and other tangible evidence are otherwise subject to discovery and were not prepared specifically for use in and actually used in the mediation;

(4) When the parties to the mediation are engaged in litigation with a third party and the court determines that fairness to the third party requires that the fact or substance of an agreement resulting from mediation be disclosed; or

(5) When the disclosure reveals abuse or neglect of a child by one (1) of the parties.

(c) The mediator shall not be compelled to testify in any proceeding, unless all parties to the mediation and the mediator agree in writing.

Date Issued: October 21, 2020



Frank Cantrell



Richard Ladd, Jr.



Leslie M. Gattas