IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PETITION FOR THE ADOPTION OF AMENDED TENNESSEE SUPREME COURT RULE 31, APPENDIX A TO RULE 31, AND SUPREME COURT RULE 31 A

DOCKET NO. ADM2018-00425

COMMENT TO PROPOSED RULE 31 AMENDMENTS
BY JOE E. MANUEL, ATTORNEY-AT-LAW

COMES, Joe E. Manuel, in response to this Court's Order soliciting comments to the proposed Rule 31 Amendments:

COMMENTS:

1. **Rule 31, § 18(e):** The jurisdiction of the ADRC or the Supreme Court of Tennessee to regulate the conduct, etc. of mediators or neutrals is a fundamental issue. And, one that has seemingly been ignored in certain respects and would continue to be ignored under the proposed Petition by the ADR Commission (hereafter the "Petition").

Although the ADRC Proposal reminds us that the ADRC's jurisdiction is limited to Rule 31 Neutrals serving in "eligible civil actions", the current and proposed Rule 31 requires Rule 31 Mediators to "report to the ADRC" . . . **" as to any mediation conducted by the Rule 31 Mediator including those mediations which are not subject to Rule 31**".[Sec, **Rule 31, § 18(e)** and **§ 19(a)(8)**]. Indeed, the front page of the ADR News (Spring 2018) reminds us of this obligation.

I am unable to reconcile how the ADRC has the jurisdiction to require a "Rule 31 Mediator" to report information that is by definition activity outside the ambit of Rule 31 ? I do not find it persuasive that jurisdiction is conveyed just because the AOC wants to know.

2. **Rule 31, § 2 (i).** The term "Rule 31Mediation" combined with the definition of "Eligible Civil Action" is the essence of Rule 31's jurisdiction. The Petition proposes to change the definition by adding the phrase **"or related to an eligible Civil Action".** [See, proposed **Rule 31, § 2 (i)**].

A matter is either within the pending lawsuit or it is not. I suggest that the terminology "related to an eligible civil action" is overly elastic. Does it mean that it will impact someone who is "kin to the parties to the lawsuit" ? I suggest there has never been a divorce with children wherein multiple relatives of the divorcing couple were not affected or impacted by the Parenting Plan. The term is so elastic that it could be utilized to expand the scope of Rule 31 to infinity and beyond.

I applaud the Petition's suggestion for the additional language : **"2. In any civil dispute in which the Rule 31 Mediator and the parties have agreed in writing that the mediation will be conducted pursuant to Rule 31".** This does expand the scope of Rule 31, but only when the Parties and the Mediator wish to bring the mediation underneath the Rule 31 tent. This Mediator has included such a provision in his Mediation Agreement for years. It will be helpful to have an actual provision within **Rule 31** to rely upon as authority for this practice.

3. **Rule 31, § 10(e).** Prohibition upon Preparation of a Marital Dissolution Agreement and/or Parenting Plan for filing with the Court.

The prohibition with regard to a Martial Dissolution Agreement (MDA) in my view does clearly constitute the practice of law. It is not a form document and requires substantial legal knowledge to prepare.

The Parenting Plan is a far different matter. It is a form. Yes, the form is ultimately signed by counsel and the Court. And, yes, it should require consideration of many sophisticated and legal factors. Nonetheless, at the end of the day it is still a "fill in the blanks form" that has been blessed by the Supreme Court.

Let us consider some scenarios:

1. A married couple in a Rule 31 Mediation, whether represented or not and regardless of whether their counsel is present, is guided through the discussion of Parenting and Parenting Time by the Mediator, the Parties tell the Mediator what to place in the multitude of blanks. And, the Mediator literally fills in the blanks. The Parenting Plan form is completed and the Mediator hands the completed Parenting Plan to the parties (and/or their counsel). So, this constitutes the "practice of law" and the Mediator has sinned by violating Rule 31 ?

2.Would it be permissible for the Mediator to use the Parenting Plan as a guide for the Parties' discussion of Parenting and Parenting Time; record their answers upon a blank sheet of paper corresponding to the enumeration of the Parenting Plan; when finished with all issues in Parenting Plan, hand the sheet of paper with entries corresponding to the

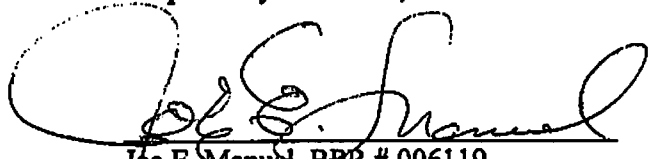
blanks and enumeration of the Parenting Plan to the Parties. [The Parties could then fill in the Parenting Plan form themselves and go to Court without counsel or take it to counsel to fill in the Parenting Plan form]. And, this approach would comply with Rule 31 ?

3.Does it make a difference if the Parties hold the pen and write down the information in the blanks contained within the Parenting Plan rather than the Mediator during the Mediation session ?

The approach taken by the Petitioner appears to be clearly a "difference without a distinction" in my view. I respect the ADRC's authority to issue Advisory Opinions. However, I most respectfully disagree with **Advisory Opinion 2017-0002** and in my view it is ill considered. Thus, this interpretation should not be memorialized in the text of **Rule 31.**

We are bombarded daily with pleas from this Court to make legal processes more transparent, more accessible and more available to people. Yet, in my view, the existing **Rule 31** interpretations regarding the Parenting Plan are totally inconsistent with making legal processes more available because it places an unreasonable obstacle in the path of parties who may wish to proceed *pro se* in their divorce. And, this proposed Rule should not be adopted by the Supreme Court.

Respectfully submitted,



Joe E. Manuel, BPR # 006119
240 Forest Avenue, Suite 301
Chattanooga, TN 37405
Telephone: 423-266-3535
Facsimile: 423-266-3136

CERTIFICATE OF SERVICE

I hereby certify that this document has been served upon the below listed individual via electronic transmission utilizing the email address set forth herein:

James M. Hivner, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37919-1407
appellatecourtclerk@tncourts.gov

This 11th day of May, 2018.

Joe E. Manuel, BPR # 006119
240 Forest Avenue, Suite 301
Chattanooga, TN 37405
Telephone: 423-266-3535
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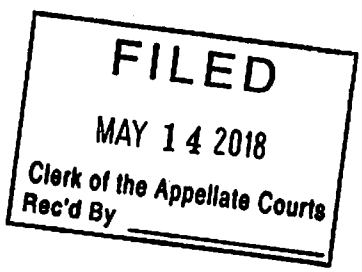
appellatecourtclerk - Comment to Proposed Amendments to S. CT. Rule 31

From: "Joe E. Manuel" <jem@joemanuel.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 5/11/2018 8:43 AM
Subject: Comment to Proposed Amendments to S. CT. Rule 31
Attachments: JEM COMMENT RULE 31.pdf

Dear Sir:

I have attached in pdf format a Comment to the Proposed Amendment to Rule 31 for filing with the Court.

Please confirm receipt.



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April 23, 2018

James M. Hivner, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Docket number **ADM2018-00425**

I would like to propose a modification to Rule 31, Section 10 (e). The proposed modification is to simply include the following wording:

> "Rule 31 Mediators may assist parties in understanding the Parenting Plan and considering its implications for themselves and their child(ren) but shall not prepare the filing."

The AOC's website contains the following language in the "Parents Guide to Mediation":

> *"When parents come before the court with a complaint for divorce, the court mandates the submission of a "parenting plan." Mediation is often used to develop such a plan. Mediation is a process in which parents who are in conflict come together with a neutral third person who assists them in reaching a mutually agreeable settlement. The mediator helps parents clarify the issues, consider the options, and reach a workable agreement that fits the needs of their children."*

This has been an area of ambiguity for Rule 31 mediators and I hope we can offer clarification going forward. I believe it would be preferable to have similarly permissive language reside within Rule 31 rather than bury it in the "Parents' Guide to Mediation." Clearly, many pro se parents and never-marrieds need assistance preparing parenting plans.

Thank you,

Charles A. Hill
Rule 31 Mediator

Christine Vicker - Proposed Rule Changes to Rule 31 ADM2018-00425

From: Charles Hill <cahill@uci.edu>
To: <appellatecourtclerk@tncourts.gov>
Date: 4/15/2018 1:02 PM
Subject: Proposed Rule Changes to Rule 31 ADM2018-00425

I would like to propose a modification to Rule 31, Section 10 (e). The proposed modification is to simply include the following wording:

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I believe it would be preferable to have similarly permissive language reside in Rule 31 rather than bury it in the "Parents' Guide to Mediation". Many pro se parents and never marrieds clearly need assistance preparing parenting plans. This has been an area of ambiguity for Rule 31 mediators and I hope we can offer clarification going forward.

Thank you,
Charles A. Hill
Rule 31 Mediator

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PETITION FOR THE ADOPTION OF AMENDED TENNESSEE SUPREME COURT RULE 31, APPENDIX A TO RULE 31, AND SUPREME COURT RULE 31A

No. ADM 2018-00425

COMMENT OF THE BOARD OF PROFESSIONAL RESPONSIBILITY TO PETITION FOR THE ADOPTION OF AMENDED TENNESSEE SUPREME COURT RULE 31, APPENDIX A TO RULE 31 AND SUPREME COURT RULE 31A

Comes now the Board of Professional Responsibility (the Board), pursuant to Order filed March 14, 2018 and submits the following Comment to Petition for the Adoption of Amended Tennessee Supreme Court Rule 31, Appendix A to Rule 31 and Supreme Court Rule 31A:

1. Proposed Tenn. Sup. Ct. R. 31 § 11 establishes proceedings for discipline of Rule 31 mediators. The Board is concerned that proposed Tenn. Sup. Ct. R. 31 omits the provision included in existing Tenn. Sup. Ct. R. 31 § 11(a)(2) which states:

> Any grievance against an active Rule 31 mediator who is an attorney that raises a substantial question as to the attorney's honesty, trustworthiness or fitness as a lawyer in other respects shall be filed with the Board of Professional Responsibility. If the ADRC Chair determines that a complaint filed with the ADRC sets out such a grievance, the ADRC shall promptly refer the complaint to the Board of Professional Responsibility. If the complaint is filed with both the ADRC and the Board of Professional Responsibility, the ADRC will defer to the Board of Professional Responsibility.

2. The proposed proceedings for discipline of Rule 31 mediators as set forth in Tenn. Sup. Ct. R. 31 § 11 includes a 180-day statute of limitations for filing a complaint with the Alternative Dispute Resolution Commission (ADRC). Tenn. Sup. Ct. R. 9 § 15 does not include a statute of limitations on complaints filed against attorneys. The Board is concerned that since the proposed rule omits the reference/referral of grievances to the

Board of Professional Responsibility and includes a 180-day statute of limitations, then some meritorious grievances may be time barred and not considered.

3. The proposed disciplinary process in Tenn. Sup. Ct. R. 31 § 11(f)(8) provides that if a grievance results in a finding that a mediator who is also an attorney violated Rule 31, then the ADRC shall report the finding to the Board of Professional Responsibility. The Board is concerned that the narrow parameters of the ADRC's review and reporting of attorney grievances to the Board of Professional Responsibility fails to fully address complaints which may reflect violations of the Rules of Professional Conduct but not a violation of Rule 31.

4. Proposed Tenn. Sup. Ct. R. 31A § 2(k) states "Rule 31A Neutrals are required to be licensed attorneys" and proposed Tenn. Sup. Ct. R. 31A § 9(b) provides that any violation of these rules and procedures by a Rule 31A neutral who is an attorney constitutes a violation of a violation of the Rules of Professional Conduct. The Board respectfully asserts that Rule 31A should include a statement that violations of the Rules of Professional Conduct by Rule 31A neutral attorneys shall be reported to the Board of Professional Responsibility.

Respectfully submitted,

Jimmie C. Miller (BPR No. 009756)
Chair, Board of Professional Responsibility
of the Supreme Court of Tennessee

1212 N. Eastman Road
PO Box 3740
Kingsport, TN 37664

Sandy Garrett, (BPR No. 013863)
Chief Disciplinary Counsel

Board of Professional Responsibility
of the Supreme Court of Tennessee
10 Cadillac Drive, Suite 220
Brentwood, TN 37027
(615) 361-7500

CERTIFICATE OF SERVICE

I certify that the foregoing has been mailed to Jocelyn Stevenson, Executive Director, Tennessee Bar Association, 221 4th Avenue North, Suite 400, Nashville, Tennessee by U.S. mail, on this the 11th day of April, 2018.

By: Jimmie C. Miller
JIMMIE C. MILLER (BPR NO. 009756)
Chair of the Board

By: Sandy Garrett
SANDY L. GARRETT (#013863)
Chief Disciplinary Counsel

appellatecourtclerk - docket number ADM2018-00425

From: Deborah Denson <deborahedenson@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 3/21/2018 8:13 AM
Subject: docket number ADM2018-00425

RE: Order Soliciting Comments

I have a comment regarding two parts of the proposed revisions. As a Mediator, I draft a Memorandum of Understanding stating that the document is not intended to be a legal document but is *the Mediator's understanding* of the agreements between the parties and I am the only one that signs the MOU stating that my signature confirms it is my understanding of the parties agreements and each has received a copy. I do this specifically because signatures denote the document is legally biding and thus perhaps denotes the practice of law.

I regularly mediate with clients without their attorney's present with the understanding that the MOU will be drafted in legal language, the terms will be clear and concise and each party will have an opportunity for legal counsel to review the agreements on their behalf prior to signing. If the MOU is to be signed by the parties and admissible as evidence "to enforce the understanding of the parties," then it is a legally binding document and the parties are making binding agreements before their attorney has vetted their agreements. It seems to follow as well that the Mediator is practicing law.

I see this as a slippery slope. Yes, the parties "intend" to be bound by the agreements in an MOU, *but only* after they are written up in formal legal language, the legal protections have been added, and they have sought advice of counsel.

Section 7. Confidential and Inadmissible Evidence
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:
(5) Assist the parties in **memorializing the agreement** of the parties' at the end of the mediation. The Rule 31 Mediator shall not prepare legal pleadings, such as a Marital Dissolution Agreement and/or Parenting Plan, for filing with the Court.

Thank you for your time and attention to this information.

Sincerely,
Deborah Denson

DEBORAH DENSON

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ADM2018-00425

appellatecourtclerk - Recent Request to Amend Rules on Mediators - Public Comment

From: Brad Hornsby <bradhornsbylaw@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 3/19/2018 3:38 PM
Subject: Recent Request to Amend Rules on Mediators - Public Comment

I recently went through family law mediation training. As part of that training I was informed of an advisory opinion that a mediator is not permitted ethically to prepare documents for submission to court. As an attorney for over 35 years and going to mediation for a significant period of time, I have discovered that this rule is probably more often violated than it is followed. I wrote to request the Board reconsider this opinion and not only was my recommendation rejected, the Board is now wanting a "hard and fast" rule prohibiting a mediator from preparing any paperwork to be filed with the court (and thus subjecting him/her to disciplinary action for preparing paperwork with the agreement of all of the parties). I strongly disagree with their position for some of these reasons:

1. If an attorney is the mediator, there should be no concern about him or her preparing the document and presenting it to court as a violation of a prohibition of practicing law without a license. The mediator is a licensed attorney. The Supreme Court is allowing a collaborative approach in litigation which in essence would partially mirror this approach of an attorney mediating the agreement, having the parties sign it, and having them submit it to court while not officially representing either side. So if I am a collaborator, I would be arguably be permitted to prepare the paperwork, but not if I am a mediator. Makes no sense to me.
2. If the parties have an attorney present, the attorneys would be signing off on the paperwork prepared by the mediator and thus adopting it as his/her own even if it is prepared by another. There should be no concern about who prepared the document when it is adopted and approved by an attorney. Heck, most of my paperwork is prepared by a paralegal, but she is not practicing law without a license because I review it and sign it. If the attorneys are present, they will review the paperwork to insure it is proper.
3. This rule flies contrary to the efforts of our Supreme Court. While I may disagree with some of their actions, they are preparing documents to be filed with the court and able to be downloaded and modified from the AOC website. They are wanting litigants to have "access to judgment" and your approach is basically making non-attorneys have to hire an attorney to prepare the court pleadings of an agreement that they reached previously as the memorandum of understanding probably would not be accepted by the court. If you really want to see a waste of time, come to court and watch a non-attorney litigant try to get a parenting plan approved (they do not often realize a PRP is required, do not know how to calculate child support, do not know how to court days, do not

know about pro-rating medical insurance, etc.). An attorney mediator knows what our judges expect.

4. Your rule flies contrary to the stated goals of mediation to obtain a prompt, cost-effective end to litigation. Once an agreement is reached, the parties should be signing the paperwork memorializing the agreement. I would suggest not getting the paperwork done promptly would result in participants getting "cold feet" and backing out of the agreement after they think about it or speak to family, friends, or an attorney. Many times the mediation is done at a neutral site or the office of the mediator (neither attorney wants to go to the other's "turf"). The attorneys do not have their staff or equipment present. The mediator can quickly use a court-approved parenting plan and fill in the blanks (that is really what is being done). If the mediator cannot do the parenting plan, one of the parties is going to have to get the paperwork done and sent back to the mediator's office and then signed (while everyone is probably waiting around and possibly getting "cold feet"). The same thing would happen in preparing a marital dissolution agreement and final decree.

5. In many cases, the act of a mediator in preparing the "agreement" is more ministerial in any event. A Parenting Plan can be found on the AOC website. It is a simple, fill-in-the-blanks, form. A mediator would simply be filing in the blanks according to the agreement reached. While in many cases a written agreement can be reached in mediation that is enforceable in a court, a Parenting Plan has to be approved by the court as being in the best interests of a minor child.

Whether you want to prohibit a non-attorney mediator preparing paperwork for non-represented litigants is a totally different matter. I am not addressing that type of issue, but only one in which an attorney is present (representing a party or the mediator).

Please do not permit this rule which emasculates the purpose of mediation.

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