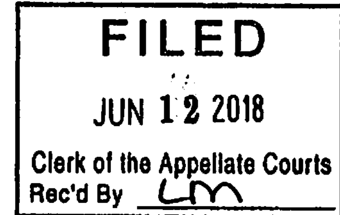
JOHN E. EVANS

ATTORNEY AT LAW

June 12, 2018



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

RE: Rule 31 Proposal – Docket No. ADM2018-00425

Dear Mr. Hivner:

I am an attorney and Rule 31 Listed General Civil/Family Mediator Specially Trained in Domestic Violence. Please accept the following comments on the proposed changes to TENN. SUP. CT. R. 31:

Written Pleadings
Sec. 10(e) Page 10 of report (17 of 121 of pdf)
I realize this proposal incorporates ADRC Advisory Opinion 2017-0002. Mediators should be allowed to help draft standard legal forms such as a parenting plan. Often mediation takes place with two pro se parties and no attorneys. Those parties are required to have a parenting plan to resolve their case. It is does not make sense that a mediator is allowed to type up a detailed memorandum of understanding (MOU), and not simply fill out the standard check box parenting plan form. By allowing the mediator to help the parties fill out this standard form ensures the entire form is filled out correctly and saves significant time, money, and stress on the parties and the Court. Otherwise, the parties are forced to hire an attorney, and they may not be able to afford that. They will then proceed to the Court Clerk, who also cannot give them legal advice, and they will be forced to try to fill out forms while standing at the Clerk's window. That is not efficient or helpful for anyone. There is a broad distinction between a mediator helping parties fill out necessary forms and the mediator providing legal advice or services. The mediator should never provide legal advice or advocacy, should not file the pleadings for the parties, should not accompany the parties to Court, etc. However, the mediator will not lose their neutrality by filling out standard forms. The AOC already supplies the standard parenting plan form. Perhaps the AOC can provide other necessary forms in concise, fill-in-the blank format to allow parties, especially indigent parties, the ability to have a mediator assist them to complete the paperwork necessary for the mediated agreement to finalize their case.

816 SOUTH MAIN STREET, SPRINGFIELD, TN 37172
PHONE: 615-384-1955; FAX: 615-384-9035; EMAIL: EVANSLAWTN@GMAIL.COM

Service of Process for Complaint
Rule 31 Sec. 11(c)(4) - Page 12 of report (19 of 121 of pdf)
If a complaint for discipline is filed against a mediator the proposed rule suggests the ADRC can "serve" the mediator by email.

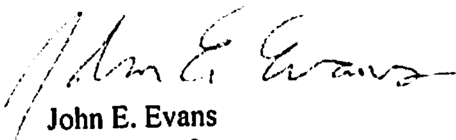
That seems rife with issues. Many attorneys/mediators receive enormous amounts of email, and some of those emails go to spam folders, which are never seen. This is not proper due process, especially since failure to file an answer in thirty (30) days can result in a de facto default judgment with sanctions. A complaint that may result in sanctions should require proper service of process similar to Tenn. R. Civ. P. 4. Email simply is not reliable enough for something this important, and should not be sufficient notice or service of any complaint with these consequences.

Appeals
Rule 31 Sec. 11(e) - Page 15-17 of report (22-24 of pdf)
The proposed rule is unclear if you get an "in person" hearing/oral arguments. The proposed rule seems to give broad discretion to the ADRC on whether an "in person" hearing would take place. An "in person" hearing should be required if requested. The current rule is clear that a hearing is granted if requested. The right to a hearing should not be at the ADRC's discretion.

Training
Proposed Rule 31A Sec. 13 - Sec. 15Page 39-40 of report (46-47 of pdf)
Rule 31A allows "any attorney in good standing" to conduct rule 31 dispute resolution (case reviews, mini trials, non-binding arbitration, etc.). There seems to be no specialized training requirement. This is unfair to those that put in time, money, and effort for required training to obtain all rule 31 listings, (General Civil/Family/Specially Trained in Domestic Violence). It should be clear that the same training is required to be listed for Rule 31 and Rule 31A.

In addition, there is mention of needing ten (10) years' experience in other cases. Again, that is not fair to those that have worked hard to obtain all listings to now to have to wait additional years before we can take some of these cases. There should at least be a grandfather clause in effect for those with current listings.

Respectfully,

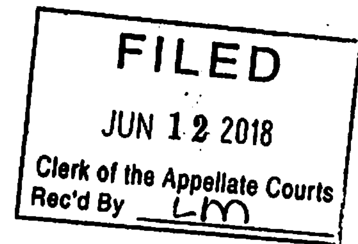


John E. Evans
Attorney at Law

Lisa Marsh - Rule 31 Proposed Changes

From: John Evans <evanslawtn@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 6/12/2018 4:24 PM
Subject: Rule 31 Proposed Changes
Attachments: Letter Rule 31 Proposed Changes.pdf

Please see attached letter.



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Respectfully,

John E. Evans
Attorney at Law
Rule 31 Listed General Civil/Family Mediator
Specially Trained in Domestic Violence
816 South Main Street / Springfield, TN 37172
(615) 384-1955 office / (615) 384-9035 Fax

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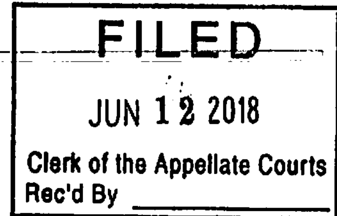
TN Courts: Submit Comment on Proposed Rules



To: Hivner, Jim
Date: 6/12/2018 9:28 PM
Subject: TN Courts: Submit Comment on Proposed Rules

From: "John Evans" <evanslawtn@gmail.com>
Date: June 12, 2018 at 4:24:13 PM CDT
To: "Jim Hivner" <Jim.Hivner@tncourts.gov>
Subject: TN Courts: Submit Comment on Proposed Rules

Submitted on Tuesday, June 12, 2018 - 4:23pm
Submitted by anonymous user: [107.77.90.30]
Submitted values are:

Your Name: John Evans
Your Address: 816 South Main Street
Your email address: evanslawtn@gmail.com
Your Position or Organization: Attorney at Law
Rule Change: Rule 31: Alternative Dispute Resolution
Docket number: ADM2018-00425
Your public comments:
Written Pleadings
Sec. 10(e) Page 10 of report (17 of 121 of pdf)
I realize this proposal incorporates ADRC Advisory Opinion 2017-0002.
Mediators should be allowed to help draft standard legal forms such as a parenting plan. Often mediation takes place with two pro se parties and no attorneys. Those parties are required to have a parenting plan to resolve their case. It does not make sense that a mediator can type up a detailed memorandum of understanding (MOU), and not simply fill out the standard check box parenting plan form. By allowing the mediator to help the parties fill out this standard form ensures the entire form is filled out correctly and saves significant time, money, and stress on the parties and the Court.
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Training - new cases
Proposed Rule 31A Sec. 13 - Sec. 15Page 39-40 of report (46-47 of pdf)
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In addition, there is mention of needing ten (10) years' experience in other cases. Again, that is not fair to those that have worked hard to obtain all listings to now to have to wait additional years before we can take some of these cases. There should at least be a grandfather clause in effect for those with current listings.

The results of this submission may be viewed at:
http://www.tncourts.gov/node/602760/submission/22709

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Improving the Practice of Law through Education, Service, and Fellowship.

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Monica W. Mackie
Executive Director

FILED
JUN 12 2018
Clerk of the Appellate Courts
Rec'd By LM
ADM2018-00425

June 12, 2018

VIA e-mail: appellatecourtclerk@tncourts.gov

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville TN 37219-1407

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

Dear Mr. Hivner,

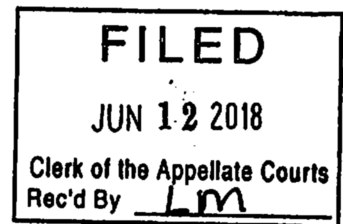
Attached to this email, please find the Comments of the Nashville Bar Association in reference to the above matter.

Thank you, and please let us know if you have any questions.

Best regards,

Monica W. Mackie
Executive Director

cc: Erin Palmer Polly, President
Robb Bigelow, NBA Governance Committee Chair



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

No. ADM 2018-00425

COMMENTS OF THE NASHVILLE BAR ASSOCIATION

Pursuant to the March 14, 2018 Order of the Tennessee Supreme Court, the Nashville Bar Association respectfully submits the following written comments to the Petition for the Adoption of Amended Tennessee Supreme Court Rule 31, Appendix A to Rule 31, and Supreme Court Rule 31A:

The proposed Rule 31, Section 7 adds a provision stating, "No Rule 31 Mediator may be compelled to testify by deposition or otherwise regarding such conduct, information, or statements." The Nashville Bar Association suggests that this provision also prohibit parties from compelling, by subpoena or otherwise, production of a Rule 31 Mediator's case file.

The proposed Rule 31, Section 10(e) adds a provision stating that a "Rule 31 Mediator shall not prepare legal pleadings such as a Marital Dissolution Agreement and/or Parenting Plan for filing with the Court."

It is understood that mediators should refrain from participating as attorneys for a party or for the parties as a whole. However, the broad language of the proposed amendment would prohibit wide-spread accepted practices that do not constitute advocacy. For example, it has been commonplace for attorney mediators to prepare draft marital dissolution agreements and permanent parenting plans that either memorialize agreements of the parties or form the basis of continuing discussion. In practice, those drafts are reviewed by clients with their attorneys, usually at the mediation or following a mediation session if the clients appear without counsel. That practice would be prohibited under a common reading of the proposed Section 10(e).

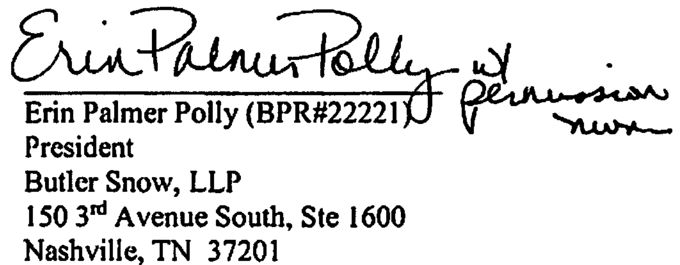
The Nashville Bar Association is further concerned that this proposed provision is contrary to the practice among mediators, who assist unrepresented parties with memorializing their agreement using parenting plans and divorce forms approved by this Court and provided by the Tennessee Administrative Office of the Courts. Often the mediator will provide a copy of these forms to the parties during the mediation. In performing this scrivener role, mediators do not give legal advice, advocate for one party or another, or direct how the parties decide the issues addressed by the forms. Rather, the mediator simply assists the parties in filling out these forms to accurately reflect agreements reached during mediation.

By prohibiting a Rule 31 Mediator from acting as a scrivener with respect to parenting plan or divorce forms, this Court's efforts to increase access to justice may be frustrated. Those parties may reach an agreement during mediation, but will have no assistance in memorializing the agreement. By being left without assistance in properly finalizing agreements reached during mediation, the likelihood of the parties returning to court and litigating may increase, which in turn increases the burden on the judicial system.

Due to these concerns, the Nashville Bar Association believes that the proposed amendment to Rule 10(e) quoted above should be stricken, recognizing that concerns about the unauthorized practice of law are addressed in other Rules.

Respectfully submitted,

Nashville Bar Association



Erin Palmer Polly (BPR#22221)
President
Butler Snow, LLP
150 3rd Avenue South, Ste 1600
Nashville, TN 37201

Christine Vicker - Fwd: ADM2018-00425 - Comment submitted by Mediation Center

From: Lisa Marsh
To: Christine Vicker
Date: 6/12/2018 3:50 PM
Subject: Fwd: ADM2018-00425 - Comment submitted by Mediation Center
Attachments: ADM2018-00425 - Comment submitted by Mediation Center

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

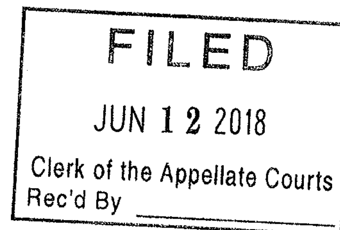
In Re: PETITION FOR THE ADOPTION OF AMENDED TENNESSEE SUPREME COURT RULE 31, APPENDIX A TO RULE 31, AND SUPREME COURT RULE 31 A

425
No. ADM 2018-~~0045~~

COMMENTS OF Beth Oschack Tarter, Esq.
Executive Director, The Mediation Center (Columbia)

June 12, 2018

VIA Email: appellatecourtclerk@tncourts.gov



James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Ave. North
Nashville, TN 37219-1407

Dear Mr. Hivner,

I am an attorney first licensed in 2005, and since 2016, a Rule 31 Listed General Family Mediator and specially listed as trained in Domestic Violence Issues, as well as the Executive Director of the Mediation Center based in downtown Columbia, Tennessee. Our Center is a 501(c)(3) non-profit that receives funding from the Administrative Office of the Courts, the Tennessee Bar Foundation, the American Arbitration Association and the United Way of Maury County to provide reduced rate and/or pro bono mediations to low income and unrepresented individuals in our community.

Pursuant to the March 14, 2018 Order of the Tennessee Supreme Court, Beth Oschack Tarter, Executive Director of the Mediation Center respectfully submits the following written comments to the Petition for the Adoption of Amended Tennessee Supreme Court Rule 31, Appendix A to Rule 31, and Supreme Court Rule 31A:

In the interest of brevity, I have reviewed and would like to state my concerns align and my comments are in full agreement with the statements previously submitted (and incorporated herein) by Jacqueline O. Kittrell, Esq. (Knoxville's Community Mediation Center) and the Nashville Bar Association with respect to their comments concerning **the proposed Rule 31, Section 10(e)** adds a provision stating that a "Rule 31 Mediator shall not prepare legal pleadings such as a Marital Dissolution Agreement and/or Parenting Plan for filing with the Court."

Due to these concerns previously stipulated in these aforementioned comments submitted the Nashville Bar Association and Jacqueline O. Kittrell, I strongly believe that the proposed amendment to Rule 10(e) quoted above should be modified significantly to address these concerns or stricken.

Thank you for your time and consideration,

Beth Tarter

Beth Oschack Tarter, Esq.
Executive Director
Rule 31 Listed Family Mediator

One Public Square, Suite 10
Columbia, Tennessee 38401
Phone: (931) 840-5583
Fax: (931) 229-1118

www.columbiamediation.org

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CBA
CHATTANOOGA BAR ASSOCIATION
Established in 1897

June 11, 2018

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VIA E-Mail: appellatecourtclerk@tncourts.gov

James Hivner, Clerk of Appellate Courts
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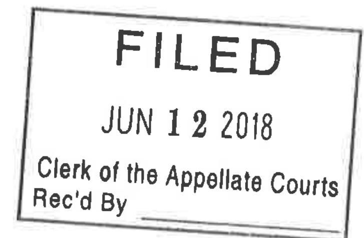


Re: Petition for the Adoption of Amended Tennessee Supreme Court Rule 31, Appendix A to Rule 31, and Supreme Court Rule 31A; No. ADM2018-00425

Dear Mr. Hivner:

The Chattanooga Bar Association ("CBA"), through Board of Governors, has carefully considered the proposed change to Tennessee Supreme Court Rule 31, Appendix A to Rule 31, and Supreme Court Rule 31A. The CBA review sought the opinions of its members with significant experience in civil and family mediation.

After discussion, the CBA Board of Governors (the "Board"), voted that the Board reject the proposed Rule 31 amendments primarily because of the effect on family law mediation. Limiting what a mediator can do to facilitate divorce between unrepresented parties would have an adverse effect on access to justice and increase costs to parties who likely already suffer from limited financial resources. Unrepresented parties in a court-ordered mediation simply can't prepare an appropriate Marital Dissolution Agreement or Parenting Plan. It seems contradictory to require unrepresented parties in a divorce proceeding to go through a mediation, and then to prohibit the mediator from documenting any agreement the parties reach.

THE PIONEER BUILDING, SUITE 420
801 BROAD STREET
CHATTANOOGA, TN 37402
(423) 756-3222
FAX: (423) 265-6602
WWW.CHATTANOOGABAR.ORG

While the Board recognizes that a Mediator must remain neutral, and that there is a risk involved in preparing documents such as an MDA or PP for unrepresented parties, the alternative is to force the parties to hire an attorney (or attorneys) or to put the burden on the trial Court.

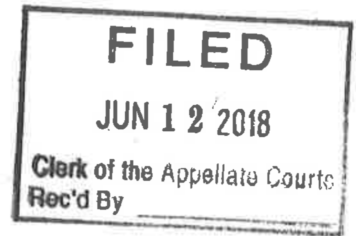
As always, the CBA appreciates the opportunity to comment on proposed Rules and changes to such Rules promulgated by the Tennessee Supreme Court.

Sincerely,

Marc Harwell by WDL w/ permission

Marc Harwell
CBA President

Tennessee Secretary of State
Tre Hargett



Administrative Procedures Division
312 Rosa L. Parks Avenue, 8th Floor
Nashville, Tennessee 37243-1102

J. Richard Collier
Director

615-741-7008
Richard.Collier@tn.gov

June 12, 2018

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

Re: Docket No.: ADM2018-00425
Comments regarding ADRC Proposed Amendment to Rule 31

Dear Mr. Hivner:

In response to and in accordance with the Tennessee Supreme Court's Order soliciting comments, the Administrative Procedures Division of the Office of the Tennessee Secretary of State provides the following comments to the Proposed Rule Amendments to Supreme Court Rule 31.

The proposed amendments delete the current references in Rule 31 to full and part time administrative law judges. *See* Rule 31 Section 14 (h) & (i)(8) (these deletions are found on pages 25 and 27 of Exhibit A to the Petition for the Adoption of Amended Tennessee Supreme Court Rule 31 (Petition)). The rationale for deleting the references to administrative judges is stated in the Petition of the Alternative Dispute Resolution Commission as "Administrative Law Judges have been taken out of 'judge' listings as they are with another state agency and not part of nor duties delineated within the "judicial system.'" Petition at p.5, section VI.E. This rationale does not fully take into account the judicial obligations placed upon administrative judges within Tennessee government. Nor does this rationale take into account the statutory requirements that connect the administrative judges employed by the Secretary of State, Administrative Procedures Division (APD) with the Administrative Office of the Courts for the purpose of certain judicial as well as mediation training.

Although administrative judges are not employed by the Judicial Branch, administrative judges are specifically governed by the same code of conduct as judges serving in the Judicial Branch of government. The Code of Judicial Conduct, Supreme Court Rule 10 provides that "[a] judge, within the meaning of this Code, is anyone who is authorized to perform judicial functions, including but not limited to an officer such as a magistrate, referee, court commissioner, judicial commissioner, special master, or an **administrative judge** or hearing officer." Rule 10 applies to

all of the administrative judges within Tennessee government, whether employed by the Secretary of State's Office or other departments within state government.

In addition, administrative judges who are employed by the Secretary of State and who also serve as mediators in special education cases are required by TENN. CODE ANN. § 49-10-605(a) to be "trained in accordance with Tennessee Supreme Court Rule 31." These administrative judges also receive initial and annual training to hear special education cases. TENN. CODE ANN. § 49-10-606(b).

TENN. CODE ANN. § 49-10-610 links the training of the administrative judges in the APD with the Administrative Office of the Courts as follows:

> All training in special education law for the administrative law judges provided for in this part shall be approved by the administrative office of the courts in consultation with the department of education. The training shall be paid for by the department of education. TENN. CODE ANN. § 49-10-610.

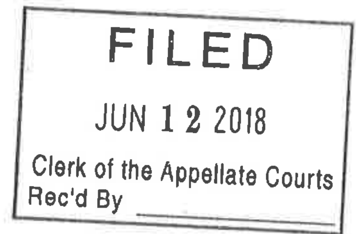
In fact, the AOC coordinates the training of administrative judges in the APD both in special education law (annually) and mediation training (biannually). AOC and APD work together to insure that in addition to the initial Rule 31 training, the administrative judges also receive bi-annual mediation training every two years.

For the above reasons, the references to administrative judges should be retained within the "judge" listings within Rule 31. Thank you for your consideration in this regard.

Very truly yours,

J. Richard Collier
Chief Administrative Judge and Director
Administrative Procedures Division
Tennessee Secretary of State

109 Handel Lane
Oak Ridge, TN 37830
June 12, 2018



VIA E-Mail: appellatecourtclerk@tncourts.gov

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

Comments of Lalia Wilson, Rule 31 Mediator
Volunteer, Community Mediation Center, Knoxville

No. ADM2018-00425

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Dear, Mr. Hivner;

I am a Rule 31 Listed General Civil & Family Mediator and listed as Specially Trained in Domestic Violence Issues. I have been listed since 2010. Primarily I work with very low income parties and the bulk of that work is parenting visitation plans. These are *pro se* cases for the most part. The parties are not only low income but unsophisticated regarding law and how it impacts their lives. Very few have any kind of legal representation, including any *pro bono* or limited scope representation. For these years I have written their agreements onto the appropriate forms for Knox County courts, under the mentoring and guidance of the Knoxville-based Community Mediation Center (CMC) and the Judges of the courts.

I am not alone as a volunteer for mediations that go to these courts, hundreds of cases each year go through these courts with mediation and forms filled out by volunteer (or reduced fee) mediators. In the case of the CMC, judges and magistrates push back when any documents are not as required by the court. In turn, CMC corrects and retrains volunteers to meet the standards of the courts.

In Knox County legal representation is unlikely for the bottom end of the income scale. Family law attorneys charge retainers of $3,000 and up, which means many people who are in dispute effectively have no access to justice.

Should the proposed Rule 31 Section 10 (c) (5) be adopted, these hundreds of situations, involving thousands of low income parties, would be without any assistance in legal matters.

For these reasons, I urge you to retain Rule 31 Section 10 (c) (5) in its present form:

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

Respectfully Submitted,

Lalia Wilson

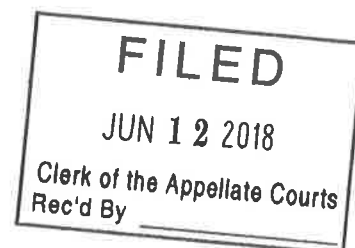
IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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

Comments of Jen Comiskey, JD

Juvenile Program Director at Community Mediation Center

No. ADM2018-00425



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Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Dear Mr. Hivner;

Thank you for the opportunity to comment on the proposed changes to Rule 31. My name is Jen Comiskey. I am a graduate of the University of Tennessee College of Law, a program director at Community Mediation Center (CMC) in Knoxville, and I have been a listed Rule 31 Family Mediator since 2014. I have reviewed the proposed changes to Rule 31 and most of them seem to increase the clarity and efficiency of the Rule. I only have concerns about two of the proposed changes.

1) My organization works with Professor Becky Jacobs of the University of Tennessee College of Law to provide Rule 31 training to 2nd and 3rd year law students in the Mediation Clinic. While I understand the concerns that led to the proposed changes to Section 14, I am concerned that the new time restrictions would make it impossible for many law students who received their Rule 31 training in a Mediation Clinic to complete the work requirement in time to be listed as a Rule 31 mediator without re-taking the mediation training. Professor Jacobs has provided feedback on this issue, and I echo and support her comments and ideas. I encourage the Court reconsider the expiration dates of these trainings or create limited exceptions so that law students who receive their Rule 31 training through a law school Mediation Clinic are not burdened with an impossible and unfair situation.

2) CMC is a nonprofit organization dedicated to providing pro bono mediation to our local area. I have spent the past 13 years at CMC working with a wide variety of clients, many of whom cannot afford to hire an attorney. I am extremely concerned about the effect that the proposed 10(c)(5) will have on the ability of CMC, and other community mediation and pro bono mediation programs across the state, to provide services to unrepresented clients.

If the mediators cannot scribe agreements of parties on court-approved mediation forms, the alternatives are impractical at best. Pro bono mediators work with clients who often have limited literacy, language barriers, power imbalances, Orders of Protection, high-conflict communication dynamics, and other

factors that often make it highly impractical (or potentially dangerous) to ask them to fill out documents themselves. It would be ideal if every client was able to hire an attorney, or if Tennessee attorneys were able to take on enough pro bono work that anyone could access legal services. We do not live in that reality, however, and ignoring the needs of the most vulnerable populations, or creating additional, unnecessary burdens on their ability to access needed services, is unconscionable. In addition to burdening families in poverty and programs that are striving to assist them, this proposed change would possibly deter many private mediators from offering pro bono services to unrepresented clients because of concerns and confusion about how the parties would then turn a memo into a court-approved document. This proposed change would also negatively impact the many courts across the state that rely on the services of community mediation centers and/or pro bono mediators in assisting unrepresented clients to memorialize their mediated agreements clearly on court-approved forms.

Mediation is an important avenue for access to justice for so many people across the state, and the pro bono requirement in Rule 31 is critically important. The need to maintain the highest ethical standards and avoid unauthorized practice of law when serving unrepresented parties is an important topic that deserves serious, ongoing discussions. Please reconsider making a quick change that could compromise mediation as a practical option for indigent, unrepresented individuals. I urge the Court to leave the wording as it currently stands in section 10(e) ("The Neutral may assist the parties in memorializing the terms of the parties' settlement at the end of the mediation"), which allows mediators to take on a limited scribing role on court-approved mediation forms using the parties' own words. I encourage the Court to examine the ways that other states like Virginia and Georgia have navigated this issue to allow a limited scribing role for mediators (see comments by Becky Jacobs and Jacqueline Kittrell). I also encourage the Court, and the mediation community across the state, to increase pro bono mediation efforts that empower vulnerable people to have safe, ethical, accessible avenues to accessing justice.

Sincerely,

Jen Comiskey, JD

KAREN E PHILLIPS, LBSW, MACR
TSC Rule 31 Listed Family & General Civil Mediator
Specially Trained in Domestic Violence Issues

Post Office Box 665
Atoka, TN 38004

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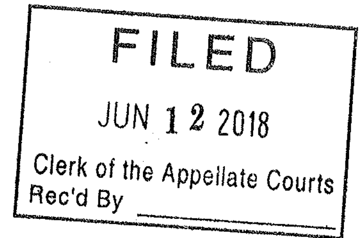
June 11, 2018



VIA E-Mail: appellatecourtclerk@tncourts.gov

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 2018-0045 425

Comments of Karen E. Phillips, Family & General Civil Mediator

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Dear Mr. Hivner;

I am a TN Rule 31 Listed Family and General Civil Mediator and hold the "Specially Trained in Domestic Violence Issues" designation. Before receiving my listing in 2010, I had spent 30+ years in the field of Social Work. I cut my professional teeth so to speak at the Memphis and Shelby County Juvenile Court, working in Child Support Enforcement. I later went on to work for the State of Hawaii, Department of Children's Services and then to work in School Social Work before retiring. In my retirement, I obtained a Master's Degree in Conflict Resolution and obtained my Rule 31 listing. I am in business by myself and accept mediation cases in large part from Memphis & Shelby County Juvenile Court and the outlying rural West TN counties such as Tipton, Lauderdale, Fayette, etc. The bulk of my cases are working with pro se and low-income parties. I am a member of the TN Association of Professional Mediators and several of my local bar associations.

With a license in Social Work, I adhere to NASW's Code of Professional Conduct as well as TSC, Rule 31.

Please find below my comments to the proposed adoption of amended Supreme Court Rule 31, Appendix A to Rule 31, and Supreme Court Rule 31A. My focus is on the proposed Section 10(c)(5)

which would replace the current Section 10(e).

1. Proposed Changes to Rule 31, Section 10(e)

Current: Section 10 (e)

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

Proposed: Section 10 (c) (5)

(c) During and following 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.

My initial issue of concern in modifying the Rule and including this additional language would in fact negate the benefit of mediation when working with pro se parties. I have conducted approximately 40 mediations per year; for the past 8 years. The population in large part that I serve is not educated beyond high school. Many of the parties are first time users of the Court system in their efforts at trying to seek relief so that they can have parenting time with their child or children. They do not know the inner workings of the court and memorializing their own agreement would be an impossiblility. For the parties that could, they would not be able to draft their document in such a fashion that the Clerk of the Court would accept it (mainly in format and language). Further, they would not have the knowledge of court procedures to draft and file such a document that could be adopted as the order of the court. This process alone would invalidate the time and effort spent in Mediation and could result in a futile effort and a squandered attempt at reaching a durable resolution. The result would be the court having to hear the matter and attempt to interpret the agreement and / or intention of the parties. This seems to invalidate the whole of the mediation process and puts the burden back on the court in order to get some form of resolution or disposition for the parties AND to get some form of documented disposition for the case file. Additionally, would this then not add further issue to and negate this court's efforts to promote and ensure access to justice for our state's poorest, most vulnerable populations? Prior to our local courts referring parties to mediation, a petitioner seeking relief and requesting custody and / or visitation, would wait 6 month's from the time of filing his / her petition to his first court appearance. Currently, with the mediation program, a parent can expect to appear in court within 2 months of filing their petition and attend mediation within about 6 weeks of that first court appearance.

It seems to me that Section 9 of Rule 31, clearly and succinctly states the rules of ethical behavior. Rather than invalidate the mediation process, why not deal with any issues of misconduct, unethical behavior and the UPL?

I am one of numerous Non-Attorney Rule 31 Mediators and proudly call many of these my "professional colleagues". As this honorable court well knows, in order to obtain one's listing as a "Family Mediator", one must have years of experience and a Master's Degree in an applicable field.

Those who hold these listings, practice under more than Rule 31 Standards of Professional Conduct. Many must adhere to a Code of Ethics under other professions and licenses. It seems that if there is a concern of Rule 31 Mediators acting outside of the purview of Rule 31 Standards of Professional Conduct, this could be addressed by and with additional, careful training, additional required ethics hours and by following the ethical directions already contained in Rule 31.

Thank you for allowing me to comment on the substance of the Petition proposed by the Alternative Dispute Resolution Commission seeking to adopt amendments to Tennessee Supreme Court Rule 31 and Appendix A of Rule 31 and seeking to adopt a new Supreme Court Rule 31A. I appreciate the opportunity to remit comment about this important topic. My life's work has been to serve and care for others. I enjoy mediation and believe that it is a valuable asset to countless of our Tennessee families. Even more valuable is the benefit that these processes have to our state's children. When working in Child Support Enforcement in the mid to late 1980's, I served single, unwed fathers who wanted to have relationships with and the ability to parent their children. At the time, there was no relief provided for through our court system for these parents to create and develop schedules for their parenting time. I saw a generation of children grow up in conflict and strife without the benefit of an involved and present father. I hope that we, as Tennessee, have made great strides in this area. I pray that our leaders make informed and wise decisions to continue serving and protecting our greatest asset, our children.

Respectfully submitted,

Karen E. Phillips, LBSW, MACR

TSC Rule 31 Listed Family & General Civil Mediator

FILED
JUN 12 2018
Clerk of the Appellate Courts
Rec'd By ________

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: ADOPTION OF AMENDED TENNESSEE SUPREME COURT RULE 31, APPENDIX A TO RULE 31, AND SUPREME COURT RULE 31A	))))))	**No. ADM2018-00425**

COMMENT OF THE TENNESSEE BAR ASSOCIATION IN RESPONSE TO THE PETITION FOR THE ADOPTION OF AMENDED TENNESSEE SUPREME COURT RULE 31, APPENDIX A TO RULE 31, AND SUPREME COURT RULE 31A

The Tennessee Bar Association ("TBA") submits the following comment regarding the adoption of amended Tenn. S. Ct. R. 31, Appendix A to Rule 31, and Tenn. S. Ct. R. 31A, filed March 14, 2018.

The TBA has carefully considered the proposed changes to Tenn. S. Ct. R. 31, Appendix A to Rule 31, and S. Ct. R. 31A. In its review, the TBA sent a survey outlining the proposed amendments to its entire membership through *TBAToday*. The proposed changes were also reviewed by the following TBA Sections: Litigation, Family Law, Tort and Insurance Practice, and Juvenile and Children's Law, and the Standing Committee on Ethics and Professional Responsibility.

During the TBA Executive Committee teleconference meeting on June 4, 2018, the Executive Committee adopted the Standing Committee on Ethics and Professional Responsibility's recommendations which are set out below.

Issue

The Tennessee Bar Association Standing Committee on Ethics and Professional Responsibility reviewed the proposed changes to Tenn. S. Ct. Rule 31. Specifically, the ADRC ("ADRC") is proposing to revise Section 10(e) of Rule 31 relating to the duties of Rule 31 Neutrals, to an amended and renumbered provision as follows:

> Section 10 (c). During and following Rule 31 Mediations, Rule 31 Mediators 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.

The Standing Committee analyzed the provision prohibiting a Rule 31 Mediator from preparing "pleadings," including a Marital Dissolution Agreement ("MDA") and Permanent Parenting Plan ("PPP") for filing with the Court.

Legal Considerations

As an initial observation, neither an MDA nor a PPP is a pleading. *See* Tenn. R. Civ. P. 7.01. Pointedly, both an MDA and a PPP are agreements as recognized by Tennessee Law. *See, e.g.*, Tenn. Code Ann. §§ 36-4-103(g) and 36-6-404(c)(1); *Ledbetter v. Ledbetter*, 163 S.W.3d 681 (Tenn. 2005); and *Barnes v. Barnes*, 193 S.W.3d 495 (Tenn. 2006).

The statutes in this state specifically require the use of mediation in most situations as a preferred means to resolve disputes in the divorce context. Tenn. Code Ann. § 36-4-131(a).

Tennessee case law has made it clear that, in order to be binding, an agreement reached in the domestic mediation process must be in writing. As would be expected, a marital dissolution agreement reached during a mediation is subject to the same rules of contract law as would apply to any other contract. *Ledbetter*, 163 S.W.3d, at 685. A marital dissolution agreement reached during the mediation process must be reduced to writing if it is to be enforced in court. *Id*. The holding in *Ledbetter* specifically was that an oral MDA, not reduced to writing, is not enforceable in court. However, a marital dissolution agreement that is reduced to

writing and signed by both parties, as witnessed by a notary public, is a contract enforceable in court. *Barnes,* 193 S.W.3d, at 499.

A Permanent Parenting Plan must contain specific statutory provisions relating to the welfare of children born to the marriage. In addition, all Permanent Parenting Plans in Tennessee must contain a dispute resolution process – including mediation as one of the available options. Moreover, at least in the case of the modification of a parenting plan, a written record of any agreement reached in mediation must be prepared with the intent that it will be drafted into a consent order for presentation to the court. Tenn. Code Ann. § 36-4-404.

Observations

In circulating questions to domestic practitioners about the proposed rule, we have received significant opposition to excluding MDAs and PPPs from the specific rule allowing mediators to assist the parties in memorializing the agreement of the parties at the end of the mediation. The majority of those responding take the position that not having the mediator work through some form MDA and PPP in assisting the parties to reach a mediated agreement is not practical. The statutory provisions for including certain things in both documents almost certainly requires a mediator to at least refer to the forms as an outline for

an agreement during the process of mediation. Any resulting agreement should be tailored to follow statutory requirements and the forms for MDAs and PPPs in common use are certainly a good source for a mediator to employ. This is certainly the case when a mediator is involved in a *pro bono* mediation and completing MDA and PPP forms seems to be a competent method for evidencing a mediated agreement even when the parties are represented by counsel.

Conclusion

For a number of reasons, including that both MDAs and PPPs are agreements and not pleadings, that a mediator should make sure that the structure of a domestic mediation agreement covers the statutory requirements for such agreements and is consistent with the statutes, that an MDA and PPP will only be enforced by a court if in writing, that the divorce statutes identify mediation as one of the preferred methods for resolving domestic disputes, and that the sheer impracticality of trusting non-represented parties to properly document their agreement in a way that comport with rather strict statutory requirements, it is the recommendation of the TBA that Rule 10(c)(5) not contain the prohibition in the last sentence proposed by the ADRC.

Further, by having the mediator assist the parties in memorializing the terms of their marital dissolution agreement and permanent parenting plan in a format that can be submitted to the court for enforcement and approval, the ethical requirements establishing the role of the mediator are fulfilled. Proposed Appendix A, Standards of Professional Conduct for Covered Neutrals, Section 1 (b) to Rule 31 states, in part:

> 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.

Additionally, even though this was not specifically addressed by the ADRC, the TBA recommends that domestic mediations in family cases should be conducted by lawyers who are Rule 31 Mediators, listed with the ADRC. While the proposed educational requirements for Rule 31(b) are helpful, the TBA asserts that, because mediators should be allowed to assist parties in memorializing the terms of their marital dissolution agreements and permanent parenting plans in a format that can be submitted to the court, these mediators should be licensed lawyers, particularly when mediation involves *pro se* parties.

RESPECTFULLY SUBMITTED,

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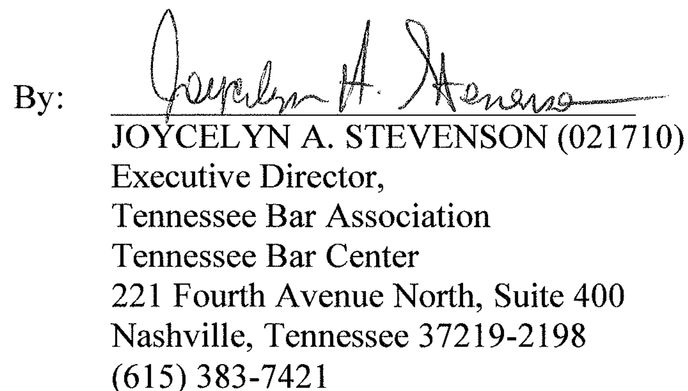

By: ______________________
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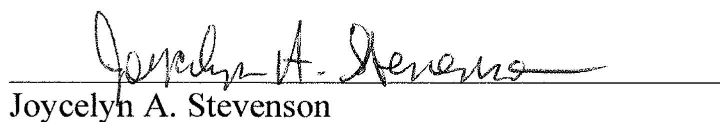
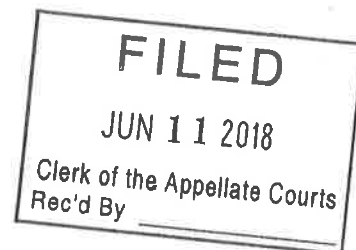
CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "A" by regular U.S. Mail, postage prepaid within seven (7) days of filing with the Court.



Joycelyn A. Stevenson



June 11, 2018

VIA E-Mail: appellatecourtclerk@tncourts.gov

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

Comments of Jacqueline O. Kittrell, Esq.
Executive Director, Community Mediation Center, Knoxville

No. ADM2018-00425

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Dear Mr. Hivner,

I am an attorney and, since 2010, a Rule 31 Listed General Civil & Family Mediator and listed as Specially Trained in Domestic Violence Issues. For the past thirteen years, I have been the Executive Director of the Community Mediation Center (hereafter "CMC") in Knoxville, Tennessee, and, in that capacity, I am an approved-Rule 31 trainer and CME/CLE provider. In our training program, we also work closely with the University of Tennessee College of Law Mediation Clinic to co-train law students with Professor Becky Jacobs. I am active in my local Knoxville Bar Association, am a past Chair of the Tennessee Bar Association Dispute Resolution Section, and am a Past President of the Tennessee Association of Professional Mediators (TAPM). I also am a member of the American Bar Association and an ABA Foundation Fellow.

Please find below my comments to the proposed adoption of amended Supreme Court Rule 31, Appendix A to Rule 31, and Supreme Court Rule 31A.

1. **Proposed Changes to Rule 31, Section 10(e)**

Current: Section 10 (e)

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

Proposed: Section 10 (c) (5)

(c) During and following 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.

The proposed changes to Section 10(c)(5) are also related to two proposed changes[1] to Appendix A. My comments are addressed to those sections as well.

First and most importantly, because of the emphasis placed on Rule 31-listed mediators' pro bono service within the Rule itself,[2] and because of the strong support this honorable Court provides for Access to Justice efforts across Tennessee[3] through its Commission and through the bar and bench, I would respectfully ask that the language of Section 10(e) remain unchanged at this point in time so that mediators might ethically memorialize parties' agreements using form pleadings approved by the Court. I am concerned about all mediations, but especially focus my comments on self-represented parties whose lack of resources can "bottleneck" the courts as well as wreak havoc on their own lives. Well-trained mediators, following the ethical principles and directives already contained in Rule 31, can assist pro se parties to memorialize their own agreements. If scribing onto parenting plans and other divorce agreement forms is

[1] Appendix A, Section 10(a)(1) and new proposed Section 6(b)(6), both of which address concerns pertaining to scribing onto parenting plans and other divorce forms and concerns pertaining to giving advice during mediation, especially legal advice.

[2] *See* the following (all underscored emphasis added by the author):

- Current Rule 31, Section 17(a)(1)(A). To be listed by the ADRC as a Rule 31 Mediator in general civil cases, one must: be of good moral character as evidenced by two references accompanying application for listing and certify in writing an intention to comply with the conditions and obligations imposed by Rule 31, including those requirements related to pro bono obligations.
- Current Rule 31, Section 18(d) Pro Bono Service. As a condition of continued listing, each Rule 31 Mediator must be available to conduct three pro bono mediations per year, not to exceed 20 total hours. At the initiation of a mediation, the court may, upon a showing by one or more parties of an inability to pay, direct that the Rule 31 Mediator serve without pay. No Rule 31 Mediator will be required to conduct more than three pro bono proceedings or serve pro bono for more than 20 hours in any continuous 12-month period.
- Appendix A, Section 14(a) Neutrals have a professional responsibility to provide competent services to persons seeking their assistance, including those unable to pay for such services. As a means of meeting the needs of the financially disadvantaged, a Neutral should provide dispute resolution services pro bono or at a reduced rate of compensation whenever appropriate.

[3] "Ten years ago, the Tennessee Supreme Court declared access to justice its number one strategic priority." 2017 Access to Justice Commission's Annual Report (May 2018).

forbidden, there is a risk of losing an amazing resource for reducing the barriers to justice for indigent and modest means families, children, domestic violence victims, and other vulnerable populations across the State.

In the introduction to the most recent ATJC Annual Report, the Commissioners state: "Further, [the ATJ] Advisory Committees partner with the Alternative Dispute Resolution Commission to examine pro bono and reduced-rate mediation opportunities. Committees address existing and proposed laws, rules, procedures, and policies that are barriers to access to justice."[4] Clearly, the Court's effort has only just begun to use mediation to deliver pro bono and reduced fee services to pro se parties. The important efforts of the two Commissions will help overcome issues implicit in the proposed Section 10(c)(5). Until further collaborative efforts can occur, overseen by this Court and their capable Alternative Dispute Resolution Commission ("ADRC") and the Access to Justice Commission ("ATJC"), we can only guess at the creative, ethical solutions which we may never reach if Rule 31 mediators are forbidden to scribe for pro se parties who need help to memorialize their self-determined agreements onto court-approved forms.

My experience as a trainer and a mediator tells me that mediators have an important role to play in removing barriers to access to justice for those in need. I was first trained as a mediator by Professor Grayfred Gray in 1991, and I have been at the helm of an organization that has been mediating pro se cases since 1994. CMC came into being through cooperation between our Knoxville Bar Association, the UT College of Law, and the county courts so that we could explicitly address the issue of self-represented indigent and modest-means citizens who need help in resolving their own disputes. Our mediation process model, our training curriculum, and our mentoring program for volunteers all are designed to follow the ethical values and standards of Rule 31 and Appendix A. We train mediators and law students to apply those very clear existing standards to the pro se case.[5] As a result, CMC volunteers handle hundreds of cases each year with great success. We are supported in our efforts with public monies from our county, approved by our County Mayor and County Commission. For as long as I've been with CMC, we have also received grants to do our work from funds administered by the Supreme Court's Administrative Office of the Courts.

Ideally, there would be an attorney available for every mediation party, but we know well that is not always the case, nor will it ever be the case. Yet there can be access to justice solutions to provide the needed help for those self-represented people who have the capacity to

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[4] *Id.* at 4.

[5] This is a sampling from the current version of Rule 31 and its Appendix A that is of special importance to mediating with pro se parties: Appendix A, Subsections 1 (a), (b), and (c) (Screening for capacity to mediate and to be self-determining); Appendix A, Section 5(a) (Screening and referral for need for independent legal advice): Appendix A, Section 8(b) (Admonition against giving advice): Rule 31, Section 10(b)(3) (Setting ground rules and expectations); Rule 31, Section 10 generally, and specifically 10(a)(3); Appendix A, Section 4(a) (Orientation Session).

mediate:

- Attorneys who are trained and willing to do limited scope work before, during, and after mediation;
- Law school clinics where law students work with the community and the courts under faculty and volunteers supervision;
- Legal "Saturday clinics" putting together willing attorneys, law students, bar associations, and legal aid pro bono programs to create more opportunities for otherwise pro se disputants;
- Community mediation centers, like Knox County CMC, that can work toward recruiting attorneys to charge mediation party referrals a very low flat fee to draft documents. This is as close to an ideal situation as we have been able to come, and still many mediation parties will simply not be able to afford the cost, especially never-married parents under Juvenile Court jurisdiction.

In very recent news, several community mediation centers, including my own, that are working together through their involvement in the Tennessee Association of Professional Mediators (TAPM) Board of Directors and Pro Bono Committee, have received a modest grant from the AAA-ICDR Foundation[6] to produce training videos to teach mediators about mediating for pro se parties as well as how to design and set up such programs, big and small, in their judicial district. We intend for the video training to be delivered through online and in-person meetings. This project would allow us to begin thinking about how best to train any Rule 31 mediator who wanted to learn how to use the "best practices" from our programs and the ethical standards and values of Rule 31 to mediate for those in need across Tennessee. Again, the ideal we seek is for everyone to have legal services, but, in case they do not, they can receive proper screening for capacity and for the need for legal advice; that they understand the difference between legal advice and information; and that they receive appropriate referrals suitable for vulnerable populations and a mediation process that is matched to their needs. The TAPM Pro Bono Committee is committed to ongoing mentoring and fine-tuning and is committed to working with the Commissions of the Supreme Court to help fulfill the important pro bono mandate of Rule 31.

Mediators handling mediations in which one or both parties have legal counsel also need more guidance from the ADRC. The proposed Rule 10(c)(5), if adopted as worded, is not clear as to what such a mediator can do regarding memorializing an agreement (on a form or on a legal pleading) "for filing with the court." On its face, it seems to state that no mediator can

[6] American Arbitration Association/International Centre for Dispute Resolution Foundation, www.aaaicdrfoundation.org. The Mediation Center in Columbia, TN, Beth Tarter, ED, is the receiving organization for the $20,500.00 grant. The other participating centers are: Sara Figal, ED, the Nashville Conflict Resolution Center, Metro Nashville; Stephen Sheilds, Board Member, the Center for Justice and Mediation, Memphis; and the Community Mediation Center under my direction, the Knox County CMC.

memorialize onto such forms as the Parenting Plan or the Marital Dissolution Agreement. But common sense would indicate otherwise. On a case with either one or two advocate lawyers, those lawyers would be retained and paid to file the papers, including the mediated agreements, with the court after review. The lawyer could direct the mediator to scribe onto the required form to save the client money, money that would be paid to the lawyer, likely at a higher rate, to do the same thing. Why not continue to allow a practice which is efficient and benefits the parties?

Additional comments related to the Unauthorized Practice of Law as it pertains to Current Rule 31, Section 10(e) and Proposed Section 10(c)(5).

I have additional comments related to the unauthorized practice of law (UPL) while mediating, something I know to be of great concern to the ADRC and which concerns routinely arise in any discussion about scribing onto agreement forms. Tennessee's Office of Attorney General issued an opinion in 2006[7] holding that mediation was, by definition, not inherently the practice of law, even though a mediator might be called upon to have an understanding of the legal context of the dispute.[8] All mediators, attorneys or not, have a duty under Rule 31 to make sure that the parties have the capacity to self-determine, that they understand the agreement they are making, and that the agreement is not unfair, inappropriate, or detrimental. The Tennessee Attorney General, in his 2006 Opinion, states that "performing such functions would not constitute the 'practice of law' as defined in Tenn. Code Ann. § 23-3-101(2), because they are not undertaken in a representative capacity."[9] Mediators traditionally use an important skill called "reality checking", asking the parties questions and assigning them homework before completing the mediation, and by following Rule 31, Section 8(b), "Independent Legal Advice. When a Neutral believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the Neutral shall advise the participants to seek independent legal counsel." Better yet with pro se parties, the mediator conducts a pre-mediation screening and orientation and assigns homework before beginning to mediate. Mediators familiar with Rule 31 ethics do not give advice to parties, neither while facilitating their discussions nor when memorializing their

[7] Opinion No. 06-079, April 27, 2006, Mediation and the Practice of Law. ("1. Does mediation by definition involve the practice of law?..[Answer] 1. No. "Mediation" as that term is defined in Tenn. S. St. R. 31 §2(f), is an informal process in which a neutral third party conducts discussions among disputing parties to facilitate an agreement between them concerning the issues in dispute. Under the definition of practice of law in Tenn. Code Ann. §23-3-101(2) and "the practice of law" in Tenn. S. Ct. R. 9, § 20.2(3), one of the components of engaging in the practice of law is acting in a representative capacity either as an advocate or counselor. Because a mediator is neutral and not acting in a representative capacity, the mediator does not engage in the practice of law."

[8] All mediators, whether attorneys or not, have a duty under Rule 31 to make sure that the parties have the capacity to self-determine, that they understand the agreement they are creating, and that the ADR proceeding is not unfair, inappropriate or detrimental. (*See generally* Rule 31, Section 10 and Appendix A)

[9] Opinion No. 06-079, p 3 (emphasis in original). To be clear, the second question asked and answered by the AG Opinion did not concern a non-attorney mediator, but rather an assistant DA mediating "off-hours." Nevertheless, the Opinion was abundantly clear that the role of a mediator was very different from the role of an attorney.

resulting agreements.

Years ago, when Rule 31 was first drafted, the Supreme Court in its wisdom knew that mediators who are not attorneys are not only capable of being good mediators, but, in many situations, might be the best mediators for the specific case at hand. These non-attorney mediators have skills and knowledge other than law, and they are sometimes able to deal with human emotion and conflict in a way that lawyers (as a profession) are not necessarily trained to do. (As an aside, it is one of the pleasures of my work that I get to train and co-mediate with both attorney-mediators, educator-mediators, businessperson-mediators, surveyor-mediators, social worker-mediators, minister-mediators, and so on.) Most all of the Commission's concerns about non-attorney mediators engaging in UPL or concerns about any mediator advising or being perceived as advising parties can be best addressed by: (1) training carefully, already an implicit requirement of Rule 31; (2) making suitable mediation process choices, already in Rule 31; (3) refraining from taking on the role of an advisor or attorney, even if the mediator is already an attorney, a therapist, a financial planner or a grandmother; and (4) following all of the other well-considered ethical directions already contained in Rule 31 and the Appendix A. If the Court feels that there is still a UPL concern and that inadvertence or carelessness while mediating must be addressed more thoroughly, it would be preferable to provide guidance for Tennessee mediators on this topic rather than to address the concern by prohibiting scribing onto court-approved forms. In Virginia, the Supreme Court's Department of Dispute Resolution published guidelines to assist Virginia mediators in avoiding UPL when providing mediation services.[10] This model would serve as a guide if this Honorable Court seeks to respond to UPL concerns in more directly.

2. **Proposed Changes to Rule 31, Section 17 Pertaining to Length of Time a Training is Valid**

Proposed Rule 14 (2):

> To be listed, an applicant must: 2) comply with the qualification and training requirements set forth in this section. All training must have been approved by the ADRC as set forth in subsection (f) and must have been completed within the five years immediately preceding the application seeking Rule 31 Mediator listing.

This requirement, while insuring that any first-time applicant requesting to be listed would have had a recent, approved mediator training, would also work to disadvantage one particular type of first-time applicant, a recent law or college graduate. A typical law student takes his or her intensive 40-hr or 46-hr basic mediation training as a part of her or her ADR course or, in the case of a law school with a clinical program, such as University of Tennessee College

[10] The pdf document can be found on the webpage for Virginia's Judicial System http://www.courts.state.va.us/courtadmin/aoc/djs/home.html under Dispute Resolution or by using this link: http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/upl_guidelines.pdf

of Law, during their Mediation Clinic curriculum, in their 2nd or 3rd year of law school. That law student would then graduate and still be required to acquire at least four years of full time work experience[11] to be able to apply for Rule 31 listing. For 2nd year students and even 3rd year students (given the vagaries of taking the bar), there could easily be a gap of five years before a graduate, now either a JD or a licensed attorney, could apply for listing. For their training requirement, they would be using a training that could very well have been taken more than 5 years in the past. This works as an inequity for law students who might go from undergraduate to law school and only have worked part-time while attending classes full-time.

There may be several possible ways to prevent the inequity while still allowing law students to take their training and, in the case of UT College of Law Mediation Clinic students, intern as volunteer co-mediators under supervision while in school. My colleague, Professor Becky Jacobs, has listed four proposals in her comments to this Honorable Court[12] on the subject of the proposed Rule 31 changes. I think all of them are workable, but, in my opinion, the one least likely to remain specific to law students and not be at risk of widening out and becoming the rule rather than the exception is her 2nd proposal:

> Make an exception to the five-year time frame for semester-long law school and/or university Mediation Clinics/mediation courses that would "toll" the validity of the training until such time as a student has gained the four years (or six years) of full-time work experience required for listing. At this time, the "clock" on the training would begin to run. [end of quoted material.]

In conclusion, I am so grateful for the opportunity to comment on the substance of the Petition proposed by the Alternative Dispute Resolution Commission seeking to adopt amendments to Tennessee Supreme Court Rule 31 and Appendix A of Rule 31 and seeking to adopt a new Supreme Court Rule 31A. The Rule changes as proposed by the ADRC are so timely and welcome. Because of the reasons I give above, I am asking that you consider my comments with respect to the two sets of changes I have identified.

---

[11] Pursuant to ADRC Policy 6, "Law school attendance is not equivalent to practical work experience as required by Section 17 of Rule 31. (Adopted 7/18/06)."

[12] (Underscore emphasis added by this author):
1. Extend the five-year time frame to ten years; 2. Make an exception to the five-year time frame for semester-long law school and/or university Mediation Clinics/mediation courses that would "toll" the validity of the training until such time as a student has gained the four years (or six years) of full-time work experience required for listing. At this time, the "clock" on the training would begin to run; 3. Create a "pending" listing category, in which those applicants who lack experience may register their training upon the condition that they pay their annual fees and comply with all listing requirements, i.e., annual CMEs, until such time as they accrue the necessary work experience to be formally listed; and 4. Require applicants whose initial listing training has expired to:

a. take a short "refresher" course (<10 hours) to renew their training;
b. take a short test based upon the current content of Rule 31; or
c. appear for an interview with the ADRC.

Respectfully Submitted,

Jacqueline O. Kittrell

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THE UNIVERSITY of TENNESSEE
COLLEGE of LAW

Professor Becky L. Jacobs | 1505 W. Cumberland Avenue | Knoxville, TN 37996-1810

June 7, 2018

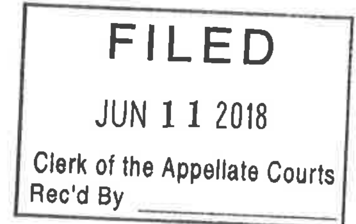
VIA E-Mail: appellatecourtclerk@tncourts.gov

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

Comments of Becky L. Jacobs
Waller Lansden Distinguished Professor of Law
University of Tennessee College of Law

No. ADM2018-00425


FILED
JUN 11 2018
Clerk of the Appellate Courts
Rec'd By

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Dear, Mr. Hivner;

Thank you for the opportunity to offer comments to the proposed adoption of amended Supreme Court Rule 31, Appendix A to Rule 31, and Supreme Court Rule 31A. I am on the faculty of the University of Tennessee College of Law, and I direct its two mediation clinics, the General Civil Mediation Clinic and the Family Mediation Clinic, both of which satisfy Rule 31's training requirements for these listings. While I am writing in my personal capacity, the following comments are informed by my experience with the Clinics, and they focus on two specific issues related to the proposed amendments.

1. **Proposed Section 14 of Rule 31 – Five-Year Initial Listing Training Validity**

My first comment pertains to the proposed Section 14 of Rule 31. While the ADRC's concerns with respect to training "staleness" are certainly understandable, this change could potentially devastate law school, university, and college mediation programs due to the demographics of the students enrolled in these programs. Addressing enrollees in the University of Tennessee College of Law's Mediation Clinic specifically, students often lack the four years of full-time work experience required pursuant to (proposed) Section 14(a)(1)(i)(A) or Section 14(b)(1)(i)(C) for Rule 31 listing, and the new five-year limit on initial listing training validity could render UT's Clinics ineligible for initial listing purposes in some circumstances.

Example: A student enrolls in UT's General Civil Mediation Clinic in her 2L year: her attendance is reported to the ADRC in the second quarter of 2020. She then takes and passes the Tennessee bar following her 2021 graduation, but health issues prevent her from beginning her full-time job until twelve months following her graduation. She gains the four years of full-time work experience in 2026 and immediately applies for her Rule 31 listing. However, her law school Clinical mediation training, although a Rule 31-approved course, expired for initial listing purposes in 2025.

This circumstance likely will discourage students without the requisite work experience from seeking this important skills training as part of their law school experience, training that, at UT, encompasses an entire semester and involves strong theoretical and experiential components. The students in this program learn not only doctrinal/substantive Rule 31 mediation-related material, but they also engage in "live" client mediations as well as gain valuable experience involving professionalism and ethics that cannot be taught in a doctrinal classroom. Clinical students also are exposed to access to justice issues and hopefully are inspired to continue to offer pro bono services to those in need in their communities throughout their careers. Fewer students in the Mediation Clinics would negatively impact the communities that these students serve during the Clinical semester, reducing the number of mediators available to the Knox County Community Mediation Center and other pro bono mediation programs.

In order to respond to the ADRC's strong concern that fifteen years is too long to assume that a mediator's training is current for initial listing purposes, perhaps this Honorable Court might consider several alternative proposals:

1. Extend the five-year time frame to ten years.
2. Make an exception to the five-year time frame for semester-long law school and/or university Mediation Clinics/mediation courses that would "toll" the validity of the training until such time as a student/applicant has gained the four years (or six years) of full-time work experience required for listing. At this time, the "clock" on the training would begin to run.
3. Create a "pending" listing category, in which those applicants who lack experience may register their training upon the condition that they pay their annual fees and comply with all listing requirements, i.e., annual CMEs, etc., until such time as they accrue the necessary work experience to be formally listed.
4. Require applicants whose initial listing training has expired to:
    a. take a short "refresher" course (<10 hours) to renew their training;
    b. take a short test based upon the current content of Rule 31; or
    c. appear for an interview with the ADRC.

Any or all of these would allow UT law students and/or other law or college students to take advantage of Rule 31-approved training courses at institutions that allow a longer, deeper engagement with mediation pedagogy and skills training. They also would not so severely disadvantage them vis-à-vis their colleagues with the requisite work experience with regard to Rule 31 listing.

2. Proposed Rule 31, Section 10(c)(5) - Drafting Prohibition

My next comments pertain to proposed Section 10(c)(5) of Rule 31. It appears that I share the concerns of a number of my colleagues regarding this proposal, so I will not belabor the issue and will comment only briefly. While UPL is a concern to all lawyers, the drafting prohibition in proposed Section 10(c)(5) appears at odds with the priority that this Honorable Court has placed on access to justice. As more parties attempt to navigate the judicial system without the assistance of counsel, their efforts not only may be challenging for the pro se litigants themselves, but they also may frustrate the judges and slow the work of the courts. If mediators cannot assist parties complete court-approved forms, parties may have difficulty with phrasing or details, creating inefficiencies, inflating costs, increasing the potential for post-mediation conflict, and multiplying the number of poorly-drafted pleadings. States that authorize a more flexible drafting role for mediators acknowledge this situation.

The ABA has made it clear in at least two documents that attorney-mediators may act as "scriveners" to memorialize agreements if they have the professional experience and competence to do so.[1] In addition, the Model Standards of Practice for Family and Divorce Mediation provide that "the mediator may document the participants' resolution of their dispute[,]" with the caveat that the mediator should inform the participants that any agreement should be reviewed by an independent attorney before it is signed.[2]

A number of states with highly-regarded, effective mediation systems have found that it is appropriate in some circumstances for mediators to draft proposals or memorialize party agreements.[3] In Virginia, for example, mediators may prepare settlement agreements and memoranda of understanding for the parties and may use court-approved forms.[4] Similarly, Georgia recognizes a drafting role for mediators. Its Rules of Fair Practice require that mediators "exercise diligence in ... drafting the agreement ... and returning completed necessary paperwork to the court or referring agency."[5] Florida, a state that tightly regulates court-annexed mediations, mandates that mediators "shall cause the terms of any agreement reached to be memorialized appropriately" per Rule 10.420.[6]

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[1] *See* SODR Ethical Guidance 2010-1, http://webcache.googleusercontent.com/search?q=cache:2rQIYJWWsWoJ:apps.americanbar.org/dch/thedl.cfm%3Ffilename%3D/DR018600/relatedresources/SODR_2010_1.pdf+&cd=1&hl=en&ct=clnk&gl=us. *See also* SODR 2002 Resolution on Mediation and the Unauthorized Practice of Law, file:///H:/BLJ%20Documents/Mediation%20Clinic/1%20-%202018/Proposed%20Changes%20Rule%2031%20-%202018/ABA%20-%20Mediation%20and%20the%20Unauthorized%20Practice%20of%20Law.pdf.

[2] *See* Model Standard of Practice for Family and Divorce Mediation § VI.19 (2001).

[3] While there are jurisdictions that prohibit mediators from drafting mediated agreements, they are in the minority. *See, e.g.*, Washington State Bar Association Advisory Opinion 2223 (2012), http://mcle.mywsba.org/IO/print.aspx?ID=1669.

[4] *See* Va. Code Ann. § 8.01-576.12 (West 2015). Of course, Virginia law always requires mediators to inform the parties in writing that mediated agreements should be reviewed by independent counsel before they are signed or that the parties should waive their opportunity for independent review. Standards of Ethics and Professional Responsibility for Certified Mediators § D(2)(b)(4) (2011).

[5] Georgia Alternative Dispute Resolution Rules, app. C, Ch. 1.A.V (2013) ("Diligence").

[6] Fla. Rules for Certified and Court-Appointed Mediators R. 10.420(c) (2013).

Rather than adopt the total prohibition on legal pleadings set forth in proposed Rule 31, Section 10(c)(5), I respectfully request that the Court retain the language set forth in Rule 31's current Section 10(e) and that the Court reject the proposed Rule 31, Section 10(c)(5).

To conclude, I very much appreciate the opportunity to comment on the substance of the petition proposed by the Alternative Dispute Resolution Commission seeking to adopt amendments to Tennessee Supreme Court Rule 31 and Appendix A of Rule 31 and seeking to adopt a new Supreme Court Rule 31A. It is my hope that the Court will consider in particular the possible negative consequences that the proposed five-year limit on the validity of initial listing training in Section 14 of Rule 31 might have on law and/or other students seeking to acquire and/or enhance their skills and perhaps reject this proposal or adopt alternative solutions that would mitigate this impact.

Very Respectfully Submitted,

Becky L. Jacobs
Waller Lansden Distinguished Professor of Law
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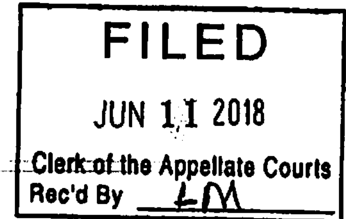


ADM2018-00425

Lisa Marsh - Changes to Rule 31 commentary

From: MaryEllen Bowen <vorp7@hotmail.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 6/11/2018 7:54 PM
Subject: Changes to Rule 31 commentary

Dear Mr. Hivner, I am the founding Executive Director of Mid South Mediation Services, an 18 year old community mediation center serving several (mostly rural) counties in Middle Tennessee. I am writing to comment on the proposed changes to Rule 31 regarding Rule 31 mediators helping unrepresented parents with their parenting plans. I would like to reference Jackie Kittrell's comments from her submission earlier today, pages one through seven. It was hard to pick out just parts of her excellent representation of the point of view of the mediator and the realistic interaction with people who can not afford an attorney. I am also a board member of the Tennessee Association of Professional Mediators (TAPM) and I know many members have made submissions in response to the call for comments. I hope you will give much consideration to these responses and encourage the rest of the Commission members to take into account the mediator's perspective in working with this population. Thank you, Mary Ellen Bowen.

Mary Ellen Bowen, MSc
Executive Director, Rule 31 Mediator
Mid South Mediation Services

June 11, 2018

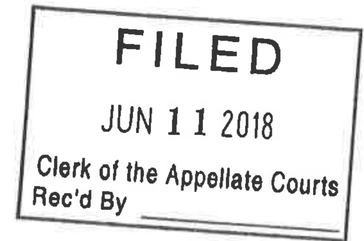
James M. Hivner, Clerk

Tennessee Appellate Courts

100 Supreme Court Building

401 7th Avenue North

Nashville, TN 37219-1407



Re: ADM2018-00425

Dear Mr. Hivner,

Thank you for the opportunity to offer comments on the proposed amendments to Tennessee Supreme Court Rule 31. Specifically, my comments pertain to proposed Section 14 of Rule 31; the section regarding the listing status of Mediators.

As background, I am a United States Administrative Law Judge with the Department of Health and Human Services and I have maintained a law license in Tennessee since 1981. My work involves the adjudication of Complaints brought by the Food and Drug Administration against retailers across the United States for the unlawful sale of tobacco products to minors.

I initially completed the 40-hour Rule 31 General Civil Mediation Training in August 2016. In October 2016, the Alternative Dispute Resolution Commission (Commission) notified me that I met the requirements of Tennessee Supreme Court Rule 31. The Commission told me that pursuant to Rule 31, Section 17(h), I could request in writing to be listed as a Rule 31 General Civil Mediator after I retired as a United States Administrative Law Judge. In April 2018, I refreshed my training as a Mediator by completing another 40-hour Rule 31 General Civil Mediation Training course. My status as a Rule 31 Mediator has remained inactive since October 2016.

Despite my Federal employment as an Administrative Law Judge, I have completed these 80 hours of training for the purpose of serving as a pro bono Mediator. I envision volunteering for community organizations such as the Mid-South Community Justice and Mediation Center and the Mediator of the Day Program; a program instituted in the Shelby County General Sessions Court. I understand that any volunteer services as a Mediator would always be governed by ethics principles and must be provided without any conflict of interest or the appearance of a conflict of interest. Further, the ethics requirements of my Federal employment prohibit my engaging in outside activity that utilizes or gives the appearance of utilizing my position as a Federal Administrative Law Judge. In fact, my comments and recommendations herein are made in my personal capacity as a licensed attorney and they are not offered in my official capacity as a Federal Administrative Law Judge.

My comments relate to the two following issues:

(1) Section 17(h) of existing Rule 31 prohibits a sitting judge from serving as a listed Mediator until after the judge's retirement or resignation. The proposed amendment for Section 14 (h) (replacing the previous language in Section 17 (h)) removes full-time Administrative Law Judges as "sitting judges" prohibited from listing status prior to resignation or retirement. The Commission explains that "Administrative Law Judges have been taken out of 'judge' listings as they are with another state agency and not part of nor duties delineated within the 'judicial system'."

I request the Commission to consider clarification of Rule 31 to address the following:

As Administrative Law Judges are no longer identified in Section 14 as "judges" prohibited from serving as listed Rule 31 Mediators, I recommend that Rule 31 be revised to specifically clarify that Section 14 (h) does not apply to Administrative Law Judges and does not prevent their serving as a listed Rule 31 Mediator; assuming that they otherwise meet all other Rule 31 qualifying criteria. Furthermore, I request that Section 14 be revised to clarify that Administrative Law Judges that are not employed by the State of Tennessee or serving in a judicial capacity within the State of Tennessee are exempt from the prohibitions of Section 14 (h).

(2) Proposed Section 14 of Rule 31 further provides that there will no longer be an inactive status for Rule 31 Mediators. Mediators will only be listed or not listed. The proposed amendments to Rule 31 also give the Commission more discretion to determine whether an applicant should be listed.

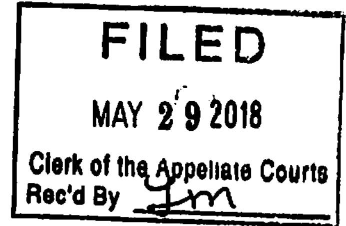
In accord with the Supreme Court's Access to Justice Initiative, I recommend that Section 14 be revised to allow a Mediator to be listed solely as a pro bono Mediator; a separate status independent of a listing for Mediators who engage in mediation for profit. Such a restrictive listing would be at the discretion of the Commission and the Mediator must meet all qualifying requirements set forth in Rule 31 including Sections 9, 14, and 15.

Thank you for your time and attention to these recommendations and comments.

Sincerely,

Margaret Guill Brakebusch

ADM2018-00425



From: "Bari B. Gerbig" <bgerbig@comcast.net>
To: <lisa.marsh@tncourts.gov>
Date: 5/28/2018 10:54 AM
Subject: TN Courts: Submit Comment on Proposed Rules

Submitted on Monday, May 28, 2018 - 10:54am
Submitted by anonymous user: [76.123.239.78]
Submitted values are:

Your Name: Bari B. Gerbig
Your Address: 5500 Green Valley Drive, Knoxville, TN 37914
Your email address: bgerbig@comcast.net
Your Position or Organization: Rule 31 Family Mediator
Rule Change: Rule 31: Alternative Dispute Resolution
Docket number: ADM2018-00425
Your public comments: As a pro bono mediator for six years, I respectfully ask you to reconsider the role of the Neutral in assisting the parties. Most of the parties that I have mediated cannot afford to hire an attorney nor can they complete legal pleadings on their own. They have relied on the Neutral to assist them and I have willingly done so. This practice needs to continue in the name of accessible justice for all. Thank you.

The results of this submission may be viewed at:
http://www.tncourts.gov/node/602760/submission/22617

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May 24, 2018

FILED
MAY 24 2018
Clerk of the Appellate Courts
Rec'd By ________

VIA E-Mail: appellatecourtclerk@tncourts.gov

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Petition for the Adoption of Amended Tennessee Supreme Court Rule 31, Appendix A to Rule 31, and Supreme Court Rule 31A; No. ADM2018-00425

Dear Mr. Hivner:

The Knoxville Bar Association ("KBA"), through its Professionalism Committee ("Committee") and Board of Governors, has carefully considered the proposed change to Tennessee Supreme Court Rule 31, Appendix A to Rule 31, and Supreme Court Rule 31A. In its review, the KBA sought the opinions of its members, representatives of the KBA Alternative Dispute Resolution Section and the leadership of the Community Mediation Center.

After discussion, the Committee voted to recommend to the KBA Board of Governors (the "Board"), that the Board adopt the proposed Rule 31 amendments but to recommend a revision that would make it clear that attorney mediators conducting Rule 31 mediations can continue to scribe pleadings and memorialize the terms of the parties' settlement agreement during mediation.

The matter was thoroughly considered at the Board meeting held on May 16, 2018. Following the Committee's presentation and thorough discussion by the Board, the Board as a whole unanimously adopted the Committee's recommendation.

As always, the KBA appreciates the opportunity to comment on proposed Rules and changes to such Rules promulgated by the Tennessee Supreme Court.

Sincerely,

Keith H. Burroughs

Keith H. Burroughs, President
Knoxville Bar Association

cc: Marsha Watson, KBA Executive Director (via e-mail)
KBA Executive Committee (via e-mail)

Thomas D. MacNamara
MEDIATOR & ARBITRATOR
7335 Creek Song Court
Knoxville, TN 37920-8229
1.865.202.0334

May 21, 2018

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

PETITION No. ADM2018-00425
ADOPTION OF AMENDED TENNESSEE SUPREME COURT RULE 31
PUBLIC POLICY RE PRO SE FORMS AND ACCESS TO JUSTICE

Dear Mr. Hivner:

Thank you for the opportunity to offer my comments on the proposed revisions.

Summary. In my opinion, the proposed rule revisions will operate as a denial of due process and access to justice for the poor and middle class seeking to utilize forms approved by the Supreme Court. The rule proposal to restrict court ordered mediations to Rule 31 mediators, who are licensed to practice law, will eliminate most mediations for other Rule 31 mediators. Filling out and completing Supreme Court approved forms, where no legal advice is given by mediators, is not the unauthorized practice of law.

As background, I am a retired attorney after a thirty five year legal career and I have been a Supreme Court listed mediator in the State of Florida and the State of Tennessee for the last ten years. In Florida, I was a court approved mediator, with special training in foreclosure law. I mediated over 200 foreclosure actions, where the mediation was required by the Supreme Court. In most of these

mediations, the bank was represented by an attorney and the homeowner was not represented. As a mediator and a neutral, I could not act as an attorney. I was able to assist the homeowner by providing a roadmap of the legal proceeding he was involved in. A successfully mediated agreement was reduced to writing and submitted to the Court for approval or a notice of impasse was submitted.

In my opinion, the Alternative Dispute Resolution Commission (ADRC) proposed revisions appear to usurp the power of the Supreme Court and the 24 year history of mediation under Rule 31. The ADRC revisions are too numerous for me to address in a single letter. The most important revisions appear to propose a division of authority to exclude the education, training and ability of current Rule 31 mediators from all court ordered mediations, including attorneys who are not currently licensed to practice law. The proposed rule excludes Rule 31 mediators, who are not licensed attorneys, from all court ordered mediations and some eligible civil actions which have not been filed.

> The Rule should be as clear regarding this division of authority.
> -- ADRC Chair Edward P. Silva, Esq.

Rule 31 currently and clearly provides that a Rule 31 neutral shall refrain from participation as an attorney and may assist the parties in memorializing terms of the parties' settlement agreement at the end of the mediation. The neutral shall refrain from giving legal advice but may point out possible outcomes and may indicate a personal view of the persuasiveness of a particular claim or defense. The Rule provides a neutral's evaluation, award or advisory verdict **will not be considered to be legal advice for purposes of the Rule.** The Rule defines a neutral as an impartial person who presides over alternative dispute resolution proceedings.

The proposed Revisions appear to delete the use of the term neutral from Rule 31 and adds a new division of authority providing a "Rule 31A Neutral" is any impartial person, licensed as an attorney, who acts as a guide in a Rule 31A Proceeding. Rule 31A Neutrals are required to be licensed attorneys.

The ADRC Advisory Opinion 2017-0002 generally provides a Rule 31 listed mediator's role can include preparing a Memorandum of Understanding (MOU) and a neutral "shall discuss with the participants the process for formalization and implementation of the agreement". 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. The parties can take the MOU to a lawyer and have the lawyer draft a Marital Dissolution Agreement. If the parties do not have attorneys, then the parties can prepare the paperwork necessary for filing with the court.

> 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 pertains to within the body of the Parenting Plan. The parties can review a copy of the Parenting Plan with the Mediator to make sure 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 an attorney" per Rule 31 10 (c) and ensure the prevailing public policy is explained to the parties.

In my opinion, the public policy of the ADRC, expressed above, is that trained family mediators are prohibited from assisting parties in completing Marital Dissolution Agreement and Parenting Plan, utilizing forms approved by this Court,

but pro se parties are being directed to prepare legal documents and orders to be submitted to the Court for approval. In my opinion, this ethical advisory opinion and the proposed rule revisions do not further access to justice and are not consistent with the public policy of this Court.

It is well settled that the Tennessee Supreme Court "possesses not only the inherent supervisory power to regulate the practice of law, but also the corollary power to prevent the unauthorized practice of law." **Petition of Burson**, 909 S.W.2d 768, 773 (Tenn. 1995).

> The essence of the professional judgment of the lawyer is the lawyer's educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. **Id.** at 775.

In my opinion, the vast majority of marital dissolution agreements and permanent parenting plans benefit from the professional judgment of attorneys and a mediator must be able to recognize when this is necessary. However, there is a subcategory of these parties who can formulate their own agreements without the need of attorneys.

The Public Policy issue presented to the Court in the proposed rule revision is whether the use of Supreme Court approved forms for Martial Dissolution and Parenting Plans by pro se parties, with or without mediators, is the unauthorized practice of law.

The ADRC's position in the revisions is clear that pro se parties may use the forms for filing with the court but a trained family mediator is prohibited.

> The Rule 31 Mediator shall not prepare legal pleadings, such as a Marital Dissolution Agreement and/or Parenting Plan for filing with the Court. Proposed Rule revision, p.10, Sec.10(c) (5).

Stated differently, would the divorce court judge prefer documents and orders prepared by pro se parties, or documents and orders using Supreme Court

approved forms by a family trained listed mediator, after a successful family mediation of all issues and proper completion of all forms within a signed MOU ?

A recent article in the Florida Bar Journal discusses the difficulty finding access to justice for a divorce working mother of four school-aged children, ages 4, 10, 12 and 16 and a potential upfront attorney fee of $3,000. She described the pro se divorce package from the court as "overwhelming" and without information on "how to get started." The article describes the efforts of a pro bono legal clinic at Barry University, which provides a collaborative law process leading to a "signed divorce agreement". The clinic involves law students, an adjunct law professor, a mental health neutral, a financial neutral, and case managers. The goals of the parents were to be "cordial to each other especially in front of their kids" and provide for the financial needs of the husband as well as the mother and kids. The collaborative process avoids many of the pitfalls of litigation, which is adversarial by nature and can inflict further damage on family relationships, including with the children. See gen. 92 Fla. Law J. 24, 26 May 2018.

In **State of Tennessee F/B/O City of Columbia v. 2013 Delinquent Taxpayers,** ___S.W. 3d ___(Tenn. 2018), No. M2017-01439-COA-R3-CV, the Court of Appeals reversed the trial court's conclusion of law finding the unauthorized practice of law when a taxpayer did not draft the legal form and did not give legal advice when he filed a motion to redeem real property from delinquent taxes.

> John Nixon did not need legal knowledge to execute the motion on behalf of Appellant. Based on the particular facts of this case, we conclude that John Nixon was not engaged in the unauthorized practice of law when he executed the Motion to Redeem on behalf of Appellant. **Id.** at ___.

In my opinion, the proposed revisions are not consistent with public policy of this Court and my ability and training as a Rule 31 Family Mediator to mediate the disputes of (1) parties who have not filed suit, (2) parties where one party is represented by an attorney and one or more is not represented, (3) parties seeking access to justice who cannot afford attorneys, (4) parties seeking to mediate a Marital Dissolution Agreement (MDA), and (5) parties

seeking to mediate a Permanent Parenting Plan (PPP) or amend an existing PPP. For the reasons set forth herein, I am opposed to the proposed revisions of Rule 31, which operates to exclude qualified and listed Rule 31 Mediators solely because they are not licensed attorneys.

Finally, it is my opinion that the proposed Rule 31 revisions are not consistent with the public policy established by this Court for access to justice and public utilization of Marital Dissolution and Permanent Parenting forms approved by this Court.

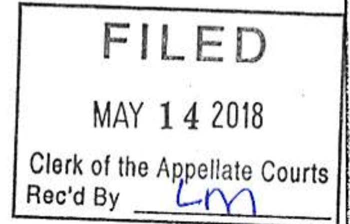
Thank you for the opportunity to comment on proposed revisions to Rule 31.

Every Good Wish,

Thomas D. MacNamara

TDM/bh

No trees were killed in the sending of this message.
However, a large number of electrons were terribly inconvenienced.



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**".[See, **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,

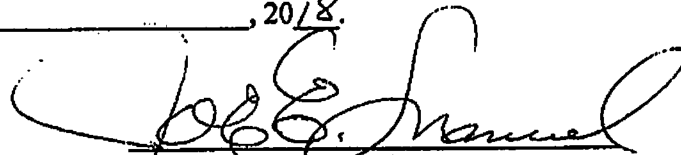
Joe E. Manuel, BPR # 006119
240 Forest Avenue, Suite 301
Chattanooga, TN 37405
Telephone: 423-266-3535
Facsimile: 423-266-3136

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
Facsimile: 423-266-3136

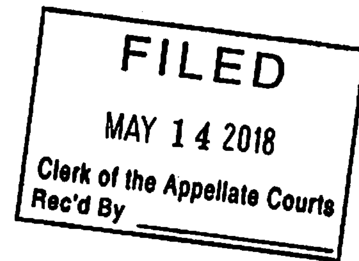
appellatecourtclerk - Comment to Proposed Amendments to S. CT. Rule 31

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.



Joe Manuel

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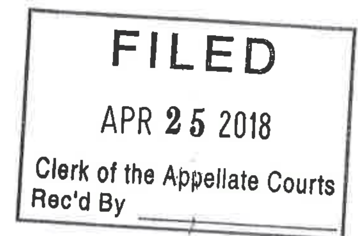


Charles A. Hill
5904 Seven Points Trace
Hermitage, TN 37076
(615) 712-7898
cahill@uci.edu

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":

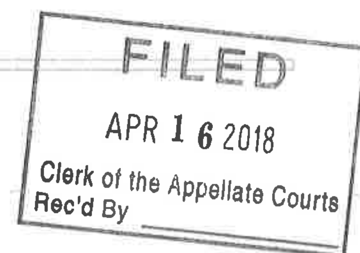
> *"When parents come before the court with a complaint for divorce, the court mandates the submission of a "parenting plan." Mediation is often used to develop such a plan. Mediation is a process in which parents who are in conflict come together with a neutral third person who assists them in reaching 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

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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

FILED
APR 11 2018
Clerk of the Appellate Courts
Rec'd By LM

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.

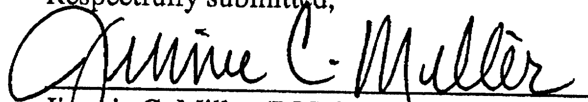
2. The proposed proceedings for discipline of Rule 31 mediators as set forth in Tenn. Sup. Ct. R. 31 § 11 includes a 180-day statute of limitations for filing a complaint with the Alternative Dispute Resolution Commission (ADRC). Tenn. Sup. Ct. R. 9 § 15 does not include a statute of limitations on complaints 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

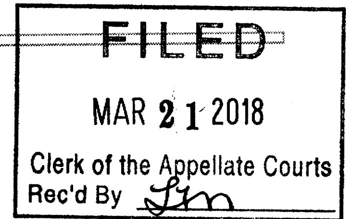
CERTIFICATE OF SERVICE

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.

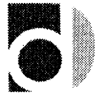
I see this as a slippery slope. Yes, the parties "intend" to be bound by the agreements in an MOU, *but only* after they are written up in formal legal language, the legal protections have been added, and they have sought advice of counsel.

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



Conflict Management Services
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deborah@deborahdenson.com
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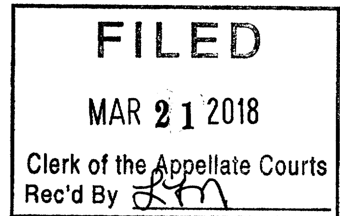
facebook.com/DeborahDensonMediation



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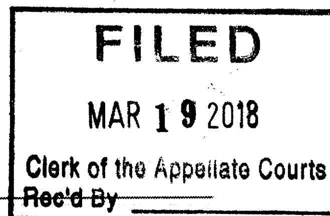
ADM2018-00425

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.

Brad Hornsby
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BradHornsbyLaw@gmail.com