

DISPUTE RESOLUTION

The Newsletter for Conflict Resolution Neutrals and Attorneys published by the Dispute Resolution Section of the Tennessee Bar Association August 2006 issue Copyright Tennessee Bar Association

DISPUTE RESOLUTION is an e-newsletter publication of the Dispute Resolution Section of the Tennessee Bar Association. Articles may be submitted to its co- editors, Hayden Lait at haydenlait@gmail.com or Elizabeth Guenther at eguenther@boultcummings.com

I. MESSAGE FROM TBA DISPUTE RESOLUTION SECTION CHAIR

I have returned from the ABA Convention greatly energized and recovered from the time zone changes. Among other things I attended a meeting of the ABA Dispute Resolution Section. I plan to propose that the ABA Dispute Resolution Section reactivate its Committee on State and Local Bar Associations. That will be an effective way for the TBA DR Section to network with other bar associations.

Regards, Marnie Huff
Chair, TBA Dispute Resolution Section

II. BILINGUAL PRO BONO MEDIATION OPPORTUNITY IN NASHVILLE - AUGUST 23 MEETING

The Nashville Conflict Resolution Center's Hispanic Outreach project is meeting on August 23, 2006 at 5:30 - 7:30 p.m. at Boulton, Cummings & Berry. All bilingual (Spanish/English) mediators in the Nashville area are welcome to attend this meeting. The NCRC plans to train bilingual persons to be mediators in the Hispanic Community in Nashville. For more information, call the NCRC at 615-242-9272.

III. SEPTEMBER 19, 2006 DINNER AT INSTITUTE FOR CONFLICT MANAGEMENT AT LIPSCOMB UNIVERSITY FOLLOWING ITS FIRST ANNUAL FORUM ON NEGOTIATED OUTCOMES: AN EXAMINATION OF APPLICATIONS.

A dinner featuring Terry Waite, Anglican Church hostage negotiator and Hezbollah hostage, will be held at the Institute for Conflict Management at Lipscomb University in Nashville on September 19, 2006. Waite will also be in town to speak at a luncheon at the ICM during its First Annual Forum on Negotiated Outcomes: An Examination of Applications. Watch for upcoming details about the dinner at <http://icm.lipscomb.edu>

IV. AUGUST 24-26 CLE - TBA GENERAL PRACTICE SUMMIT IN NASHVILLE

Network with your colleagues who may need mediation services and get 15 CLE credits as well at the TBA General Practice Summit in Nashville. Recognized experts in 15 practice areas will answer your questions and provide valuable information to apply to your law practice. Areas included are: Business Organization and Compliance Issues; Juvenile and Family Law; Criminal Law; Technology; Wills, Trusts and Estates; Workplace Discrimination and Sexual Harassment;

Real Estate; Intellectual Property; Bankruptcy and Creditors Rights; and Best Practices for Clients and Lawyers. For more information see www.tba.org.tennbaru

V. ABA FORMAL OPINION NO. 06-439 ADDRESSES LAWYER'S OBLIGATION OF TRUTHFULNESS WHEN REPRESENTING A CLIENT IN NEGOTIATION, AS IT IS APPLIED TO CAUCUSED MEDIATION

The ABA Standing Committee on Ethics and Professional Responsibility recently issued a formal ethics opinion discussing a lawyer's obligation of truthfulness when representing clients in caucused mediation. The opinion noted that there should be no distinction drawn, regarding lawyer truthfulness, between caucused mediation and other negotiation settings--the standard is neither higher nor lower. Therefore, Model Rule 4.1 applies to caucused mediation--a lawyer may not make a false statement of material fact, but statements characterized as "puffing" are acceptable. However, the Committee warned that statements conveying a client's position must not be conveyed in a way that creates false factual representations. (For example, a lawyer may not state, falsely, that a client had formally disapproved any settlement over a certain amount, when the lawyer actually has authority to settle for a higher amount.)

ABA Members may order the full text of the opinion at <http://www.abanet.org/cpr/pubs/ethicopinions.html>

VI. JUDICIAL IMMUNITY ARGUMENT PROTECTS NATIONAL ADR PROVIDER FROM BREACH OF CONTRACT CLAIMS In the unpublished opinion Simpson v. JAMS/Endispute LLC, No. A110634 (Cal. Ct. App. 2006), the California Court of Appeals upheld a lower court ruling that the defendant JAMS, a national ADR provider, and other mediators and neutrals, enjoy a "quasi-judicial immunity" regarding their services as neutrals. Therefore, the plaintiff could not bring a claim for breach of contract for his dissatisfaction with the mediation. The court noted that this immunity extends to all neutral activity "short of complete nonperformance."

The full decision can be viewed at: <http://www.courtinfo.ca.gov/opinions/nonpub/A110634.DOC>

VII. TBA FILES COMMENT ON PROPOSED AMENDMENTS TO RULE 31 WITH TENNESSEE SUPREME COURT

Below is the full text of the comment filed on August 21, 2006 by the TBA.

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

IN RE: PROPOSED AMENDED RULE) No. M2006-01303-SC-RL2-RL
31, RULES OF THE TENNESSEE)
SUPREME COURT)

COMMENT OF THE TENNESSEE BAR ASSOCIATION

INTRODUCTION

The Tennessee Bar Association ("TBA"), by and through its President, Larry D. Wilks; General Counsel, Gail Vaughn Ashworth; and, Executive Director, Allan F. Ramsaur, urges the adoption

of certain proposed amendments and modification of other proposed amendments to Tennessee Supreme Court Rule 31 ("Rule").

BACKGROUND

On June 22, 2006, this honorable Court published for comment proposed amendments to Tennessee Supreme Court Rule 31 proposed by the Alternative Dispute Resolution Commission. The TBA promptly distributed the proposed amendments to its various interested entities and its Executive Committee, meeting on August 14, 2006 authorized the filing of this comment.

1. RULE 31 NEUTRALS OTHER THAN RULE 31 MEDIATORS SHOULD BE LICENSED ATTORNEYS.

The proposed amendment to Tenn. Sup. Ct. R. 31 § 2 (o) proposes to modify the definition of Rule 31 neutral to clarify that Rule 31 neutrals other than the mediators are required to be licensed attorneys. The TBA endorses this clarification. The application of Rule 31 is confined to court-annexed alternative dispute resolution proceedings. As stated in Section 1 of the rule, the rule does not "affect or address the general practice of alternative dispute resolution in the private sector outside of the ambit" of proceedings which are annexed to a court. Case evaluation, mini-trial, non-binding arbitration, and summary jury trial proceedings all contemplate that the neutral presides over the proceeding and may actually issue a recommended decision. The training, skills, and experience of a licensed attorney are necessary to fulfill this role.

2. THE DEFINITIONS OF "MEDIATION" AND "MEDIATOR" SHOULD REFLECT THAT THE PROCESS IS AN EFFORT TO REACH A MUTUALLY ACCEPTABLE AGREEMENT.

The proposed amendments recommend adoption of a new subsection 2(g) to add a definition of mediator and continue the definition of mediation as a informal process in which a neutral conducts discussions. Both of these definitions seem to indicate that the discussions must result in a mutually acceptable agreement. However, experience dictates that mediation can only engage in efforts to enable a mutually acceptable agreement among the parties and may not reach a satisfactory conclusion. Therefore, the TBA recommends that the definition of mediator and mediation be modified so they read as follows:

- (g) "Mediator" is a neutral who conducts discussions among disputing parties in an effort to enable them to reach a mutually acceptable agreement among themselves on all or any part of the issues in dispute.
- (h) "Mediation" is an informal process in which a neutral conducts discussions among disputing parties in an effort designed to enable them to reach a mutually acceptable agreement among themselves on all or any part of the issues in dispute.

3. GENERAL DIRECTIVES FROM THE TRIAL COURT REGARDING RULE 31 ADR PARTICIPATION SHOULD BE ADOPTED BY LOCAL RULE RATHER THAN STANDING ORDER OF REFERENCE.

The Alternative Dispute Resolution Commission recommends amendment to Tenn. Sup. Ct. R. 31 § 3(b), § 3(c) and § 4(a) to require that a directive that certain types of matters be referred to alternate dispute resolution be accomplished by a local rule rather than through a standing order of reference. The TBA heartily endorses this proposal. The adoption of local rules to address reference of matters to alternative dispute resolution is worthwhile because it gives notice to the bar and the parties as to the practice in each jurisdiction, provides greater uniformity as to results from judge to judge, and offers the opportunity for input from the public and the bar under Tennessee Supreme Court Rule 18.

4. FAMILY LAW MEDIATORS SHOULD CONTINUE TO BE REQUIRED TO RECEIVE CONTINUING TRAINING IN FAMILY LAW.

Under the proposed Rule 31 § 18 the ADRC proposes to delete the present requirement that family law mediators complete six (6) hours of training every two (2) years including at least one (1) hour of ethics and three (3) hours of family law training and to allow a Rule 31 mediator to substitute education in psychiatry, psychology, counseling, social work, education or accounting for the family law requirement. The TBA opposes this change. Rule 31 mediators who are not lawyers play a valuable role in assisting clients to arrive at a mutually acceptable solution to their family legal dispute. In so doing, the mediator must be able to articulate to the parties the parameters within which their settlement will lie. Only through constant updating and adequate training in family law changes can non-lawyers adequately serve the public. The TBA takes no position on requiring three hours of mediation training, but does believe that family mediators, particularly because they may be non-lawyers, should be required to obtain at least three (3) hours of family law training every two (2) years.

5. REPORTS REQUIRED OF RULE 31 MEDIATORS SHOULD BE NARROWLY SUBSCRIBED SO AS NOT TO REQUIRE SUBMISSION OF CONFIDENTIAL INFORMATION.

The ARDC recommends adoption of a new provision in Rule 31 § 18(e) to require reports by a mediator in order that the commission may evaluate client satisfaction, quality of results, and effect on case management. The proposal seems to indicate that the ARDC may request any data it needs to conduct the evaluation. This new rule should limit the reports to the information necessary for the commission to fulfill its responsibilities and should not include any information otherwise made confidential. To accomplish this purpose the TBA suggests the following language with respect to Rule 31 § 18(e):

In addition to compliance with Section 5 of this Rule, upon the request of the ADRC to assist it in fulfilling its responsibilities under Section 19(a)(8), Rule 31 Mediators shall be required to submit to the ADRC, with respect to mediations that they have conducted, whether under Rule 31 or otherwise, non-confidential information concerning participant satisfaction and whether or not a dispute was settled. The report forms will be available on the AOC website and from the AOC.

6. WITH CONSENT OF THE PARTIES, THE COURT BEFORE WHOM THE MATTER IS PENDING SHOULD BE ELIGIBLE TO SERVE AS A PRESIDING NEUTRAL IN SUMMARY JURY TRIALS.

The proposed amendments to the rule give new emphasis to summary jury trials as an alternative dispute resolution mechanism. The TBA recommends that the provisions with regard to summary jury trials explicitly permit the court before whom the matter is pending to employ a summary jury trial when the parties consent to the action. To accomplish this change the TBA recommends that the following sentence be inserted between the first and second sentence in Tenn. Sup. Ct. R. 31 § 24.

The court before whom the matter is pending may, with consent of the parties, act as the presiding neutral in a summary jury trial.

RESPECTFULLY SUBMITTED,

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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 on August 21, 2006.

Allan F. Ramsaur