

FILED
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 Clerk of the Appellate Courts
 Rec'd By KTM

IN THE SUPREME COURT OF TENNESSEE

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

No. ADM2018-00425

**PETITION OF THE ALTERNATIVE DISPUTE RESOLUTION COMMISSION
 FOR THE ADOPTION OF AMENDED TENNESSEE SUPREME COURT RULE 31,
 RULE 31 APPENDIX A AND NEW RULE 31A**

The Alternative Dispute Resolution Commission (“ADRC”) respectfully petitions the Court to adopt a new Rule 31A and adopt amendments to Rule 31 and Appendix A of Rule 31.

In support thereof, the ADRC submits that since 2001, the Court has reviewed and modified Rule 31 many times, each amendment addressing a few specific issues. There has never been a holistic and complete review of Rule 31 and Appendix A since the Rule’s enactment. The ADRC is of the opinion that a thorough review of the Rule 31 and Appendix A is needed to improve the efficiency and effectiveness of the alternative dispute resolution processes in Tennessee courts. To this end, the ADRC started a thorough review process in April 2016, with Chairman Edward P. Silva dividing up the Rule and assigning committees look at Rule sections to study for proposed revisions. In July 2016, the Chair completed the work assignments to the appropriate committees and they started meeting.

In July 2016, the ADRC emailed all Rule 31 active listed mediators with a request to review the Rule and provide suggestions for modifications. The ADRC included notice of its plan to consider proposed revisions in the ADRC Newsletter that is posted on the AOC website and emailed to all active listed Rule 31 mediators.

In October 2016, the ADRC Rule and Policy Committee reviewed with the full ADRC the first initial drafts of revisions to the Rule based on work done by the separate committees. The ADRC decided at its October, 2016 meeting to conduct an ADRC retreat in April 2017, during which ADRC members would undertake a day-long intense review of the additional proposed changes and issues to be reviewed at the upcoming January 2017 meeting. The sections

were divided up once again for committee review based on the original assignments given out at the July, 2016 meeting. The following committees reviewed the following sections:

Training/Education - Rule 31, Section 17(c) 18(a)

Ethics Advisory - Rule 31, Sections 9, 11, Appendix A

Credentials - Rule 31, Sections 14, 15, 16, 17(a), (b), (d) through (i), 18(b) through (d) and (f)

Communications - Rule 31, Sections 5, 18(e)

Rule and Policy Review - All remaining sections and Appendices

At the January 2017 ADRC quarterly meeting, the ADRC again discussed suggested changes and delineated issues for the upcoming April 2017 retreat. In April 2017, the ADRC held a full day retreat with all ADRC members intensely discussing proposed Rule revisions and several specific issues. At the July 2017 ADRC quarterly meeting, the last draft of the Rule was again reviewed and at the October 2017 ADRC quarterly meeting intense discussions on the last draft were had.

Based on a lengthy, thorough study and review of the Rule and relevant issues, the ADRC recommends modifications to the Rule as set forth below.

I. RULE 31 SHOULD BE DIVIDED INTO RULE 31 AND RULE 31A

The ADRC noted during its many discussions that it only oversees training and listing of Rule 31 mediators. It has not had any occasion to address issues concerning other forms of alternative dispute resolution as noted in the current Rule sections 20 – 24. These other forms of alternative dispute resolution require a lawyer or a judge as the neutral and are ordered by the court either on its own motion or that of the parties. The court oversees all these types of dispute resolution and due to fact that only lawyers can be the neutrals in these cases, the Board of Professional Responsibility has the authority to hear and determine grievances in these cases. Therefore, the ADRC has no authority or means to discipline any of the neutrals in these actions. As such, the Rule should be as clear regarding this division of authority.

II. ELIGIBLE CIVIL ACTION RE-DEFINED AND CLARIFICATION OF MEDIATIONS THAT RULE 31 ENCOMPASSES

The ADRC spent many hours researching and discussing what Rule 31 can and should cover. The current Rule notes in Section 1. Application: that the Rule only applies to neutrals serving pursuant to the Rule and that the provisions of the rule “do not affect the general practice of alternative dispute resolution in the private sector outside the ambit of Rule 31.” The ADRC reviewed the June 1994 Report of the Tennessee Supreme Court Commission on Alternative Dispute Resolution, the report used to create the initial Rule 31. The Tennessee Supreme Court Commission on Alternative Dispute Resolution clearly meant for mediation and all proposed forms of alternative dispute resolution to be based on parties attempting to settle issues and/or the entire dispute that had been filed with a court. The initial report of this Commission did not envision dispute resolution therefore “outside the ambit” of the courts and did not intend for the proposed rule to cover mediations in situations where no court filing had taken place – in other words, the initial Commission envisioned the rule only applying to “court annexed” disputes over which courts would have jurisdiction. To this end, the ADRC modified definitions in Section 2 of Rule 31 to clarify that that Rule 31 and Rule 31A will only apply (with a few exceptions to types of cases) to “any civil action filed in a Court in which the Court has continuing jurisdiction” and in the case of Rule 31 only, to any civil dispute by written agreement of the Rule 31 Mediator and the parties.

III. GRIEVANCE PROCEDURE CLARIFIED

The ADRC reviewed grievance procedures from other states and clarification of the procedure was determined necessary. Therefore, the new procedure is laid out step by step in proposed Rule 31, Section 11 and notes when in the process ADRC decisions are appealable and when they are final.

IV. CONFIDENTIALITY, PRIVILEGE AND ADMISSABILITY

Section 7 of the proposed Rule 31 addresses the confidentiality of mediations to add that “information” disclosed during the mediation is also confidential. In addition, this section also adds that “No Rule 31 Mediator may be compelled to testify by deposition or otherwise regarding such conduct, information or statements made” during the mediation. Section 7 of the

proposed Rule 31 also has substantive changes. It clarifies that a written “signed” mediated agreement is admissible to enforce the understandings of the parties.

Proposed Section 12 of Rule 31 proposes that Rule 31 mediations are privileged.

V. OBLIGATION OF RULE 31 MEDIATORS

The proposed Rule 31, Section 10 (e) adds that the Rule 31 Mediator “shall not prepare legal pleadings such as a Marital Dissolution Agreement and/or Parenting Plan for filing with the Court.” This addition is due to the clarification of Section 10 of the proposed Rule as noted in the recent ADRC Advisory Opinion 2017-0002. An attorney who is acting as a Rule 31 mediator per said Opinion “is not the advocate for either party nor is the Mediator the advocate for both parties. The obligation is on the Rule 31 Neutral to “refrain from participation as attorney” and to ensure this prevailing public policy is explained to the parties.” (Per Section 10 of the proposed Rule and current Rule) There is a distinction of an attorney being in the role of a mediator versus being in the role of an attorney. If the attorney is acting as a mediator, he/she cannot act as an attorney by drafting legal documents for filing with a court. The attorney is acting as the neutral. This distinction is also specifically noted in the Board of Profession Responsibility Formal Ethics Opinion 93-F-13. In addition, if one is a mediator and not an attorney, he/she cannot, by law, be drafting legal documents and acting in the role of an attorney.

VI. TRAINING AND LISTING REQUIREMENTS MODIFIED AND CLARIFIED

Proposed Section 14 of Rule 31 makes many significant changes:

- A. There will no longer be an inactive status for Rule 31 Mediators. Rule 31 Mediators will only be listed or not listed.
- B. Initial listing training will only be valid for up to five years from the date of the training vs. the current Rule of 15 years. The ADRC feels strongly that fifteen is too long to assume a mediator’s training was current for initial listing purposes. The ADRC recommends that proposed Rule 31 Section 14(2) and 15(a)(4) become effective one year

following implementation of the Rule change to give everyone time to become active again.

- C. The ADRC felt strongly that it needed to have discretion to list or not list applicants for listing. The current Rule provided that an applicant would not be listed if he/she were not in good standing with a licensing agency; there were three or more open Bar complaints and/or the applicant did not appear to be of “good moral character” as evidenced by two references accompanying the listing application. The section now includes language giving the Commission more discretion to determine whether an applicant should be listed.
- D. Proposed Section 14 provides in the Rule the procedure that has been used for dual listing and “specially trained” in Domestic Violence.
- E. Applications by retiring judges will still be allowed in the proposed Rule 31, but the language has been modified to require the judge to have given official notice of retirement before he/she can apply for approval for listing to take effect when the retirement date comes. 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”.

VII. ADDITIONAL DUTIES OF MEDIATORS

Section 15 of the proposed Rule 31 provides that if one has not completed the requirements for renewal of Rule 31 Mediator listing by March 15 of the year, the listing lapses and the mediator must comply with all applications requirements including applying for listing again. There will no longer be an inactive Rule 31 Mediator status. The ADRC determined that having a listing that can be re-activated for up to 15 years was not appropriate or in the public’s best interest. The ADRC determined that initial training for listing was only valid for five years and submits that if Rule 31 Mediators want to keep their listed status, they need to keep their listing in good standing.

Reports filed with the ADRC per new Rule 31 Section 15(d) are proposed to be confidential and for statistical purposes only. Their existence or not is not to be used for grievances purposes and are for statistical compilation and analysis purposes only.

VIII. REMOVAL OF APPENDICES B-E (FORM ORDERS)

The ADRC proposed removing Appendices B-E from the Rule and maintaining these Forms as documents on the AOC website instead. Appendices B-E are Form Orders for Non-Binding Arbitration, Case Evaluation, Minitrial, and Summary Jury Trial. By removing these Forms from the Rule, this would allow the AOC staff to maintain and update the Forms easily as well as increase accessibility to those in the judicial system by making each a true form available as individual documents. The ADRC believes this would provide greater clarity in separating mediation from other forms of alternative dispute resolution. Additionally, this would reduce the length of the Rule by approximately 22 pages and allow for efficiency when referring to Rule 31 and 31A.

For ease of noting changes that are proposed, attached is a copy of a comparison version of the current Rule to the proposed changes (“Exhibit A”). Sections underlined are proposed changes of the ADRC and sections crossed out are sections deleted from the current Rule. A “clean” copy of the new proposed Rule/Rules is attached also (“Exhibit B”).

The ADRC respectfully petitions this Court to adopt the Rule amendments proposed by the ADRC in the attached documents and as noted above.

Submitted this 8th day of March, 2018.

Respectfully,

By:



Edward P. Silva, Esq.

Chairperson, ADRC