

IN THE TENNESSEE ALTERNATIVE DISPUTE RESOLUTION COMMISSION

Advisory Opinion No. 2023-0002

The Alternative Dispute Resolution Commission (“ADRC”) received a request for an advisory opinion from a Tennessee Rule 31 Listed Mediator. The request has been modified for purposes of a response within the context of Tennessee Supreme Court Rule 31 (“Rule 31”). The Ethics Advisory Opinion Committee, consisting of Marc Harwell, Lori Thomas Reid and Cindy Ettingoff reviewed the request and issued the following Opinion.

Background Information:

The issue was raised because of a request from a Tennessee circuit court judge (Judge). The Judge was asked about "remote" filings by local Rule 31 mediators. While discussing the issue, the Judge stated it was expected settlement agreements were to be filed with the Court by the mediator (most usually when *pro se* parties were involved). This request created concerns among the Rule 31 listed mediators. Opinion 2020-0001 is clear - settlement agreements may not be submitted to the Court by the mediator if it is a Rule 31 mediation. This led to the current questions submitted for opinion.

Questions Presented:

Question 1: When is a mediation a Rule 31 mediation?

Response: Rule 31, Section 2(i) states that a Rule 31 mediation is first, *an informal process in which a Rule 31 Mediator conducts discussions among the parties that is designed to enable them to reach a mutually acceptable agreement among themselves on all or any part of disputed issues; second, in or related to an Eligible Civil Action ...* ("Eligible Civil Action" is defined at Section 2(f) *as certain civil actions filed in a court.*)

In section 2(i), the last sentence begins with the disjunctive "or." 2) *or in any civil dispute which the Rule 31 Mediator and the parties have agreed in writing that the mediation will be conducted pursuant to Rule 31.4*

The mediator and parties do not have to agree in writing that the mediation will be pursuant to Rule 31 if the first two requirements are met - it is a Rule 31 mediation.

And, if the parties consent to a mediation at the Judge's "suggestion", without an Order and without a written agreement, it is still a Rule 31 mediation if it meets the first two requirements, thus making the Advisory Opinion applicable.

Question 2: Does Rule 31 or TN ADR Plan require that the mediator be a Rule 31 Listed mediator and, if so, under what circumstances?²

Response: Yes. Several provisions of Rule 31 and the Tenn. S. Ct. ADR Plan address this question. In particular Rule 31, Sections 1, 2(i) and 4(a), (b), (c) and ADR Plan 2.1(b) and Section 3(b)(c)(d).

Rule 31 Section 1. Application. *Pursuant to the revisions of this Rule, the court may order the parties in an eligible civil action as defined in Section 2(f) to participate in a Rule 31 mediation.*

Section 2(i) *A Rule 31 mediation is an informal process in which a Rule 31 mediator conducts discussions among the parties*

Section 4. Selection of Rule 31 Mediators. Subsection (b)(4) *The Court's nomination of any Rule 31 Mediator shall be by random selection unless the matter requires particular expertise not possessed by all Rule 31 Mediators. Subsection (c). If a Rule 31 Mediation is conducted by consent of the parties without an Order of Reference, the parties shall choose the Rule 31 Mediator.*

In addition, the Tennessee Supreme Court issued an ADR Plan. The Plan supplements Tennessee Supreme Court Rule 3. In particular, Section 3(b) provides mediators conducting a mediation under the ADR Plan *shall be a Rule 31 Listed Mediator currently in good standing with the Alternative Dispute Resolution Commission.*

Lastly, the ADR plan and Rule 31 do not allow parties to agree to a non-Rule 31 mediator in an eligible civil action. See Rule 31, Section 4(b)...*when the parties cannot agree on the selection of a Rule 31 Mediator, the court shall nominate a Rule 31 Mediator in accordance with the following procedure. ADR Plan Section 3(b)...Qualification of Mediators. A mediator conducting mediations under the ADR Plan shall be a Rule 31 Mediator currently in good standing with the Alternative Dispute Resolution Commission.*

References:

Tn Supreme Court Rule 31 - <http://tncourts.gov/rules/supreme-court/31>

Section (1) Section 1. Application. The standards and procedures adopted under this Rule apply only to Rule 31 Mediations and Rule 31 Mediators serving pursuant to this Rule. The standards and procedures do not affect or address the general practice of mediation or alternative dispute resolution in the private sector outside the ambit of Rule 31. Pursuant to the provisions of this Rule, a Court may order the parties in an Eligible Civil Action, as defined in Section 2(f), to participate in a Rule 31 Mediation.

Section (2)(i) A "Rule 31 Mediation" is an informal process in which a Rule 31 Mediator conducts discussions among the parties that is designed to enable them to reach a mutually acceptable agreement among themselves on all or any part of disputed issues: 1) in or related to an Eligible Civil Action; or 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.

Section (2)(f) "Eligible Civil Action" includes any civil action filed in a Court in which the Court has continuing jurisdiction, except civil commitments, adoption proceedings, habeas corpus and extraordinary writs, juvenile delinquency, or dependency and neglect cases. The term "Extraordinary writs" does not encompass claims or applications for injunctive relief.

Section (4)(a) within 15 days of the date of an Order of Reference, the parties must notify the Court of the Rule 31 Mediator(s) agreed to by the parties or their inability to agree on a Rule 31 Mediator(s).

Section 4 (b) When the parties cannot agree on the selection of a Rule 31 Mediator(s), the Court shall nominate a Rule 31 Mediator(s) in accordance with the following procedure:

Section 4 (b) (4) The Court's nomination of any Rule 31 Mediator shall be by random selection unless the matter requires particular expertise not possessed by all Rule 31 Mediators.

Section 4 (c) If a Rule 31 Mediation is conducted by consent of the parties without an Order of Reference, the parties shall choose the Rule 31 Mediator.

Tennessee Supreme Court ADR Plan - <https://www.tncourts.gov/ADRPlan>

Section (3)(b) Qualification of Mediators. A mediator conducting mediations under the ADR Plan shall be a Rule 31 Listed Mediator currently in good standing with the Alternative Dispute Resolution Commission.

Date Issued: April, 2024

s/ Marc Harwell

Commissioner Marc Harwell

s/ Cindy Ettingoff

Commissioner Cindy Ettingoff

s/ Lori Thomas Reid

Commissioner Lori Thomas Reid

