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

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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

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

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

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

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

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

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

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

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

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

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