

IN THE TENNESSEE ALTERNATIVE DISPUTE RESOLUTION COMMISSION

Advisory Opinion No. 2023-0001

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, Elizabeth Meadows and Lori Thomas Reid reviewed the request and issued the following Opinion.

Background Information:

This request was submitted by a listed Rule 31 Mediator (Mediator). The Mediator had received several inquiries regarding mediators and arbitrators. Specifically, whether a mediator, having conducted an unsuccessful mediation, can subsequently act as the arbitrator in the same matter and make a final and binding decision on the matter. It is noted other jurisdictions do permit the mediator to serve as the arbitrator following an unsuccessful mediation.

Questions Presented:

Question 1: Does Rule 31(10)(c)(1) prohibit a mediator from subsequently acting as the arbitrator (final and binding decision maker) in the same matter in which the mediator had previously conducted a Rule 31 mediation?

Response: Yes, Rule 31 subsection 10. Obligations of Rule 31 Mediators prohibits a mediator from acting as an arbitrator and mediator in the same matter.

The Committee believes the question is expressly addressed by Rule 31, subsection 10. *Obligations of Rule 31 Mediators*, subsection c. During *and* Following Rule 31 Mediations, Mediators *shall*: (1) *Refrain from participation* as attorney, advisor, judge, guardian ad litem, master, or in any other judicial or *quasi-judicial capacity in the matter in which the Rule 31 Mediation was conducted.*” (Emphasis added)

Question 2:

Assuming the answer to the question above is yes, are there any circumstances that would permit the mediator to subsequently act as an arbitrator in the Rule 31 mediation conducted by the mediator (e.g. agreement by the parties to waive the provision of §10(c)(1))?

Response: No.

References:

<http://tncourts.gov/rules/supreme-court/31>

GENERAL PROVISIONS APPLICABLE TO ALL RULE 31 MEDIATIONS

Section 10. Obligations of Rule 31 Mediators

(c) During and following Rule 31 Mediations, Rule 31 Mediators shall:

(1) Refrain from participation as attorney, advisor, judge, guardian ad litem, master, or in any other judicial or quasi-judicial capacity in the matter in which the Rule 31 Mediation was conducted.

Date Issued: October 3, 2023

s/ Marc Harwell

Commissioner Marc Harwell

s/ Elizabeth “Betsy” Meadows

Commissioner Elizabeth “Betsy” Meadows

s/ Lori Thomas Reid

Commissioner Lori Thomas Reid