

IN THE TENNESSEE ALTERNATIVE DISPUTE RESOLUTION COMMISSION

Advisory Opinion No.: 2019-0001

The Alternative Dispute Resolution Commission received a request for an advisory opinion from a Tennessee Rule 31 Listed Mediator. The request has been modified for purposes of response within the context of Rule 31. The Ethics Advisory Opinion Committee, consisting of Frank Cantrell, Richard Ladd, Jr., and Virginia Story, reviewed the request and issued the following opinion.

Inquiry:

May a Rule 31 Listed Mediator attend a trial involving an action which the mediator had previously mediated?

Background Information:

A Rule 31 Listed Mediator served as the mediator for a matter, but it did not settle. The matter is set for trial, and the Rule 31 Listed Mediator would like to attend. The Rule 31 Listed Mediator believes this could provide valuable insight into the realities of post-mediation litigation. The Rule 31 Listed Mediator also believes it would be educational especially for a Rule 31 Mediator who is beginning to develop his/her practice and skills.

Both attorneys representing each side informed the Rule 31 Listed Mediator that they did not have any concerns with this nor did they anticipate the Rule 31 Listed Mediator would be a distraction if the Rule 31 Listed Mediator observed the trial.

Response:

Tennessee Supreme Court Rule 31 does not prohibit nor expressly authorize a Rule 31 Listed Mediator from attending a trial involving a matter that the Rule 31 Listed Mediator served as mediator for. The Ethics Advisory Committee suggests that each Rule 31 Listed Mediator consider all factors, including the nature of the matter involved, when making an independent decision to attend a trial in this manner.

Confidentiality is a key component of a Rule 31 Mediation; thus, the Rule 31 Listed Mediator should ensure he/she maintains confidentiality especially in this situation.

The Ethics Advisory Committee acknowledged that especially in some of the Tennessee's rural jurisdictions, this was likely to occur on a frequent basis for Rule 31 Listed Mediators who are also practicing attorneys who have another matter on the docket that day. Thus, it is certainly not prohibited.

The Ethics Advisory Committee encourages Rule 31 Listed Mediators to be mindful of the resulting outcome in post-mediation litigation and can see the benefit of the mediator attending court as a result.

There is no obligation in Rule 31 to request permission from the attorneys and/or the parties to attend the trial. However, if a Rule 31 Listed Mediator were to discuss this option with an attorney representing a party, then the courteous practice would be for the mediator to not attend if the attorney requested the mediator not be present.

References:

Rule 31, Section 7 - Confidential and Inadmissible Evidence

Evidence of conduct, information disclosed, or any statement made in the course of a Rule 31 Mediation is confidential to the extent agreed by the parties or provided by other law or rule of this State. Such evidence shall be inadmissible to the same extent as conduct or statements are inadmissible under Tennessee Rule of Evidence 408. No Rule 31 Mediator may be compelled to testify by deposition or otherwise regarding such conduct, information, or statements. A written mediated agreement signed by the parties is admissible to enforce the understanding of the parties.

Rule 31, Section 10 - Obligations of Rule 31 Mediators, especially (c)

(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.

(2) Provide a timely report as required under Section 5 of this Rule.

(3) Avoid any appearance of impropriety in the Rule 31 Mediator's relationship with any member of the judiciary or the judiciary's staff with regard to the Rule 31 Mediation or the results of the Rule 31 Mediation.

(4) Preserve and maintain the confidentiality of all information obtained during the Rule 31 Mediation and shall not divulge information obtained by the Rule 31 Mediator during the course of the Rule 31 Mediation without the consent of the parties, except as otherwise may be required by law.

(5) Assist the parties in memorializing the agreement of the parties at the end of the mediation. Rule 31 Mediators may assist the parties in filling out the Parenting Plan Forms maintained by the Administrative Office of the Courts pursuant to T.C.A. 36-6-404, the Marital Dissolution Agreement as approved by the Tennessee Supreme Court under Tenn. Sup. Ct. R. 52 and any other forms approved by the Tennessee Supreme Court.

Rule 31, Section 10(b) of Appendix A - Concluding an ADR Proceeding

(b) Without Agreement.

(1) Termination by Participants. The Neutral shall not require a participant's further presence at an ADR Proceeding when it is clear the participant desires to withdraw.

(2) Termination by Neutral. If the Neutral believes that the participants are unable to participate meaningfully in the process, the Neutral shall suspend or terminate the ADR Proceeding. The Neutral should not prolong unproductive discussions that would result in emotional and monetary costs to the participants. The Neutral shall not continue to provide dispute resolution services in an ADR Proceeding where there is a complete absence of bargaining ability.

Date Issued: _____



Frank Cantrell



Richard Ladd, Jr.



Virginia Story