

ETHICS ADVISORY OPINION

ALTERNATIVE DISPUTE RESOLUTION COMMISSION

Issue Presented:

Does Rule 31, §10(d) prohibit a mediator from testifying as an expert witness in a proceeding that seeks judicial interpretation and construction of a Memorandum of Understanding drafted by the mediator?

Factual Background:

The Rule 31 Neutral ("*Neutral*" herein) conducted mediation in 2000. At the conclusion of the mediation, the Neutral drafted a Memorandum of Understanding for the parties. The parties' attorneys prepared a Marital Dissolution Agreement based upon the Memorandum of Understanding. The Memorandum of Understanding contained a provision that required Husband to maintain life insurance so long as he had alimony or child support obligations.

Contrary to the terms of the Marital Dissolution Agreement, Husband changed the beneficiary designation to exclude his Wife. Husband died in 2011. The insurance company issued all the death benefits to the parties' daughter.

Wife has filed an action against daughter for Wife's share of the death benefits.

Wife's attorney has approached Neutral about testifying as an expert about the standard interpretation of life insurance provisions like the one contained in the Marital Dissolution Agreement.

Applicable Rules and Statutes:

Rule 31, §10(d) of the Supreme Court Rules states the following:

"Rule 31 Neutrals shall preserve and maintain the confidentiality of all information obtained during Rule 31 ADR Proceedings and shall not divulge information obtained by them during the course of Rule 31 ADR Proceedings without the consent of the parties, except as may be required by law."

Rule 31, Appendix A, Section 7(a) of the Supreme Court Rules states the following:

"A Neutral shall preserve and maintain the confidentiality of all dispute resolution proceedings except where required by law to disclose information."

T.C.A §36-4-130 states the following:

“(a) When the parties to a divorce action mediate the dispute, the mediator shall not divulge information disclosed to the mediator by the parties or by others in the course of mediation. All records, reports, and other documents developed for the mediation are confidential and privileged.

(b) Communications made during a mediation may be disclosed only:

(1) When all parties to the mediation agree, in writing, to waive the confidentiality of the written information;

(2) In a subsequent action between the mediator and a party to the mediation for damages arising out of the mediation;

(3) When statements, memoranda, materials and other tangible evidence are otherwise subject to discovery and were not prepared specifically for use in and actually used in the mediation;

(4) When the parties to the mediation are engaged in litigation with a third party and the court determines that fairness to the third party requires that the fact or substance of an agreement resulting from the mediation be disclosed; or

(5) When the disclosure reveals abuse or neglect of a child by one (1) of the parties.

(c) The mediator shall not be compelled to testify in any proceeding, unless all parties to the mediation and the mediator agree in writing.”

Analysis:

Rule 31, §10(d) provides that all information obtained during a Rule 31 ADR proceeding is confidential. Unless the parties agree to waive confidentiality, the Neutral is required to preserve and maintain the confidentiality of all information secured during the course of mediation. However, Rule 31, §10(d) also states that there are limits to confidentiality as “otherwise may be required by law.”

T.C.A §36-4-130 does create very limited exceptions to the almost complete confidentiality that envelops the mediation process. However, it does not appear that any of the exceptions would permit a Neutral to act as an expert witness in a case mediated by the Neutral.

In the factual situation presented here, the Neutral does not lose her status as the Neutral for the underlying divorce action by assuming the role of an expert witness. She functioned as a Rule 31 Neutral first, with all the attendant duties and obligations. The duty to preserve the confidentiality of all information disclosed to the Neutral continues indefinitely.

The two roles are inconsistent. The role of an expert witness necessarily would involve rendering an opinion on the very document generated in the mediation process.

Rule 31 does not permit a Neutral to serve as an expert witness in a case mediated by the Neutral.

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