M2008-01403

JAN - 7 2009

THE HARDISON LAW FIRM

A Professional Corporation
Pembroke Square
119 South Main Street, Suite 800
Memphis, Tennessee 38103-3685
Telephone (901) 525-8776
Telecopier (901) 525-8790
www.thehardisonlawfirm.com
dcook@hard-law.com

LEE A. HARDISON, Jr. (1915-1983)
DAVID M. COOK [1,2,3]
JERRY O. POTTER [2,3]
W. TIMOTHY HAYES, Jr.
KAREN S. KOPLON [4]
JONATHAN T. MARTIN
ALBERT G. MCLEAN
ALAN R. STRAIN [3]
REID R. PHILLIPS [5]
CHRISTOPHER H. CRAIN [4]

VIRGINIA PATTERSON BOZEMAN
JENNIFER S. HARRISON [6]
CHAPMAN SELLERS MORROW
KIMBERLY CROSS SHIELDS [6]
JOSHUA B. SPICKLER
SHERRY S. FERNANDEZ [3]
AARON T. CASSAT
JOSHUA A. HILLIS [4,5]
S. LEE AKINS

[1] Certified Medical Malpractice Specialist - Tennessee Commission on Continuing Legal Education and Specialization and American Board of Professional Liability Attorneys

[2] Certified Civil Trial Specialist - Tennessee Commission on Continuing Legal Education and Specialization and National Board of Trial Advocacy

[3] Tennessee Supreme Court Rule 31 Listed Mediator

[4] Licensed also in Arkansas
[5] Licensed also in Mississippi
[6] Also Registered Nurse

January 5, 2009

Mr. Michael Catalano
Supreme Court Building
Clerk of the Appellate Court
401 7th Avenue North
Nashville, TN 37219

RE: Comments Regarding Proposed Changes to Rule 31 and the Proposed *Pro Bono* Rules

Dear Mike:

have the following comments to offer regarding the proposed Supreme Court Rules changes referenced above:

1. As regards Rule 31, I offer the following:

   A. I agree that a law degree from an accredited institution should be deemed as a graduate degree;

   B. I agree with this proposal, particularly since I have been a Supreme Court listed Alternate Dispute Resolution Specialist since June 6, 1997, and it will not affect me;

   C. I disagree with proposed Rule 3. I do not believe the court clerks and part-time judicial officers should be allowed to be listed as or act as Rule 31 mediators, unless they are trained and meet all of the requirements I had to meet. Further, Supreme Court approved

neutrals need all the referrals they can get to meet the three *pro bono* mediations per year requirement of Rule 31. I have had some unfortunate experiences with *pro bono* mediations which I will address in more detail below.

D. I also suggest that all the state's trial and appellate judges be required to report their referrals of *pro bono* mediations. There is, essentially, no other source for approved mediators for these mediations, and despite the best efforts of the Memphis Bar Association to plead for referrals from the bench, very few are forthcoming. Approved mediators are required to perform three *pro bono* mediations per year, as set out above, but it is impossible to meet the requirement without referrals. We could dispose of countless cases for the judiciary, given the chance.

2. As regards the proposed changes to the *pro bono* rules, I offer the following:

A. I believe that the goal of each lawyer performing fifty hours of *pro bono* work per year should not be aspirational, but mandatory, particularly if not exclusively in the state's urban counties. There may be insufficient numbers of potential *pro bono* clients in rural areas. We have a number of worthy *pro bono* initiatives in Memphis, regarding all of which Chief Justice Holder is well aware. Imagine how much good we could do for the public if all of Shelby County's 3,000 lawyers were required to meet a goal of fifty *pro bono* hours per year- for one example, we could make our monthly Saturday *pro bono* clinics weekly, if not daily, but only the Justices can accomplish this;

B. I agree with the requirement that lawyers report *pro bono* work done each year;

C. I agree with the revision of the rule to permit limited scope representation;

D. I agree with the provision which will allow corporate counsel to provide *pro bono* legal services.

As regards my unfortunate experience with my own *pro bono* mediations, I had three cases which involved very vexatious and malicious litigation involving two *pro se* parties who were, by definition, paupers. I conducted a *pro bono* mediation at my office and secured their agreement to dismiss all litigation, pending, respectively, in the Tennessee

Court of Appeals for the Western Section, the Chancery Court of Shelby County, and the Circuit Court of Shelby County, in exchange for my personal payment to them of the sum of $250.00 each. The Chancellor and the Circuit Court Judge referred the matters to me at the request of one of the litigants, whom I had met at our Saturday Free Legal Clinic- I resolved the Court of Appeals litigation on my own, since Tennessee has no corollary to the Federal Appellate Rule requiring mediation on appeal. Tennessee should have such a Rule. I told the litigants, but did not, of course, promise them, that I expected the judges would be so happy to see this specious and time-wasting *pro se* litigation between the two of them resolved that the court costs would be waived. The Chancellor did in fact waive the court costs; the Circuit Court Judge refused to do so upon advice from a Clerk, not the County Attorney nor the state Attorney General, despite the fact that both litigants were paupers and thus qualified for court cost waivers, and I personally paid in excess of $400.00 in Circuit Court costs because it occurred to me that perhaps the litigants had misunderstood me, although I had made it as clear as I possibly could in the English language (my mother tongue) that I could not control nor make any guarantees of any kind whatsoever regarding what the judges would do, and because, of course, it would have been highly unethical and improper for me to suggest that I could. My reputation is the most important thing I own. I have recently been advised by counsel for the Western Section Court of Appeals that that entity likewise refuses to waive its court costs, and I have requested that the cost bill be sent to me. I understand it to be in excess of $1,000.00. Hence, this particular good deed on my part will have cost me over $2,000.00 when all is said and done. I have paid all of this personally, because I could not in good conscience request that my law firm pay it. This is my reward, I suppose, for trying to meet my professional and approved ADR neutral obligations, and to just plain do the right thing.

I believe that the court rules need to be changed, or the legislature needs to take appropriate action, so that it is made crystal clear to all the judges that court costs can in fact be waived in circumstances such as these.

Thank you and the Tennessee Supreme Court for considering my comments.

Yours very truly,

THE HARDISON LAW FIRM, P.C.

DAVID M. COOK

DMC:dd

cc: The Honorable Van Sturdivant, Circuit Clerk
Ms. Kristi R. Rezabek
Ms. Linda W. Seely
Mr. George T. (Buck) Lewis, III

State of Tennessee
Department of State
Administrative Procedures Division
312 Eighth Avenue North
8th Floor, William R. Snodgrass Tower
Nashville, Tennessee 37243
Phone: (615) 741-7008 Fax: (615) 741-4472

February 12, 2009

Michael W. Catalano, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

RE: Proposed Amendment to Tennessee Supreme Court Rule 31, §17(h)

Dear Mr. Catalano:

The purpose of this letter is to offer a comment to the proposed amendment to Supreme Court Rule 31, §17(h). I would propose that "administrative judge" be added to the full-time positions listed which constitute a sitting judge for purposes of the rule. The Supreme Court considers an administrative judge to be a judge. A part-time administrative judge should be allowed to be listed as a Rule 31 mediator and therefore should be added to the list of part-time judicial officers in §17(i). For purposes of clarity it would seem appropriate to specifically list administrative judges in the Rule. I have discussed this matter with personnel at the Administrative Office of the Courts and they are in agreement with my views.

Thank you for taking the time to consider this comment to the proposed amendment. Please do not hesitate to contact me should you have any questions.

Sincerely,

Thomas G. Stovall, Director
Chief Administrative Judge

October 23, 2009

OCT 26 2009

Michael W. Catalano, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

RE: Request for Comments relative to Proposed Amendments to Tenn. Sup. Ct. R. 31

Dear Mr. Catalano:

In review of the proposed Amendments as referenced above, I noted the following and would request additional consideration be given to revising or amending the language of Rule 31 to the extent that the Court and the ADR Commission deems such appropriate:

In regards to § 3(b) it would appear that the amendment as written is inconsistent as the implication is that the Court would have authority to order the parties to participate in a Case Evaluation. At the same time, the language as stated indicates that the Case Evaluation can only take place upon the consent of the parties. Respectfully, I would suggest that the Court either has the authority to order same or it does not. If the intent is to ensure that both parties consent to the case evaluation, I would suggest that the amendment be revised to state: Upon entry of a joint motion by the parties, trial courts are also authorized to order the parties to participate in a Case Evaluation.

In regards to § 9(d)(4), it may benefit the parties to have the language specify as to whether the opinion must be signed by each member of the Committee or only those members in concurrence with the majority opinion of the Committee. If all members of the Committee sign the opinion, it may be of benefit to specify those members who concur in the opinion versus those who dissent from the opinion. Likewise, I would respectfully suggest that the last line should end in", and made available upon request' rather than", and be made available upon request."

In regards to § 9(d)(6), I would recommend that the last sentence be revised to read,"If the requesting Neutral is later brought before the Grievance Committee on allegations of misconduct in the same mediation or event for which the Neutral requested and received an opinion, the Commissioners who served on the Ethics Advisory Opinion Committee will be precluded from participating in the grievance procedure."

In regards to § 11(b)(4), I would recommend that the sentence be amended to identify whether the Court intends for a response to be submitted within 10 calendar days or 10 business days from the date of receipt.

In regards to § 11(b)(6), I would suggest that the last sentence be revised to allow the mediator to meet with the Grievance Committee in person if desired and/or

that the language otherwise be revised to allow for whatever method of meeting is convenient for the parties as the mediator and/or the complainant may not always have the resources to attend an in person conference, video-conference, and/or teleconference. As the Committee would be initiating the meeting, the Court may prefer to revise the language to indicate that the Committee has the discretion to notice the parties of certain dates and/or times during which the parties, either jointly or separately, must make themselves available for a meeting with the Grievance Committee. Such meetings might then be in person, by video-conference or teleconference depending on the location and resources of the parties and the committee members.

In regards to § 11(b)(10), while I understand the importance and the need for the Grievance Committee and/or the ADRC to necessitate the appearance of individuals and/or witnesses relative to these issues, I am concerned that a subpoena requiring attendance and discussion of information relative to a mediation and/or other proceeding protected under Rule 31 may create issues relative to the confidentiality of the proceedings and/or information disclosed by one party to the mediation even though that party is not the Complainant filing the grievance. Likewise, I am concerned that such may leave some question about the protection of 'Section 12' which states, 'Immunity. Activity of Rule 31 Neutrals in the course of Rule 31 ADR proceedings shall be deemed the performance of a judicial function and for such acts Rule 31 Neutrals shall be entitled to judicial immunity.' Thus, I would request that the Court give further consideration to these issues prior to approving or revising the proposed Amendments.

In regards to § 11(b)(13), I would recommend that the second to last sentence be revised to read 'Rule 31 Mediator, which may include a' rather than 'Rule 31 Mediator, including a.'

In regards to § 11(b)(14), I would request that the Court give further consideration to this provision as it appears to be somewhat confusing and leaves some question as to its application. Specifically, (i) regarding the 'without the initiation of a hearing' causes some concern as it appears to suggest that an individual could be publicly censured without having the opportunity to be heard as to the charges.

In regards to § 11(b)(16), I would request that the Court give further consideration to the provision stating, 'However, nothing in this rule shall prohibit the complainant, the mediator, or any witness from disclosing the existence or substance of a complaint, matter, investigation, or proceeding under this rule or from disclosing any documentation or correspondence filed by, served on, or provided to that person' as the statement as written appears to allow for full disclosure of this information to anyone including the public and/or the news instead of limiting such disclosure to the Court and/or the Grievance Committee and/or the ADRC.

Lastly, in regards to § 11(b)(17), I would renew my concerns relative to the issue of confidentiality and would request that you consider that not all parties to the complaint may be involved and therefore not all parties may have agreed to the waiver of the confidentiality of their proceedings.

Please understand that these comments are being submitted for consideration and reflection only. As I understand a great deal of time and energy goes into proposed Amendments, I am not suggesting that the above stated comments or recommendations have not previously been considered and/or rejected; nevertheless, such are being submitted in hopes that they may be beneficial to the Court as it considers approving the requested Amendments to Rule 31.

Sincerely,

Heather F. Magnuson

CAVETT & ABBOTT, PLLC
ATTORNEYS AT LAW
801 BROAD STREET, SUITE 428
CHATTANOOGA, TENNESSEE 37402

TELEPHONE: 423-265-8804
TELEFAX: 423-267-5915
www.cavett-abbott.com

JOHN C. CAVETT, JR.
BARRY L. ABBOTT*
*ALSO LICENSED IN GEORGIA

OF COUNSEL
BENJAMIN L. McGOWAN
ALAN N. DUNN
WILLIAM G. COLVIN
KEVIN L. LOPER

September 1, 2009

Honorable Michael W. Catalano, Clerk
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: *Public Comments to Proposed Amendments to Rule 31, Rules of the Tennessee Supreme Court*

Dear Mr. Catalano:

I am writing to respectfully submit comments for consideration by the Alternative Dispute Resolution Commission (ADR Commission) concerning proposed amendments to Rule 31.

I recently participated in the disciplinary process before the ADR Commission as a complainant concerning misconduct allegations against a Rule 31 mediator. My case was concluded in favor of the mediator after an evidentiary hearing by a panel from the ADR Commission. During that process, I encountered issues which were not addressed in Rule 31. Addressing these issues would facilitate the proper handling of similar proceedings in the future.

With respect to the proposed amendments to Rule 31, I have identified the following issues which were problematic in the process in which I was involved. These issues are set forth below:

1. *Defining the applicable rules of procedure and evidence for disciplinary hearings* - Presently, Rule 31 does not specify any particular set of rules of procedure to be used by the hearing panel during disciplinary proceedings and pre-trial proceedings. This omission could be cured by specifying in §11 the applicable rules of procedure that are to be used. There is no indication in the rules or the proposed amendment whether the Commission will utilize the *Tennessee Rules of Civil Procedure* or other rules. Additionally, upon inquiry of the parties, the panel had to determine whether or not the hearing panel would utilize the *Tennessee Rules of Evidence* during the hearing. This issue is likewise not resolved by the proposed amendments to §11.

2. *Appointment of an independent prosecuting attorney upon a finding of probable cause* - A fundamental omission from the entire proceeding as currently drafted is that, upon a finding of probable cause (pursuant to proposed §11(b)(8)) with regard to the conduct of a Rule 31 mediator, the panel should appoint an attorney to serve as prosecutor in the case. This procedure is currently utilized by the Board of Professional Responsibility for ethics complaints against attorneys. This issue has not been addressed by the proposed amendment.

In my case, to my great my surprise, I found myself having to function as the prosecutor as well as the complaining witness. This obviously made for a rather awkward proceeding. As a lawyer, I presented the evidence and argued the case. During the hearing, I was called to testify by opposing counsel (who was representing the mediator) as an adverse witness. Thereafter, I "testified" as a witness as part of my cross examination. Thereafter, I presented a closing argument based in part upon my own testimony. If I were not trained both as an attorney and a litigator, this procedure would have been confusing at best. Non-attorney complainants who are not familiar with the court system and the roles of litigants in trial would be substantially disadvantaged by being forced to prosecute a case against a competent trial attorney who would likely be representing the mediator in the case.

The entire process as it is presently designed fails to address the central issue – whether the accused Rule 31 Mediator has, in fact, violated the code of professional conduct. Without a disciplinary counsel to present the case, the purpose of the rules cannot be effectively accomplished. From my own personal experience, I would not likely file a Rule 31 complaint in the future because of this issue alone. Even if I were aware of clear evidence of a violation, the process is prohibitive and punitive to a complainant who has to serve as their own counsel. The burden of having to expend substantial time and resources presenting the case as a "prosecuting attorney" was far in excess of anything I would have anticipated when I originally filed the Complaint in my case.

If the purpose of these rules and amendments is to have the Commission consider the need for discipline of a mediator when probable cause has been established that a mediator is in violation of the ethical rules; then it makes no sense to have a procedure that functionally prohibits or extremely minimizes the probability that a non-attorney complainant can survive the pure procedure himself by being held responsible for the presentation of the case – especially where the complainant is not a trained trial attorney.

I would strongly recommend that the ADR Commission consider adopting appropriate rules and establishing procedures whereby, upon a finding of probable cause that a violation has been committed, disciplinary proceedings would be prosecuted by a separate ADR prosecutor rather than the complaining witness.

3. *Confidentiality of the disciplinary process* - I find it troubling that the proceedings appear to be largely confidential. The fact that a witness complains about the misconduct of a mediator should not protect that mediator from public scrutiny unless the confidentiality in a particular situation is required to prevent the inadvertent disclosure of otherwise privileged or confidential information. If anything, this should be the option of the complainant, not the mediator.

I recognize the need to provide reasonable confidentiality protection where it is necessary to prevent the complainant from having to make the choice between choosing between not reporting unethical conduct of a mediator because of the potential disclosure of confidential, privileged or damaging information to the complainant. However, the use of the word "all matters" in §11 (b)(14) would prohibit the complainant from discussing the matter with the media in appropriate cases.

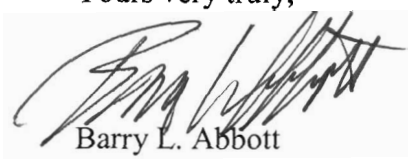
In my case, the mediator was also a candidate for a local public office. The conduct complained of in that situation was conduct which impacts that individual's honesty and integrity. Although I did not notify the media of the fact that a petition had been filed, this fact was disclosed to the media by some of the witnesses in the case.

As long as the complaining witness consents to the disclosure of the contents of the complaint and other documents pertaining to disciplinary proceedings, I see no legitimate purpose to make the blanket declaration that "all matters" are confidential concerning proceedings evaluating the conduct of mediators who stand accused of violating the Rules of Conduct. In fact, rules prohibiting the disclosure of these proceedings by a complaining witness may be questionable as a constitutional infringement on free speech. Subparagraph 11(b)(14)(iii) seems extremely lopsided in the application of this rule as it allows the mediator to request that the matter be public; however, there is no provision in the rules affording the same option to the complaining witness.

Thank you for consideration of my comments. If the Commission has any questions, I would happy to address them at any time.

With kindest personal regards,

Yours very truly,



Barry L. Abbott

BLA:dmm

G:\BLADOCS\Catalano.ltr.8-31-09.doc

LAW OFFICES

W. J. MICHAEL CODY
JOEL PORTER
CHARLES F. NEWMAN
C. THOMAS CATES
JOE M. DUNCAN
J. BROOK LATHRAM
JEF FEIBELMAN
DEWITT M. SHY, JR.
ALLEN T. MALONE
W. ROWLETT SCOTT
R. MICHAEL POTTER
RALPH B. LAKE
DAVID J. HARRIS
SAM L. CRAIN, JR.
NATHAN A. BICKS
STEPHEN D. CRAWLEY
LAUREL C. WILLIAMS
LISA A. KRUPICKA

LEEANNE MARSHALL COX
BETH WEEMS BRADLEY
LES JONES
MELISSA A. MARAVICH
JAY H. LINDY
SCOTT J. CROSBY
TODD A. ROSE
DOUGLAS F. HALIJAN
R. PORTER FEILD
CHARLES S. BLATTEIS
JOSHUA B. LAWHEAD
JENNIFER S. HAGERMAN
TAYLOR A. CATES
MILTON L. LOVELL
DAVID E. GOODMAN, JR.
DEBRA A. WILES
TED C. RAYNOR

BURCH, PORTER & JOHNSON
A PROFESSIONAL LIMITED LIABILITY COMPANY
130 NORTH COURT AVENUE
MEMPHIS, TENNESSEE 38103
TELEPHONE 901-524-5000
FAX 901-524-5024

Writer's Direct Dial: 901-524-5110
Internet Address: jduncan@bpjlaw.com

ERIC J. PLUMLEY
MARY HALE MORRIS
JOHN R. MCCANN
FRANK B. THACHER, III
LEAH L. HILLIS
MARY C. HAMM
PAULA P. DANIEL
EMILY T. BRACKSTONE
DAVID E. MCKINNEY
C. FARRIS DEBOARD

LUCIUS E. BURCH, JR. 1912-1996
JOHN S. PORTER 1909-1990
JESSE E. JOHNSON, JR. 1913-1980
CHAS N. BURCH 1868-1938
H. D. MINOR 1868-1947
CLINTON H. MCKAY 1889-1943

PARIS OFFICE
107 WEST BLYTHE
P.O. BOX 130
PARIS, TENNESSEE 38242
TELEPHONE 731-642-2555
FAX 731-642-1070

September 3, 2009

SEP 08 2009

Clerk's Rec'd By

Mr. Michael W. Catalano
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Amendments to Rule 31 of the Tennessee Supreme Court Rules

Dear Mr. Catalano:

I have read the proposed Amendment to Rule 31 which was filed in your office on August 25, 2009. Unfortunately, the pages are unnumbered, but my only comment regarding a change is a very minor one.

In Section 11(b)(4), I believe that the 10 day period within which the mediator is to send a written response to the Programs Manager could be a little short under certain circumstances. For example, sometimes I am out of the country for more than 10 days, and if I receive a "list of alleged violations" while I was gone, I would be precluded from sending in a written response. My suggested rewording is as follows:

> "Within 10 days following the receipt of the list of alleged violations prepared by the Grievance Committee and the complaint, the mediator shall either send a written response to the Programs Manager by registered or certified mail or request a 10 day extension of time within which to file such written response. If the mediator does not respond within the original 10 day period, or within the 10 day extension, the allegations shall be deemed admitted.". . .

Otherwise, I believe that the proposed change is very well worded.

Thank you for giving me this opportunity to comment.

Yours very truly,

BURCH, PORTER & JOHNSON, PLLC

Joe M. Duncan

Joe M. Duncan

lce
U:\DUNCAN\WPDATA\LETTERS.09\CATALANO.DOC