

IN THE SUPREME COURT OF TENNESSEE

**FILED**

December 17, 1996

IN RE: RECOMMENDATIONS REGARDING ALTERNATIVE DISPUTE  
RESOLUTION

Cecil W. Crowson  
Appellate Court Clerk

**ORDER ESTABLISHING RULE 31  
TENNESSEE SUPREME COURT RULES  
REGARDING ALTERNATIVE DISPUTE RESOLUTION**

Pursuant to a Report filed by the Alternative Dispute Resolution Commission, and after allowing time for and soliciting public comment, the Tennessee Supreme Court hereby adopts this Rule regarding alternative dispute resolution in Tennessee.

IT IS THEREFORE ORDERED that the Rule set forth herein as amended be and hereby is adopted as Rule 31 of the Rules of the Supreme Court of Tennessee.

**RULE 31: ALTERNATIVE DISPUTE RESOLUTION**

Preamble

In its continuing efforts to enhance the quality of justice for the citizens of the state of Tennessee, the Supreme Court commissioned a study on alternative dispute resolution in 1992. The Commission was charged with studying dispute resolution in Tennessee “with a view toward the use and implementation of procedures to expedite and enhance the efforts of the courts to secure the just, speedy, and inexpensive determination of disputes.” The Commission on Dispute Resolution, through the excellent leadership of its chairperson and the faithful service of its members, engaged in a thorough investigation and made comprehensive recommendations to the court. We are extremely grateful to the Commission for its dedication and service and we thank the Commission, and the many other practitioners, judges, and citizens, who have expressed their opinions on this important topic.

The Commission’s considered recommendations, the growing caseloads which our courts face, and our responsibility to supervise the administration of justice in the courts in our state lead us to establish for Tennessee a system of court-annexed alternative dispute resolution methods. Our rule envisions the use of various methods of alternative dispute resolution, all selected after consideration of the case and the circumstances, and all intended to make the process of dispute resolution more efficient, more economical, and equally fair.

**Section 1.** Application

The standards and procedures adopted under this rule apply only to Rule 31 dispute resolution proceedings and to dispute resolution neutrals serving pursuant to Rule 31. They do not affect or address the general practice of alternative dispute resolution in the private sector outside the ambit of Rule 31.

Pursuant to the provisions of this Rule, a court may order the parties to an eligible civil action to participate in an alternative dispute resolution proceeding in accordance with this Rule.

**Section 2.** Definitions

(a) “Court” includes Circuit, Chancery, Law & Equity, Probate, and General Sessions Courts exercising jurisdiction of courts of record.

(b) “Eligible civil action” includes all civil actions except forfeitures of seized property, civil commitments, adoption proceedings, and habeas corpus and extraordinary writs. The term “extraordinary writs” does not encompass claims or applications for injunctive relief.

(c) “Mediation” is an informal process in which a neutral person, called a mediator, conducts discussions among the disputing parties designed to enable them to reach a mutually acceptable agreement among themselves on all or any part of the issues in dispute.

(d) “Judicial settlement conference” is a mediation conducted by a judicial officer other than the judge before whom the case will be tried.

(e) “Non-binding arbitration” is a process in which a neutral person or a panel, called an arbitrator or an arbitration panel, considers the facts and arguments presented by the parties and renders a decision which is non-binding.

(f) “Case evaluation” is a process in which a neutral person or a panel, called an evaluator or evaluation panel, after receiving brief presentations by the parties summarizing their positions, identifies the central issues in dispute as well as areas of agreement, provides the parties with an assessment of the relative strengths and weaknesses of their case, and may offer a valuation of the case.

(g) “Mini-trial” is a settlement process in which each side presents an abbreviated summary of its case to the parties or representatives of the parties who are authorized to settle the case. A neutral person may preside over the proceeding. Following the presentation, the parties or their representatives seek a negotiated settlement of the dispute.

(h) “Summary jury trial” is an abbreviated trial with a jury in which the litigants present their evidence in an expedited fashion. The litigants and the jury are guided by a presiding neutral person. After an advisory verdict from the jury, the presiding neutral person may assist the litigants in a negotiated settlement of their controversy.

(i) “Dispute resolution neutral” is any person who acts as a mediator, arbitrator, case evaluator, or presiding judge or jury in a mini-trial or summary jury trial in an effort to facilitate the resolution of the case by alternative dispute resolution methods. A Rule 31 dispute resolution neutral or Rule 31 mediator is a dispute resolution neutral who has met all the requirements to be a qualified Rule 31 dispute resolution neutral or mediator.

(j) “Order of Reference” is an order of a court in an eligible civil action referring the parties to participate in an alternative dispute resolution proceeding and requiring the filing of a final report regarding the proceeding by the Rule 31 dispute resolution neutral.

### **Section 3. Initiation**

Upon motion of either party, or upon its own motion, a court, by order of reference, may order the parties to an eligible civil action to participate in a judicial settlement conference, mediation, or case evaluation. Upon motion of either party, or upon the court’s motion, and with the consent of all parties, a court, by order of reference, may order the parties to participate in non-binding arbitration, mini-trial, summary jury trial, or other appropriate alternative dispute resolution proceedings. The Order of Reference shall direct that all alternative dispute resolution proceedings be concluded as efficiently and expeditiously as possible given the circumstances of the case. The court may include in the Order of Reference a schedule for conducting and completing the proceedings. The Order of Reference shall require the Rule 31 dispute resolution neutral to file a final report with the court in accordance with Section 8 of these rules.

### **Section 4. Evidence**

Evidence of conduct or statements made in the course of court-ordered alternative dispute resolution proceedings shall be inadmissible in court to the same extent as conduct or statements are inadmissible under Tennessee Rules of Evidence 408.

### **Section 5. Immunity**

Persons acting as Rule 31 dispute resolution neutrals in court-ordered alternative dispute resolution proceedings shall be deemed to be engaged in the performance of a judicial function and for such acts shall be entitled to judicial immunity.

### **Section 6. Confidentiality**

A Rule 31 dispute resolution neutral or settlement judge shall preserve and maintain the confidentiality of all alternative dispute resolution proceedings except where required by law to disclose the information.

### **Section 7. Costs**

The costs of any alternative dispute resolution proceeding, including the costs of the services of the Rule 31 dispute resolution neutral, at the neutral’s request, may be charged as court costs. Parties who are indigent may present to the court a completed uniform

affidavit of indigency and request the court to waive or reduce the costs of the alternative dispute resolution proceeding.

**Section 8. Reports**

The Rule 31 dispute resolution neutral shall file a report with the court within thirty days of the initial meeting with the parties acknowledging that the alternative dispute resolution proceedings have been initiated. Thereafter, the neutral shall file status reports with the court every thirty days in the event the proceeding is not concluded, and shall file a final report with the court within the time provided by the court in its order of reference. The final report shall indicate (a) whether both parties appeared and participated in the alternative dispute resolution proceeding; (b) whether the case was completely or partially settled; and (c) whether the neutral requests that the costs of the neutral's services be charged as court costs. In the event the court does not establish a deadline for the final report in the order of reference, the final report shall be filed within sixty days of the initial meeting with the parties.

**Section 9. Participation of Attorneys**

Attorneys may appear with clients during alternative dispute resolution proceedings.

**Section 10. Procedure for Initiating Participation**

(a) After all parties are before the court, the court may, on its own motion, or on the motion of any party, order the parties to participate in alternative dispute resolution proceedings authorized by these rules.

(b) Before ordering the parties to participate in alternative dispute resolution proceedings, the court shall confer with the attorneys for the parties and any unrepresented parties with regard to whether (1) participation in alternative dispute resolution proceedings is appropriate, and (2) if so, the most appropriate method of alternative dispute resolution for the case.

(c) Within fifteen days of the Order of Reference ordering participation in a dispute resolution proceeding, other than a judicial settlement conference, the parties must notify the court of the Rule 31 dispute resolution neutral agreed to by the parties or of their inability to agree on a neutral. In the event the parties cannot agree, the court will designate, at random, three Rule 31 dispute resolution neutrals and one additional Rule 31 dispute resolution neutral for each additional party over two. The court's designation shall be random unless the matter requires particular expertise not possessed by all Rule 31 dispute resolution neutrals. Only in such extraordinary circumstances can the court designate specific Rule 31 dispute resolution neutrals possessing the particular expertise. After receiving the court's designation, the parties shall each strike one name from the court's designations. The court shall appoint the remaining Rule 31 dispute resolution neutral unless a valid and timely objection is made and upheld. In that event, or in the event the designated neutral cannot serve, the process will be repeated.

(d) The clerks for each judicial district shall maintain and make available to the public, upon request, a list of Rule 31 dispute resolution neutrals approved by the Commission on Alternative Dispute Resolution, the date of their approval, and their qualifications and experience.

**Section 11. Commission on Alternative Dispute Resolution**

(a) The Supreme Court shall appoint an Alternative Dispute Resolution Commission and shall name one of the members as the Chair. The Commission shall have the responsibility for:

(1) reviewing and revising, if appropriate, the standards for Rule 31 dispute resolution neutrals who will be allowed to participate in court-ordered alternative dispute resolution proceedings;

(2) determining the procedure for qualification of Rule 31 dispute resolution neutrals for inclusion on the list of neutrals approved for court-ordered alternative dispute resolution proceedings;

(3) drafting a brochure which details and explains alternative dispute resolution proceedings in Tennessee;

(4) reviewing and revising, if appropriate, the standards of professional conduct that shall be required of Rule 31 dispute resolution neutrals in court-ordered alternative dispute resolution proceedings;

- (5) reviewing the content of training programs to determine whether they meet the standards for qualification under Rule 31;
- (6) assuring that all Rule 31 dispute resolution neutrals have participated in approved training, have complied with qualification requirements, and have certified their agreement to follow the guidelines and applicable standards and their understanding of the sanctions for failure to comply;
- (7) recommending to the court approval of Rule 31 dispute resolution neutrals who have met the eligibility requirements;
- (8) evaluating the success of alternative dispute resolution proceedings based on participant satisfaction, quality of results, and effect on case management;
- (9) evaluating and reviewing each qualified Rule 31 dispute resolution neutral for continued compliance with the established standards;
- (10) suggesting rules and revisions in rules regarding alternative dispute resolution proceedings.

(b) The day-to-day work of the Alternative Dispute Resolution Commission shall be conducted by the Director of the Alternative Dispute Resolution Commission who shall be responsible for:

- (1) processing applications for inclusion on lists of qualified Rule 31 dispute resolution neutrals in accordance with procedures recommended by the Commission and approved by the Supreme Court;
- (2) processing annual reports from Rule 31 dispute resolution neutrals and assuring their continued qualification for inclusion on lists of qualified dispute resolution neutrals;
- (3) taking such steps as may be necessary to provide lists of Rule 31 dispute resolution neutrals to the appropriate Clerks of the Court;
- (4) coordinating, approving, or providing training to Rule 31 dispute resolution neutrals;
- (5) assisting applicants seeking to become Rule 31 dispute resolution neutrals in fulfilling observation requirements;
- (6) processing grievances against Rule 31 non-attorney dispute resolution neutrals;
- (7) coordinating the work of and assisting the Commission;
- (8) assisting in the evaluation of Rule 31 alternative dispute resolution programs;
- (9) taking such other steps in conjunction with the Supreme Court and the Commission as may be reasonably necessary to establish, maintain, and improve the court-annexed dispute resolution program in Tennessee.

**Section 12.** Requirements for Rule 31 Dispute Resolution Neutrals

(a) A Rule 31 dispute resolution neutral shall comply with all rules and procedures promulgated by the Tennessee Supreme Court regarding qualifications, compensation, and participation in any court-ordered alternative dispute resolution proceedings under this Rule.

(b) All Rule 31 dispute resolution neutrals must be approved by the Tennessee Supreme Court through the ADRC before participating in any court-ordered alternative dispute resolution proceeding, must continually comply with conditions, qualifications, and standards set for Rule 31 dispute resolution neutrals by the Tennessee Supreme Court, and may be removed from participation upon noncompliance.

(c) Any attorney or non-attorney Rule 31 dispute resolution neutral, participating in court-ordered alternative dispute resolution proceedings shall be trained in ascertaining the appropriateness of the use of alternative dispute resolution techniques in light of the parties' education, status, and prior relationship, and shall advise the court if based on the neutral's skill and training, alternative dispute resolutions methods are likely to be inappropriate, unfair, or detrimental in the referred action.

(d) Rule 31 dispute resolution neutrals are entitled to be compensated at a reasonable rate for participation in court-ordered alternative dispute resolution proceedings.

(e) Before commencing any alternative dispute resolution proceeding, any Rule 31 dispute resolution neutral participating in court-ordered alternative dispute resolution proceedings shall make full disclosure of any known relationships with the parties or their counsel or the proceedings that may affect or give an appearance of affecting the neutral's neutrality.

(f) Before commencing any alternative dispute resolution proceeding, any Rule 31 dispute resolution neutral shall advise the parties of the neutral's qualifications and experience.

(g) Before commencing any alternative dispute resolution proceeding, any Rule 31 dispute resolution neutral shall discuss with the parties the rules and procedures which will be followed in the proceeding.

(h) A Rule 31 dispute resolution neutral shall be impartial toward all parties. Impartiality means freedom from favoritism or bias in favor of or against any party, issue, or cause.

(i) A Rule 31 dispute resolution neutral shall not give legal advice to parties to any alternative dispute resolution proceeding in which the neutral is participating. A person serving as a Rule 31 dispute resolution neutral in an alternative dispute resolution proceeding shall not participate as attorney, advisor, judge, guardian-ad-litem, master or in any other judicial, or quasi-judicial capacity in the matter in which the alternative dispute resolution proceeding was conducted.

(j) A Rule 31 dispute resolution neutral shall report to the court as required by Section 8 of this Rule. The report to the court shall advise (1) whether both parties appeared and participated in the proceedings; (2) whether the matter was resolved; and (3) whether the neutral requests that the costs of the proceedings be charged as court costs. No other details of the proceeding shall be revealed to the court or any other person.

(k) A Rule 31 dispute resolution neutral shall avoid the appearance of impropriety in the neutral's relationship with any member of the judiciary or the judiciary's staff with regard to referrals for alternative dispute resolution proceedings or the results of proceedings.

(l) A violation of any of these rules and procedures by any attorney Rule 31 dispute resolution neutral shall constitute a violation of the Code of Professional Responsibility.

### **Section 13. Qualifications for Rule 31 Mediators**

#### **(a) Rule 31 Mediators in General Civil Cases**

To be qualified as a Rule 31 mediator in general civil cases, one must:

- (1) be of good moral character and certify in writing an intention to comply with the conditions and obligations imposed by Rule 31, including those requirements related to mentorship and pro bono obligations;
- (2) have a postgraduate degree plus four years of practical work experience, or a baccalaureate degree plus six years of practical work experience;
- (3) complete forty hours of general mediation training which includes the curriculum components specified by the Commission for Rule 31 mediators in general civil cases; and
- (4) complete a documented observation of one complete mediation conducted by a Rule 31 mediator who has completed at least three mediations.

#### **(b) Rule 31 Mediators in Family Cases**

To be qualified as a Rule 31 mediator in family cases, one must:

- (1) be of good moral character and certify in writing an intention to comply with all the conditions and obligations imposed by Rule 31, including those requirements related to mentorship and pro bono obligations;
- (2) be a Certified Public Accountant or have a postgraduate degree;
- (3) have four years of practical work experience in psychiatry, psychology, counseling, social work, education, law, or accounting;
- (4) complete forty hours of training in family mediation which includes the curriculum components specified by the Commission for Rule 31 mediators in family cases and which also includes four hours of training in screening for and dealing with domestic violence in the mediation context;
- (5) complete six additional hours of training in Tennessee family law and court procedure; and
- (6) complete a documented observation of one complete family mediation conducted by a Rule 31 family mediator who has completed at least three family mediations.

#### **(c) Mediators Currently Providing Mediation Services**

Upon petition to and acceptance by the ADRC, the following persons already providing mediation services in Tennessee may be qualified as Rule 31 mediators without first complying with the qualification and training requirements set forth in Section 13(a) or (b):

- (1) Graduates of accredited law schools who have passed a law school mediation course which awards at least three semester hours credit and which includes the curriculum components set forth in this Rule

- or their substantial equivalent as determined by the ADRC and who have four years of practical work experience;
- (2) Trained mediators who substantially comply with the qualifications set forth for Rule 31 mediators in general civil cases or Rule 31 mediators in family cases as of March 1, 1997, as may be determined by the Commission with the assistance of the Director of the ADRC, provided that their training be the substantial equivalent of that required under this Rule as determined by the ADRC and have been completed within ten years prior to the application;
- (3) Individuals who are providing mediation services either as general civil mediators or as family mediators, as of December 31, 1996, through the auspices of existing Tennessee Circuit Court or Chancery Court programs, the United States District Court, Eastern District of Tennessee program, or other court programs in the state of Tennessee, provided that the judge of the court certify same to the ADRC and provided that such person meets the training (but not educational) requirements set forth herein for general civil or family mediators by June 1, 1998.

(d) Application Fees for Rule 31 Mediators

All Rule 31 mediators must pay the application fee set by the ADRC.

**Section 14.** Maintenance of Status As a Rule 31 Mediator

(a) Continuing Education

To maintain their status as qualified Rule 31 mediators:

- (1) Rule 31 mediators in general civil cases must complete six hours of training every two years, with at least one of those hours devoted to ethics; and
- (2) Rule 31 family mediators must complete six hours of training every two years, with:
  - (i) at least one hour devoted to ethics, and
  - (ii) an additional three hours of training in family law developments.

(b) Annual Renewal of Rule 31 Mediator Status

As a condition of continued qualification, each Rule 31 mediator must file an annual report with the Director of the ADRC attesting to his or her continued qualification under Rule 31 and attesting to continued compliance with the various orders, standards, and requirements promulgated under Rule 31 and must pay an annual registration fee to be set by the Commission.

**Section 15.** Proceedings for Discipline of Rule 31 Mediators

- (a) Grievances against non-attorney mediators regarding the failure of the Rule 31 mediator to comply with the provisions of Rule 31 or any standard promulgated under Rule 31 shall be filed with the ADRC.
- (b) Grievances against attorney mediators regarding the failure of the Rule 31 mediator to comply with the provisions of Rule 31 or any standard promulgated under Rules 31 shall be filed with the Board of Professional Responsibility and determined in accordance with procedures adopted by that board.
- (c) Any grievance against a non-attorney Rule 31 mediator will be heard in the first instance by a Grievance Committee of three Commissioners, appointed by the Chair, and where possible from the Grand Division in which the alleged act or failure to act giving rise to the grievance took place.
- (d) The Grievance Committee will hear and determine the grievance and provide a written ruling stating whether there is cause for the grievance. If the Grievance Committee finds that there is cause for the grievance, it shall impose an appropriate sanction upon the Rule 31 mediator, including private admonishment, public reprimand, suspension, or disqualification.
- (e) A party who wishes to obtain a review of the decision of the Grievance Committee may appeal to the full Commission by filing a written notice of appeal with the ADRC, through its Director, within 30 days following the Grievance Committee's decision.

- (f) The Commission will then hear the grievance de novo sitting without those members who served on the original Grievance Committee.
- (g) The Commission will hear and determine the grievance and provide a written ruling stating whether there is cause for the grievance. If the Commission finds that there is cause for the grievance, it shall impose an appropriate sanction, upon the Rule 31 mediator, including private admonishment, public reprimand, suspension, or disqualification.

**Section 16.** Pro Bono Requirement for Rule 31 Mediators

Any person who wishes to be listed as a qualified Rule 31 mediator must be available to conduct three pro bono mediations per year, not to exceed twenty total hours. At such time as an Order of Reference to mediation is made, the court making the order may, upon a showing by one or more parties of an inability to pay, direct that the mediator serve without pay. No Rule 31 mediator will be required to conduct more than three pro bono mediations or serve pro bono for more than twenty hours in any continuous 12-month period.

**Section 17.** Training Programs for Rule 31 Mediators

- (a) Content of Training Programs

All Rule 31 mediators shall complete a course of training consisting of not less than forty hours, including the following subjects:

- (1) Rule 31 and procedures and standards adopted thereunder
- (2) Conflict resolution concepts
- (3) Negotiation dynamics
- (4) Court process
- (5) Mediation process and techniques
- (6) Communication skills
- (7) Standards of conduct and ethics for Rule 31 mediators
- (8) Community resources and referral process
- (9) Cultural and personal background factors
- (10) Attorneys and mediation
- (11) The unrepresented party and mediation

The forty hours of instruction for Rule 31 general civil case mediators will also include:

- (1) State rules, state statutes, and local procedures and forms effecting civil mediation
- (2) Appropriate techniques for mediating with multiple parties
- (3) Appropriate techniques for handling situations where individual(s) present do not have authority to settle
- (4) Observation and role playing of trainees in general civil mediations

The forty hours of instruction for Rule 31 family mediators will also include:

- (1) State rules, state statutes and local procedures and forms governing family mediation
- (2) Special ethical dilemmas arising in the family mediation context
- (3) The constraints attending the mediation of cases where a threat of domestic violence exists
- (4) Confidentiality as it relates to child abuse and spouse abuse
- (5) The use of protective services, as in cases of child abuse, domestic violence, or elder abuse, and maintaining a list of these services
- (6) Psychological issues in separation, divorce and family dynamics
- (7) Issues concerning the needs of children in the context of divorce
- (8) Family economics
- (9) Observation and role playing of trainees in family mediations
- (10) In addition to the forty-hour program of instruction, Rule 31 family mediators will receive six hours of training in Tennessee family law and procedure

**Section 18.** Standards of Professional Conduct for Rule 31 Mediators

The Standards of Professional Conduct for Rule 31 mediators attached as Appendix A are adopted.

ENTER this 17th day of December, 1996.

PER CURIAM