

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

IN RE: PROPOSED AMENDED RULE )  
31, RULES OF THE TENNESSEE ) No. M2006-01303-SC-RL2-RL  
SUPREME COURT )  
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**COMMENT OF THE TENNESSEE BAR ASSOCIATION**

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**INTRODUCTION**

The Tennessee Bar Association (“TBA”), by and through its President, Larry D. Wilks; General Counsel, Gail Vaughn Ashworth; and, Executive Director, Allan F. Ramsaur, urges the adoption of certain proposed amendments and modification of other proposed amendments to Tennessee Supreme Court Rule 31 (“Rule”).

**BACKGROUND**

On June 22, 2006, this honorable Court published for comment proposed amendments to Tennessee Supreme Court Rule 31 proposed by the Alternative

Dispute Resolution Commission. The TBA promptly distributed the proposed amendments to its various interested entities and its Executive Committee, meeting on August 14, 2006 authorized the filing of this comment.

**1. RULE 31 NEUTRALS OTHER THAN RULE 31 MEDIATORS SHOULD BE LICENSED ATTORNEYS.**

The proposed amendment to Tenn. Sup. Ct. R. 31 § 2 (o) proposes to modify the definition of Rule 31 neutral to clarify that Rule 31 neutrals other than the mediators are required to be licensed attorneys. The TBA endorses this clarification. The application of Rule 31 is confined to court-annexed alternative dispute resolution proceedings. As stated in Section 1 of the rule, the rule does not “affect or address the general practice of alternative dispute resolution in the private sector outside of the ambit” of proceedings which are annexed to a court. Case evaluation, mini-trial, non-binding arbitration, and summary jury trial proceedings all contemplate that the neutral presides over the proceeding and may actually issue a recommended decision. The training, skills, and experience of a licensed attorney are necessary to fulfill this role.

**2. THE DEFINITIONS OF “MEDIATION” AND “MEDIATOR”  
SHOULD REFLECT THAT THE PROCESS IS AN EFFORT TO  
REACH A MUTUALLY ACCEPTABLE AGREEMENT.**

The proposed amendments recommend adoption of a new subsection 2(g) to add a definition of mediator and continue the definition of mediation as a informal process in which a neutral conducts discussions. Both of these definitions seem to indicate that the discussions must result in a mutually acceptable agreement.

However, experience dictates that mediation can only engage in efforts to enable a mutually acceptable agreement among the parties and may not reach a satisfactory conclusion. Therefore, the TBA recommends that the definition of mediator and mediation be modified so they read as follows:

(g) “Mediator” is a neutral who conducts discussions among disputing parties in an effort to enable them to reach a mutually acceptable agreement among themselves on all or any part of the issues in dispute.

(h) “Mediation” is an informal process in which a neutral conducts

discussions among disputing parties in an effort designed to enable them to reach a mutually acceptable agreement among themselves on all or any part of the issues in dispute.

**3. GENERAL DIRECTIVES FROM THE TRIAL COURT  
REGARDING RULE 31 ADR PARTICIPATION SHOULD BE  
ADOPTED BY LOCAL RULE RATHER THAN STANDING  
ORDER OF REFERENCE.**

The Alternative Dispute Resolution Commission recommends amendment to Tenn. Sup. Ct. R. 31 § 3(b), § 3(c) and § 4(a) to require that a directive that certain types of matters be referred to alternate dispute resolution be accomplished by a local rule rather than through a standing order of reference. The TBA heartily endorses this proposal. The adoption of local rules to address reference of matters to alternative dispute resolution is worthwhile because it gives notice to the bar and the parties as to the practice in each jurisdiction, provides greater uniformity as to results from judge to judge, and offers the opportunity for input from the public and the bar under Tennessee Supreme Court Rule 18.

**4. FAMILY LAW MEDIATORS SHOULD CONTINUE TO BE REQUIRED TO RECEIVE CONTINUING TRAINING IN FAMILY LAW.**

Under the proposed Rule 31 § 18 the ADRC proposes to delete the present requirement that family law mediators complete six (6) hours of training every two (2) years including at least one (1) hour of ethics and three (3) hours of family law training and to allow a Rule 31 mediator to substitute education in psychiatry, psychology, counseling, social work, education or accounting for the family law requirement. The TBA opposes this change. Rule 31 mediators who are not lawyers play a valuable role in assisting clients to arrive at a mutually acceptable solution to their family legal dispute. In so doing, the mediator must be able to articulate to the parties the parameters within which their settlement will lie. Only through constant updating and adequate training in family law changes can non-lawyers adequately serve the public. The TBA takes no position on requiring three hours of mediation training, but does believe that family mediators, particularly because they may be non-lawyers, should be required to obtain at least three (3) hours of family law training every two (2) years.

**5. REPORTS REQUIRED OF RULE 31 MEDIATORS SHOULD BE  
NARROWLY SUBSCRIBED SO AS NOT TO REQUIRE  
SUBMISSION OF CONFIDENTIAL INFORMATION.**

The ARDC recommends adoption of a new provision in Rule 31 § 18(e) to require reports by a mediator in order that the commission may evaluate client satisfaction, quality of results, and effect on case management. The proposal seems to indicate that the ARDC may request any data it needs to conduct the evaluation. This new rule should limit the reports to the information necessary for the commission to fulfill its responsibilities and should not include any information otherwise made confidential. To accomplish this purpose the TBA suggests the following language with respect to Rule 31 § 18(e):

In addition to compliance with Section 5 of this Rule, upon the request of the ADRC to assist it in fulfilling its responsibilities under Section 19(a)(8), Rule 31 Mediators shall be required to submit to the ADRC, with respect to mediations that they have conducted, whether under Rule 31 or otherwise, non-confidential information concerning participant satisfaction and whether or not a dispute was settled. The report forms will be available on the AOC website and from the AOC.

**6. WITH CONSENT OF THE PARTIES, THE COURT BEFORE WHOM THE MATTER IS PENDING SHOULD BE ELIGIBLE TO SERVE AS A PRESIDING NEUTRAL IN SUMMARY JURY TRIALS.**

The proposed amendments to the rule give new emphasis to summary jury trials as an alternative dispute resolution mechanism. The TBA recommends that the provisions with regard to summary jury trials explicitly permit the court before whom the matter is pending to employ a summary jury trial when the parties consent to the action. To accomplish this change the TBA recommends that the following sentence be inserted between the first and second sentence in Tenn. Sup. Ct. R. 31 § 24.

The court before whom the matter is pending may, with consent of the parties, act as the presiding neutral in a summary jury trial.

RESPECTFULLY SUBMITTED,

By: /s/ by permission\_\_\_\_\_

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "A" by regular U.S. Mail, postage prepaid on August 21, 2006.

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Allan F. Ramsaur

