ACD Associates

Alan C. DeBusk
President

December 20, 2014

James Hivner, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN. 37219-1407

Re: Tenn. Sup. Ct. R. 31 – M2013-01612-SC-RL1-RL

Dear Mr. Hivner:

Please kindly accept this as my only comments regarding the aforementioned amendment proposal.

Paragraph (p) starting at line 55 strikes the words "initiated by the court" and similar needs to be done on line 64 for consistency.

No other comments are provided. Don't hesitate in contacting should you have any questions.

Kindest regards,

Alan C. DeBusk

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE PETITION OF THE ADOPTION OF AMENDED SUPREME COURT RULE 31

No. M2013-01612-SC-RL1-RL

COMMENT OF THE TENNESSEE BAR ASSOCIATION

The Tennessee Bar Association ("TBA"), by and through its President, Jonathan O. Steen; Chair, TBA Dispute Resolution Section, Jackie Kittrell; General Counsel, Paul Ney; and Executive Director, Allan F. Ramsaur, files these comments in respect to the above matter.

BACKGROUND

In June of 2013 the Alternative Dispute Resolution Commission ("Commission") filed a petition seeking amendment to several sections of Tenn. Sup. Ct. R. 31. On July 22, 2013 this Honorable Court issued an order soliciting written comments on the Commission's proposed amendment. The TBA, among others, offered comments on the proposals. The Court asked the Commission to consider the written comments. Modifications to those proposed comments were published for comment on November 21, 2014. The deadline for submitting further comments was set as Monday, December 22, 2014.

The TBA applauds the efforts of the Commission to bring greater clarity and definition to the Rule 31 proposals. On the recommendation of the Dispute Resolution Section, the TBA offers some additional thoughts regarding the two items upon which the TBA commented in its January, 2014 comment.

COMMENT ON TENN. SUP. CT. R. 31 §(10)(e)

The Commission has deleted the term "scrivener" in Tenn. Sup. Ct. R. 31 §10(e) and now includes the statement that the neutral may assist the parties' in memorializing the terms of the parties' settlement at the end of the mediation. On behalf of our section, the TBA suggests that Commission comments be added to further illuminate what an ethical neutral does under different circumstances. In addition, we recommend that the training required in Tenn. Sup. Ct. R. 31 §17(c) include memorializing agreements resulting from mediation.

COMMENTS ON EDUCATIONAL REQUIREMENTS OF TENN. SUP. CT. R. 31 §17(d)(1)

The TBA again applauds the efforts of the Commission to strengthen its Rule by providing more clarity to the educational requirements and experience for equivalency of Commission-sanctioned educational programs. One question that remains and calls for further definition and guidance is whether a strictly online graduate mediation course could qualify under these provisions. Neutrals need to have theoretical and practical experience in dealing with interpersonal dynamics and interpersonal conduct. It is our sincere belief that personal contact is needed to

ensure that the neutral honed the requisite interpersonal skills. For that reason, the TBA believes that a graduate mediation course solely administered online might not provide sufficient training for neutrals.

The TBA appreciates the efforts of the Commission to provide greater clarity to its Rules, and we are hopeful that these comments will assist the Court and Commission in the adoption of the final rule.

Respectfully Submitted,

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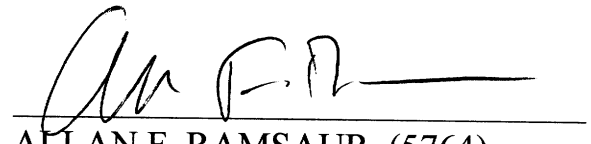
By: 

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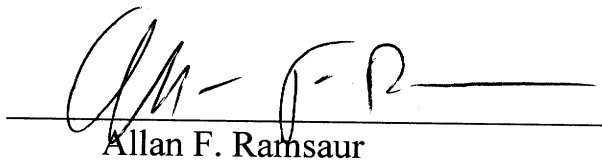
CERTIFICATE OF SERVICE

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 within seven (7) days of filing with the Court.



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January 15, 2014

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IN RE: PETITION FOR THE ADOPTION OF
AMENDED SUPREME COURT RULE 31

Dear Mike:

Attached please find an original and six copies of the Comment of the Tennessee Bar Association in reference to the above matter.

We would like to acknowledge the assistance in the preparation of this comment by Christy Gibson a staff member at the TBA and a student at the Nashville School of Law.

As always, thank you for your cooperation. I remain,

Very truly yours,

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PETITION FOR THE ADOPTION OF AMENDED TENNESSEE SUPREME COURT RULE 31	)	**No. M2013-01612-SC-RLI-RL**

COMMENT OF THE TENNESSEE BAR ASSOCIATION

The Tennessee Bar Association ("TBA"), by and through its President, Cynthia R. Wyrick; Chair, TBA Dispute Resolution Section, Jackie Kittrell; General Counsel, Paul C. Ney; and Executive Director, Allan F. Ramsaur, makes the following comment regarding the amendments to the Tennessee Supreme Court Rule (TN. Sup. Ct. R.) 31.

On July 22, 2013, this Honorable Court issued an Order soliciting comments on various amendments proposed by the Alternate Dispute Resolution Commission (ADRC). The TBA solicited comments from all of the affected practice groups in the association. Based upon the recommendations of the affected sections the TBA hereby submits comments related to two proposed changes: (1) adding the role of

"scrivener" to TN. Sup. Ct. R. 31, Section 10(e) and (2) expanding eligibility requirements in TN. Sup. Ct. R. 31, Section 17(d)(1) for those who completed required mediation coursework and training at an "accredited graduate school."

Comments related to TN. Sup. Ct. R. 31 Section 10(e):

GREATER CLARITY AND GUIDANCE SHOULD BE PROVIDED REGARDING THE NEWLY DEFINED ROLE OF SCRIVENER AS IT APPLIES TO NEUTRALS.

The ADRC proposes the following paragraph be added to TN. Sup. Ct. R. 31 Section 10(e):

> "Rule 31 Neutrals may assist the parties by serving as a scrivener to record or memorialize the terms of the settlement agreement."

In regards to this new language, the TBA recommends that greater clarity and guidance is needed to avoid confusion and possible violation of ethical obligations when neutrals are acting in this new role of "scrivener":

(1) The Rule should include a clear definition for the role of "scrivener," that takes into account the specific duty of the neutral in assisting the parties. Especially given that this new role of "scrivener" is a permissive one, the specific obligations of the neutral should be emphasized, especially when certain issues arise. Some of

these potential issues include but are not limited to: giving legal advice; recording or memorializing complex settlement agreements; engaging in the unauthorized practice of law; and, in situations when parties are not represented by counsel. "Scrivener" implies a clerical or notary role and mediators who scribe agreements would be required to remain in the neutral role. However, the parties who ask for assistance in recording or memorializing an agreement often are those who are either not represented by counsel or whose counsel does not attend the mediation session. The legal advice and UPL issues that may arise during the recording or memorializing of an agreement can be addressed by providing a more clear definition of the term and role of "scrivener," thus assisting the mediator to better understand his or her role during the process.

(2) The Rule should include comments that provide guidance to mediators, especially related to the affirmative duties and obligations outlined in the context of the entire TN. Sup. Ct. R. 31, Section 10. Comments would be helpful in providing direction and examples for handling similar issues, which would alleviate confusion or dilemmas that may arise when the neutral is serving as "scrivener." Comments could help address numerous potential issues that may arise, including but not limited to those mentioned above: giving legal advice;

recording or memorializing complex settlement agreements; engaging in the unauthorized practice of law; and, in situations when parties are represented by counsel.

(3) The Rule should clarify between allowed scribing by lawyer and non-lawyer mediators. The lawyer's role in dispute resolution actions is governed by TN. Sup. R. 8, RPC 2.4.Section 2.4(e) reads:

> "upon termination of a lawyer's service as a dispute resolution neutral, the lawyer: (1) may, with the informed consent of all the parties to the dispute and in compliance with the requirements of RPCs 1.2(c) and 2.2, draft a settlement agreement that results from the dispute resolution process, but shall not otherwise represent any or all of the parties in connection with the matter, and (2) shall afford each party to the dispute the protections afforded a client by RPCs 1.6, 1.8(b), and 1.9."

On the other hand, there are no similar rules addressing scribing by non-lawyer mediators.

(4) The Rule should be revised to provide specific guidelines to non-lawyer mediators to allow them to avoid engaging in the Unauthorized Practice of Law, especially as it relates to serving in the role of scrivener. The Tennessee

Unauthorized Practice of Law statute Tennessee Code Annotated § 23-3-101 reads as follows:

> "No person shall engage in the "practice of law" or do "law business"...unless such person has been duly licensed therefore."

This language makes it very clear that a non-lawyer cannot engage in the practice of law. Questions that arise under TN. Sup. Ct. R. 31, Section 10(e) are whether it is even possible for the non-lawyer mediator to serve as scribe without engaging in the practice of law. While the mediator may provide information to the parties about legal matters and community resources that are within the mediator's expertise, there are many issues that might arise that are within a gray area for the mediator as discussed above in (1) when the terms of a settlement agreement are memorialized.

Comments related to TN. Sup. Ct. R. 31 Section 17(d)(1):

RECOGNITION OF REQUIRED DISPUTE RESOLUTION COURSES SHOULD BE RESERVED FOR CREDIBLE ACCREDITING BODIES.

The current TSC Rule 31 section 17(d)(1) allows the ADRC to waive the normally required mediation training for those applicants who graduated from an accredited "law school" and took substantially the same subjects and received at least three

semester hours of credit. The proposed change would add eligibility based on completed coursework from "accredited graduate schools."

Specifically, the ADRC proposes the following change in TN. Sup. Ct. R. 31, Section 17(d)(1):

> (d)(1) Upon petition to and acceptance by the ADRC, the following persons may be qualified as Rule 31 Mediators without first complying with the qualification and training requirements set forth in Section 17(a), (b), or (c): (i) graduates of accredited law schools **or accredited graduate 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 **full time** practical work experience; (ii) 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 may be determined by the ADRC with the assistance of the AOC Programs Manager, provided that their training be the substantial equivalent of that required under this Rule and that the training has been completed within fifteen years prior to the application. If a trained mediator has complied with the qualifications for approval as a mediator by another state and such approval has been granted, and if the mediator is in good standing in such state at the time of the application for approval in Tennessee, the ADRC may, upon review of the qualifications of the applicant, waive such training requirements as required by Section 17. **(iii) Alternative dispute resolution professors at accredited law schools or graduate schools who have taught a mediation course which awards at least three semester hours credit for at least two semesters 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 full time practical work experience.**

In regards to this amendment the TBA makes the following recommendations:

(1) The rule should define an accredited graduate school as a school accredited by an independent accrediting agency recognized by the Council of Higher Education Accreditation (CHEA) or the United States Department of Education (USDE) or both. There are numerous private organizations throughout the United States that claim to be accredited institutions of higher learning many of which may or may not be legitimate. Defining an accredited graduate school as one accredited by an official organization recognized by the Council of Higher Education Accreditation (CHEA) or the United States Department of Education (USDE) or both should prevent any legitimacy issues that may arise in the future.

(2) There should be a defined criteria and process for determining whether the required graduate school coursework taken is equivalent to the approved mediation-training curriculum. One specific area of concern arises with programs that utilize online or other distance instruction in the required mediation courses. Many graduate schools offer distance learning as an option and some programs are entirely comprised of coursework completed remotely. Although the Distance

Education Training Council (DETC) may accredit these programs, the ADRC approved mediation training depends on face-to-face interaction and role-play simulation. Providing specific criteria for how distance-learning programs are substantially equivalent or otherwise provide for this interaction would be helpful in evaluating them.

Specifying the appropriate accreditation and how to determine the equivalency of graduate school coursework and mediation-training curriculum should ensure that the ADRC's mediation training standards are met.

CONCLUSION

For the reasons stated, the TBA urges the Court to modify the rules changes sought by the ARDC before adopting the proposed amendments.

RESPECTFULLY SUBMITTED,

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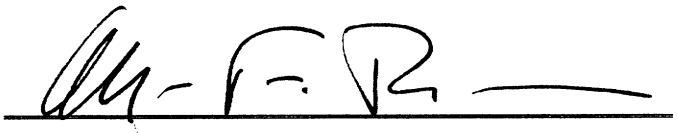
By: 

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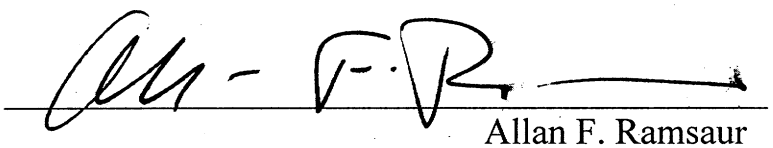
CERTIFICATE OF SERVICE

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 within seven (7) days of filing with the Court.



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October 31, 2013

VIA EMAIL
AND UNITED STATES MAIL

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

Re: Comment of the Knoxville Bar Association Regarding the Proposed Amendments to Rule 31

Dear Mr. Catalano:

Pursuant to the Tennessee Supreme Court's order filed July 22, 2013, soliciting comments on proposed amendments to Tennessee Supreme Court Rule 31, the Knoxville Bar Association has carefully considered the proposed amendments and respectfully submits the following comments.

The KBA, through its Professionalism Committee, studied the proposed amendments and felt that only two of the proposed amendments required comment or discussion. The particular sections are Section 10, Paragraph (f) and Section 18, Paragraph (b).

Considering Section 10(f), it is the KBA's position that the Court should adopt the proposed amendment that a "Rule 31 Neutral shall not be called as a witness to enforce the terms of the resulting agreement." Some initial concerns were raised that the mediator is the only neutral actor able to inform a Court as to the ability of the parties to enter into a mediated agreement. However, there was unanimous agreement that absolute immunity from being called as a witness would be preferred and would better enable Rule 31 Mediators to carry out one's duties. It was discussed that the Court may consider adding an additional, separate paragraph co-opting Federal language, such as found in Local Rule 16.4:

> The Mediation Conference of all proceedings relating thereto, including statements made by any party, attorney, or other

participant, are confidential and are inadmissible to the same extent as discussions of comprise and settlement are inadmissible under Federal Rules and Evidence 408.

Lastly, as to Section 18 (b), it is KBA's recommendation that the Supreme Court not adopt the language as proposed and further study the issue. The KBA shares the Supreme Court's desire to ensure the quality of Rule 31 Mediators, but the KBA has doubts that the proposed language will achieve the desired results. One issue identified is that the Rule 31 Mediators are not only attorneys, but come from many allied professions and further information would be necessary to determine the different processes existing for the making of and processing of complaints to the relevant boards or agencies for those allied professions. Additionally, there is no requirement that the three or more open complaints be valid or meritorious. The proposed language seems to place more value on the existence of complaints themselves rather than on the merits of the complaints. The proposed language could bar quality mediators from the active list due to three frivolous open complaints where a suspect Rule 31 Mediator could remain on the active list because several valid complaints have now been closed. The proposed language would allow for unscrupulous parties to detrimentally affect the practice of a Rule 31 Mediator by simply having numbers of anonymous complaints made to the board. Additionally, the KBA has reviewed the July 26, 2011 letter from Joe G. Riley, Esq. to Michael W. Catalano, Clerk regarding the proposed amendments to Section 18(b) and agree with his concerns.

As always, we appreciate the opportunity to comment on proposed rules promulgated by the Tennessee Supreme Court.

Sincerely,

Heidi A. Barcus

Heidi A. Barcus, President
Knoxville Bar Association

m2013-01612-SC-RL1-RL

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July 26, 2011

Michael W. Catalano, Clerk
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100 Supreme Court Building
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Nashville, TN 37219-1407

RE: Proposed Amendments to Rule 31

Your Honors:

Thank you for the opportunity to comment upon the Alternative Dispute Resolution Commission's proposed amendments. My only comment concerns Section 18(b). As a condition of continued listing as a Rule 31 mediator, the proposed rule provides as follows:

> "The Rule 31 Mediator must not be the subject of three or more open complaints made to the Board or Agency charged with hearing complaints about the applicant's professional conduct. If there are three or more open complaints with the relevant Board or Agency, the Mediator will be put on the inactive list by the ADRC until the applicant has advised the ADRC that three or more open complaints no longer exist."

In my view, the problem is that there is no requirement that such complaints have any merit. The deprivation is simply based upon complaints pending. It would appear to be unfair to punish a mediator because three people have filed, and have pending, what may well be meritless or even frivolous complaints. We cannot assume that meritless complaints will be immediately dismissed upon their filing by the disciplinary authority. Many complaints against attorneys are found to be without merit after an investigation. I assume the proposed rule would mean three disgruntled litigants in the same lawsuit could file separate disciplinary complaints against the opposing attorney at or about the same time, resulting in non-renewal of that attorney's listing even though the complaints are subsequently found to be without merit by the BPR.

I am sure the ACRC has reasons for its proposal, but the present proposal appears to deprive a mediator of the listing merely because of the number of complaints, which may or may not have merit, that may be pending at the time of renewal.

Thank you again for the opportunity to comment.

Sincerely yours,

Joe G. Riley