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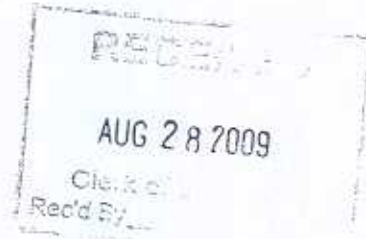
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August 26, 2009

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RE: Proposed Rule Changes to Rule 31

Dear Mr. Catalano:

I received via the KBA newsletter a notice that the Court is soliciting comments regarding proposed amendments to Rule 31. I am a Rule 31 mediator, and a great believer in the efficacy of mediation, but believe that mediation and settlement conferences are best left to the discretion of the lawyers. Some cases definitely need to be tried, and I believe that the attorneys are in the best position to make that determination. I therefore believe that Subsection (b) allowing mediation and settlement conferences to be directed by the application of only one party, or by the court itself *sua sponte* would, most respectfully, be a mistake. If I am not mistaken, an experiment mandating mediation of all worker's comp appeals a few years ago proved unsuccessful, and I suspect for the same reason: the attorneys involved in the case are in the best position to determine whether or not the case should be mediated. As a practical matter, if one side or the other is not interested in settling the case, mediation almost always turns out to be a waste of time and money. Thank you for your consideration.

Very truly yours,

DUNN, MacDONALD & COLEMAN, P.C.

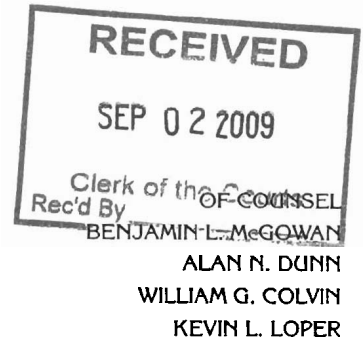
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September 1, 2009

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.

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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.

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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.

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September 1, 2009
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With kindest personal regards,

Yours very truly,



Barry L. Abbott

BLA:dmm

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September 3, 2009

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SEP 08 2009

Clerk's
Rec'd By

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:

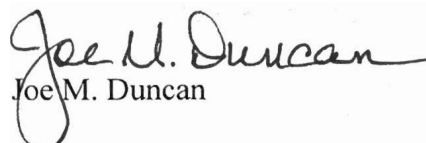
"Within 10 days following the receipt of the list of alleged violations prepared by the Grievance Committee and the complaint, the mediator shall either send a written response to the Programs Manager by registered or certified mail or request a 10 day extension of time within which to file such written 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