

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

**FILED**  
AUG 25 2009  
Clerk of the Courts

**IN RE: AMENDMENTS TO RULE 31,  
RULES OF THE TENNESSEE SUPREME COURT**

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**ORDER**

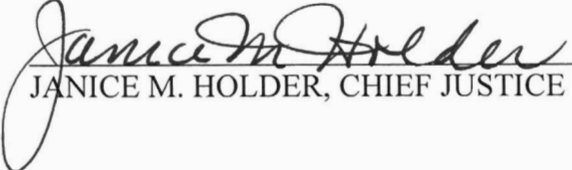
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Tenn. Sup. Ct. R. 31 established the Alternative Dispute Resolution Commission (“ADR Commission”) and governs the alternative dispute resolution proceedings specified in the rule. The ADR Commission has asked the Court to amend various sections of Tenn. Sup. Ct. R. 31. The Court hereby publishes for public comment the proposed amendments set out in the attached Appendix A; the Court solicits written comments from judges, lawyers, bar organizations, members of the public, and any other interested parties. The deadline for submitting written comments is October 23, 2009. Written comments should be addressed to:

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

The Clerk shall provide a copy of this order to LexisNexis and to Thomson Reuters. In addition, this order shall be posted on the Tennessee Supreme Court’s website.

FOR THE COURT:

  
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JANICE M. HOLDER, CHIEF JUSTICE

## *APPENDIX A*

### PROPOSED AMENDMENTS TO TENN. SUP. CT. R. 31

[Amend Tenn. Sup. Ct. R. 31, § 3(b) to read as follows:]

(b) Upon motion of either party, or upon its own initiative, a court, by Order of Reference, may order the parties to an Eligible Civil Action to participate in a Judicial Settlement Conference or Mediation. With the consent of the parties, trial courts are also authorized to order the parties to participate in a Case Evaluation.

[Add the following new paragraph (d) to Tenn. Sup. Ct. R. 31, § 9:]

#### **Section 9. Standards of Professional Conduct for Rule 31 Neutrals**

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(d) Ethics Advisory Opinion Committee.

(1) The Ethics Advisory Opinion Committee shall provide written advisory opinions to Rule 31 Neutrals and alternative dispute resolution organizations in response to ethical questions arising from Rule 31 and the Standards of Professional Conduct.

(2) The Ethics Advisory Opinion Committee shall be composed of three Commissioners, one from each Grand Division, appointed on a rotating basis by the Chair when a request for an opinion is received and reviewed by the Programs Manager. The Chair may also appoint a Committee, from time to time, to issue advisory opinions as to areas of concern to the Commission.

(3) All requests for advisory opinions shall be in writing and shall be submitted to the Programs Manager.

(4) The Committee shall meet in person or by telephone conference as necessary to consider the request for an advisory opinion. Upon due deliberation, and upon the concurrence of a majority of the Committee, the Committee shall issue an opinion. The opinion shall be signed by each member of the Committee, filed with the Programs Manager, published in the ADR News, and be made available upon request.

(5) Prior to publication, all references to the requesting Neutral or any other real person, firm, organization, or corporation shall be deleted from any request for an opinion, any document associated with the preparation of an opinion, and any opinion issued by the Committee.

(6) Reliance by a Neutral on an opinion of the Committee shall not constitute a defense in any disciplinary proceeding; such reliance, however, shall be evidence of good faith and may be considered by the Commission in relation to any determination of guilt or in mitigation of punishment. If the requesting Neutral later is brought before the Grievance Committee on allegations of misconduct in the same mediation for which the mediator requested and received an opinion, the Commissioners who served on the Ethics Advisory Opinion Committee will be precluded from participating in the grievance procedure.

[Replace existing Tenn. Sup. Ct. R. 31, § 11 with the following revised § 11:]

#### **Section 11. Proceedings for Discipline of Rule 31 Mediators.**

(a)(1) Any grievance against an active Rule 31 Mediator who is an attorney that raises a substantial question as to the attorney's honesty, trustworthiness, or fitness as a lawyer in other respects shall be filed with the Board of Professional Responsibility. If the ADRC Chair determines that a complaint filed with the ADRC sets out such a grievance, the ADRC shall promptly refer the complaint to the Board of Professional Responsibility. If the complaint is filed with both the ADRC and the Board of Professional Responsibility, the ADRC will defer to the Board of Professional Responsibility. If the Board of Professional Responsibility imposes a sanction on the attorney for misconduct as a Rule 31 Mediator, the Grievance Committee may also conduct a hearing and impose sanctions pursuant to Section (b)(8) of this Rule.

(2) All complaints setting out a grievance against an active Rule 31 Mediator who is an attorney that do not raise a substantial question as to the attorney's honesty, trustworthiness, or fitness as a lawyer shall be filed with the Programs Manager of the Administrative Office of the Courts. The Programs Manager will then forward the complaint to the ADRC Chair. The complaint shall be processed in accordance with Section (b) of this Rule.

(b)(1) Any complaint setting out a grievance against an active Rule 31 Mediator regarding the failure of the Rule 31 Mediator to comply with the provisions of this Rule or any standard promulgated under this Rule shall be filed with the Programs Manager of the Administrative Office of the Courts. The Programs Manager will then forward the complaint to the ADRC Chair.

(2) The complaint shall be reviewed 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 allegations contained in the complaint took place.

(3) The Grievance Committee shall determine whether the allegations contained in the complaint, if true, would constitute a violation of Rule 31. If the Grievance Committee finds that the conduct that is the subject of the complaint does not constitute a violation of Rule 31, the Grievance Committee shall dismiss the complaint without prejudice and the Programs Manager shall notify the complainant and the mediator of the dismissal. If the Grievance Committee determines that the allegations, if true, could constitute a violation of Rule 31, the Committee shall prepare a list of any rule(s) which the mediator may have violated. The Programs Manager will provide a copy of the list, a copy the complaint, and a copy of Rule 31 to the mediator.

(4) Within 10 days of the receipt of the list of alleged violations prepared by the Grievance Committee and the complaint, the mediator shall send a written response to the Programs Manager by registered or certified mail. If the mediator does not respond, the allegations shall be deemed admitted. The Programs Manager shall forward a copy of the mediator's response to the complainant. The complainant will then have 10 days to respond in writing to the mediator's response.

(5) The Grievance Committee will then review the complaint, the mediator's response, and the complainant's counter-response. The Committee may find that no violation has occurred and dismiss the complaint. The Committee may also resolve the issue pursuant to subdivision (6) of this rule.

(6) Notwithstanding any other provision in this Rule, at any time while the Grievance Committee has jurisdiction, it may meet with the complainant and the mediator, jointly or separately, in an effort to resolve the matter. The resolution may include sanctions if agreed to by the mediator. If sanctions are accepted, all relevant documentation shall be forwarded to the ADRC Chair. These meetings may be in person, by video-conference or teleconference at the discretion of the Committee.

(7) If there is no disposition, the Grievance Committee shall review the complaint, the mediator's response, the complainant's counter-response, and the result of any investigation directed by the Committee Chair, including any documentation, to determine whether there is probable cause to believe that the alleged misconduct occurred and would constitute a violation of this rule. If there is no probable cause, the Committee shall dismiss the complaint in a written opinion. The Programs Manager will forward a copy of the opinion to the complainant and the mediator.

(8) Upon a finding of probable cause, the Grievance Committee shall notify the complainant and the mediator that either the mediator or the complainant is entitled to a hearing before the Committee. The Committee will conduct a hearing within 30 days of finding probable cause at a place to be determined by the Committee. If, after the hearing, the Committee finds that the mediator has violated Rule 31 and that such violation warrants sanctions, it shall impose appropriate sanctions, such as a private admonition, a public reprimand, additional training, suspension or disqualification. The Committee shall issue a written opinion containing its findings. The Programs Manager will forward a copy of the opinion to the complainant and the mediator.

(9) Subpoenas for the attendance of witnesses and the production of documentary evidence for discovery and for the appearance of any person before the Grievance Committee, the ADRC, or any member thereof, may be issued by the chair of the Committee or the ADRC. Such subpoenas may be served in any manner provided by law for the service of witness subpoenas in a civil action.

(10) Any person who, without adequate excuse, fails to obey a duly served subpoena may be cited for contempt of the Grievance Committee or ADRC. Should any witness fail, without justification, to respond to the lawful subpoena of the Committee or ADRC, or having responded, fail or refuse to answer all inquiries or to turn over evidence that has been lawfully subpoenaed, or should any person be guilty of disorderly or contemptuous conduct before any proceeding, the Chair of the Committee or ADRC may cause a petition to be filed before the circuit court of the county in which the contemptuous act was committed. The petition shall allege the specific failure on the part of the witness or the specific disorderly or contemptuous act of the person which forms the basis of the alleged contempt of the Committee or ADRC. Such petition shall pray for the issuance of an order to show cause before the circuit court why the circuit court should not find the person in contempt of the Committee or ADRC and the person should not be punished by the court therefore. The circuit court shall issue such orders and judgments therein as the court deems appropriate.

(11) Any party who desires to obtain a review of the decision of the Grievance Committee may appeal to the full ADRC by filing a written notice of appeal with the ADRC through the Programs Manager, within thirty (30) days following the Committee's decision.

(12) The ADRC will then hear the complaint de novo sitting without those members who served on the Grievance Committee that initially heard the complaint.

(13) The ADRC will hear and determine the complaint and then issue a written decision stating whether the complaint has merit. If the ADRC determines that the complaint has merit, it shall impose appropriate sanctions on the Rule 31 Mediator, including a private admonition, a public reprimand, additional training, suspension, or disqualification. The decision of the ADRC is final.

(14) All matters, investigations, or proceedings involving allegations of misconduct by the mediator, including all hearings and all information, records, minutes, files or other documents of the ADRC, the Grievance Committee, and staff shall be confidential and privileged, and shall not be public records, until or unless:

- (i) a recommendation for the imposition of public discipline, without the initiation of a hearing, is filed with the ADRC by the Grievance Committee; or
- (ii) the Grievance Committee determines that a hearing must take place; or
- (iii) the mediator requests that the matter be public; or
- (iv) the complaint is predicated upon conviction of the mediator for a crime.

(15) All work product and work files (including internal memoranda, correspondence, notes and similar documents and files) of the ADRC, Grievance Committee, and staff shall be confidential and privileged and shall not be public records.

(16) All participants in any matter, investigation, or proceeding shall conduct themselves so as to maintain confidentiality. 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 documents or correspondence filed by, served on, or provided to that person.

(17) The confidentiality of a mediation is deemed waived by the parties to the extent necessary to allow the complainant to fully present his/her case and to allow the mediator to fully respond to the complaint. The waiver relates only to information necessary to deal with the complaint. The ADRC, the Grievance Committee, and staff will be sensitive to the need to protect the privacy of all parties to the mediation to the fullest extent possible commensurate with fairness to the mediator and protection of the public.

(18) Once the Grievance Committee has issued an opinion, a synopsis of the case may be published in the ADRC quarterly newsletter. If the mediator is not publicly sanctioned, the name of the complainant and mediator will not be included in the synopsis.

(19) Members of the Grievance Committee, the ADRC and staff shall be immune from civil suit for any conduct in the course of their official duties.