

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

**IN RE: PETITION FOR THE ADOPTION OF AMENDED TENNESSEE
SUPREME COURT RULE 31, APPENDIX A TO RULE 31, AND
SUPREME COURT RULE 31 A**

No. ADM 2018-00425

COMMENTS OF THE NASHVILLE BAR ASSOCIATION

Pursuant to the March 14, 2018 Order of the Tennessee Supreme Court, the Nashville Bar Association respectfully submits the following written comments to the Petition for the Adoption of Amended Tennessee Supreme Court Rule 31, Appendix A to Rule 31, and Supreme Court Rule 31A:

The proposed Rule 31, Section 7 adds a provision stating, “No Rule 31 Mediator may be compelled to testify by deposition or otherwise regarding such conduct, information, or statements.” The Nashville Bar Association suggests that this provision also prohibit parties from compelling, by subpoena or otherwise, production of a Rule 31 Mediator’s case file.

The proposed Rule 31, Section 10(e) adds a provision stating that a “Rule 31 Mediator shall not prepare legal pleadings such as a Marital Dissolution Agreement and/or Parenting Plan for filing with the Court.”

It is understood that mediators should refrain from participating as attorneys for a party or for the parties as a whole. However, the broad language of the proposed amendment would prohibit wide-spread accepted practices that do not constitute advocacy. For example, it has been commonplace for attorney mediators to prepare draft marital dissolution agreements and permanent parenting plans that either memorialize agreements of the parties or form the basis of continuing discussion. In practice, those drafts are reviewed by clients with their attorneys, usually at the mediation or following a mediation session if the clients appear without counsel. That practice would be prohibited under a common reading of the proposed Section 10(e).

The Nashville Bar Association is further concerned that this proposed provision is contrary to the practice among mediators, who assist unrepresented parties with memorializing their agreement using parenting plans and divorce forms approved by this Court and provided by the Tennessee Administrative Office of the Courts. Often the mediator will provide a copy of these forms to the parties during the mediation. In performing this scrivener role, mediators do not give legal advice, advocate for one party or another, or direct how the parties decide the issues addressed by the forms. Rather, the mediator simply assists the parties in filling out these forms to accurately reflect agreements reached during mediation.

By prohibiting a Rule 31 Mediator from acting as a scrivener with respect to parenting plan or divorce forms, this Court's efforts to increase access to justice may be frustrated. Those parties may reach an agreement during mediation, but will have no assistance in memorializing the agreement. By being left without assistance in properly finalizing agreements reached during mediation, the likelihood of the parties returning to court and litigating may increase, which in turn increases the burden on the judicial system.

Due to these concerns, the Nashville Bar Association believes that the proposed amendment to Rule 10(e) quoted above should be stricken, recognizing that concerns about the unauthorized practice of law are addressed in other Rules.

Respectfully submitted,

Nashville Bar Association

A handwritten signature in blue ink that reads "Erin Palmer Polly" followed by a flourish and the word "permission" written vertically.

Erin Palmer Polly (BPR#22221)
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