

Hon. David L. Mackey  
Superior Court in Yavapai County  
120 S. Cortez, #300  
Prescott, AZ 86303  
Telephone: (928) 771-3580  
Presiding Judge

**IN THE SUPREME COURT  
STATE OF ARIZONA**

In the Matter of:	)	Supreme Court No. R-15-0018
	)	
Petition to Amend Rule 31, Rules of the Supreme Court	)	Comment to Petition to Amend Rule 31, Supreme Court of Arizona
_____	)	

The Judges of the Yavapai County Superior Court have authorized the Presiding Judge, the Honorable David L. Mackey, to file this comment on their behalf.

The Judges of the Yavapai County Superior Court oppose the proposed change to Rule 31(d)(25)(A), Rules of the Supreme Court, and respectfully asks the Court to retain the current exemption for mediators who are employed, appointed, or referred by a court or government entity and are serving as mediators at the direction of the court or government entity. A similar proposal was put forward and adopted in 2003 but was reversed after a motion for reconsideration filed by the then-existing Alternative Dispute Resolution Advisory Committee.

Petition R-15-0018 offers no reason for the elimination of the exemption for mediators who are employed, appointed, or referred by the courts. If the concern is for the protection of the public, there are three important points we wish to make. First, we are not aware of any issues caused by Yavapai County's use of court employed trained mediators to complete settlement agreements during the course of their mediations. While parties may suffer buyer's remorse after signing a mediated agreement, the instances in which there is litigation over whether the wording of the mediated agreement accurately reflects the parties' agreement are rare.

Second, we already do our best to protect the public when we employ mediators. Before our mediators are accepted for employment they complete an employment application and must pass a background check. They are interviewed one or more times prior to selection. Then they must complete a forty (40) hour mediation training offered by the Court or show evidence of completing equivalent mediation training. A portion of that training addresses completing mediation agreements. Before being allowed to mediate on their own they must co-mediate with one of our current mediators and be evaluated by that mediator. On an annual basis, our mediation department conducts twelve in-service trainings or peer review meetings to assist in the development of better skills by our mediators. Our mediators must attend at least four of those sessions and must complete annual continuing education requirements corresponding to their part-time status. Our current group of mediators have a minimum of three-years experience in mediating and preparing mediated agreements and a few have been with us for fourteen years or more. They all have advanced degrees in areas of conflict resolution, law or psychology. Two of them are licensed counselors. Their education far exceeds the minimum requirements for a certified legal document preparer which is to have a high school diploma or GED, two years of law-related experience and a passing score on the legal document preparer exam. As court employees they are bound by the Code of Conduct for Judicial Employees.

Third, there are already court processes in place to address problems with mediator prepared settlement agreements in Yavapai County. The mediated agreement is first reviewed by our ADR Coordinator Kathy McCormick before it is forwarded to the assigned Judge. On the rare occasion whether Ms. McCormick has an issue with the wording of an agreement, she attempts to resolve the issue with the mediators and parties prior to submitting the agreement to the assigned Judge. Once the mediated agreement is submitted to the assigned Judge, the Judge

reviews the agreement and has the option of approving the agreement as written, modifying the agreement or rejecting the agreement. If the agreement is modified or rejected, the parties are given further opportunity for input to the Court regarding appropriate terms.

Next, we fail to see that there is any harm to allowing trained mediators employed by the Court to prepare mediated agreements. All mediation sessions are conducted in one of our County Courthouses. The mediators primarily use template agreements approved and provided by the Court, and the mediators complete those agreements using Court equipment and supplies. The same templates used are readily available to parties through the internet or our self-service center. If the parties do not engage in mediation through the Court, they often get help in preparing those forms from untrained individuals who may be friends or relatives of the parties. Many of those agreements are adopted by the Court when they comply with legal requirements and there is little inquiry regarding who actually filled in the blanks on the form. With the advent of so many sources for forms on-line, our ability to regulate who actually assists in filing in the forms is problematic. We know which mediator prepared our mediation agreements and have the ability to remedy any problems that might be discovered directly with that mediator.

The adoption of the proposed change will have a significant negative impact on our Court. Based upon projections from our monthly reports, in fiscal year 2014/2015 our mediators will conduct 326 domestic mediations, 101 dependency mediations and 38 civil mediations. Of those mediations, approximately 75 percent are successful and result in the mediators preparing mediation agreements. Just as important, those mediation agreements reduce the number of contested hearings conducted by our judges by at least 348. Given current judicial caseloads in civil, domestic and dependency cases of at least three-hundred and over four-hundred cases, we

would need to add at least one judge to handle the volume if we did not have a successful mediation program. That will not be happening under current budget constraints.

The Court budget in Yavapai County is stretched to the maximum. We have significant doubts in our ability to absorb the initial Legal Document Preparer certification costs and recurring certification fees. While the initial non-refundable fee is \$50, the certification renewal every two years is \$600 per person and we estimate the annual cost of ten hours of Continuing Legal Education (CLE) to be approximately \$500 per mediator exclusive of travel expenses. In addition, we would be required to pay our mediators for the time involved in completing the certification process and additional CLE beyond the mediation training we already provide. We would rather pay them for conducting mediations. This is not the time to pass additional costs to our Court when the problem sought to be remedied is less than clear.

### **CONCLUSION**

We have not seen or heard of a valid reason for the proposed change. Court-appointed mediators possess qualifications that exceed those required of Legal Document Preparers, are subject to annual continuing education requirements, and are bound by the Code of Conduct for Judicial Employees. The mediated agreements prepared are subject to multiple layers of oversight. Since safeguards are already in place to protect the public, the risk of losing Court sponsored programs or the additional costs to the programs are not justified.

We respectfully asks the Court to retain the exemption for court-appointed mediators in Rule 31(d)(25)(A), Rules of the Supreme Court.

Respectfully submitted this 18th day of May, 2015.

/s/  
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Hon. David L. Mackey  
Presiding Judge  
Yavapai County Superior Court  
On behalf of the Superior Court Judges of  
Yavapai County

Cc: Hon. Ann A. Scott Timmer  
Chair, Committee on the Review  
of Supreme Court Rules Governing  
Professional Conduct and the Practice of Law