REPORT OF THE APPELLATE MEDIATION TASK FORCE ADDRESSING ISSUES IN PUBLIC COMMENTS AND MAKING RECOMMENDATIONS FOR THE COURT'S CONSIDERATION

INTRODUCTION

This Report addresses issues raised in the comments received from the judiciary, members of the bar and several bar organizations regarding Proposed Provisional Supreme Court Rule 48.

At the outset, it is necessary to address the few comments filed that reflected a belief that the Court of Appeals had promoted the proposed rule as an effort to lessen its workload. These comments do not require much elaboration since the Court is aware of the history and composition of the Appellate Mediation Task Force (the "Task Force"). It is fair to say that none of the Court of Appeals members sought the honor of serving on the Task Force and each of the Court of Appeals members expressed reservations about some aspects of the final product.

As a preliminary matter, prior to addressing specific issues, the Task Force believes that revisiting the history of the work of the Task Force would be useful. The Task Force was to study the feasibility of a mediation program applicable to appealed civil cases generally in Tennessee and to submit a report setting out the results of its work. Justice Riley Anderson was appointed as Supreme Court liaison for the Task Force. Following Justice Anderson's retirement, Justice Janice Holder has acted in that role. After its appointment by the Supreme Court, the Task Force met several times beginning in March, 2006 and researched existing appellate mediation programs adopted by several of our sister states, including Alabama, California, Nevada, New Mexico, North Carolina, Pennsylvania, and Texas. As well, the Task Force studied law review articles and statistics relating to the appellate mediation experience under various rules adopted throughout the United States.

The Task Force's impression from the outset was that appellate mediation programs in other jurisdictions were apparently very successful and were generally supported by practitioners after the appellate mediation programs were up and running, even though some states reported that it was necessary to overcome significant initial resistance to the concept among members of the bar. While the operational features of programs in other jurisdictions varied widely, the statistics generated by them seemed to confirm that the positive results of the mediation system could not be ignored. For example, studies reported the following:

Oregon with successfully mediated settlements on the appellate level at 60% of cases in 2001 and 69% in 2002; California's settlement rate for cases selected for appellate mediation in 2002-03 was 58%; New Mexico reported a 29% settlement rate;

Michigan's settlement rate ranged between 25 to 35% during the period surveyed; Hawaii enjoyed a 53.8% rate for the last reported year[1];

Alabama's statistics for the period from January 7, 2004 through April 3, 2006, demonstrated that, of the approximately 50% of appellate cases selected for mediation, 49.73% settled[2].

Massachusetts experiences a 40% settlement rate ("more than triple the settlement rate for civil appeals in the two years before the program began..."); Nevada a 56% settlement rate among cases selected for mediation; Pennsylvania a 45% settlement rate of cases referred to mediation ("The number of cases that the program settled over the first two years is equivalent to the workload of a three-judge panel over the same period…").[3]

Alabama adopted an evaluation program from which it reported a variety of comments virtually all of which were positive. For example:

Attorney: "This was my first appellate mediation – very favorable experience."

Attorney: "Very surprised at the resolution. The client was pleased."

Attorney: "The process was instructive and useful because it provided insight as to the motivation of both parties and what led us to this state of legal proceedings."

Attorney: "Very pleased! Gives the parties an opportunity to resolve the case when otherwise that opportunity may not have existed."

Party: "This was a very good process. It got us to the point that this case will be resolved in the near future."

Party: "Fantastic."

Party: "Very satisfied with the process and the mediator."

Party: "It was successful – I think better than pre-trial mediation."

The Task Force, after considering several approaches to the appellate mediation process, focused on the Alabama Rule as one which seemed most practical in its operation and administration. We requested and reviewed substantial material from the

[1] Ignazio J. Ruvolo, *Appellate Mediation – "Settling" the Last Frontier of ADR*, 42 San Diego L. Rev. 177 (2005). (Cited as "Ruvolo").
[2] Information reported to the Task Force from the Alabama Center for Dispute Resolution.
[3] Sandra Schultz Newman, Scott E. Friedman, *Appellate Mediation in Pennsylvania: Looking Back at the History and Forward to the Future*, 5 J. App. Prac. & Process 409 (2003). (Cited as "Newman and Friedman").

Alabama Mediation Office in Montgomery, Alabama. In addition, members of the staff of that office graciously agreed to travel to Nashville to meet with the Task Force regarding the operation of that state's appellate mediation rule. In a lengthy session with the Alabama staff, the Task Force focused on practical issues of facilitating the process to ease the burden of the practitioner, keeping costs down, avoiding delays and protecting confidentiality.

After it became obvious that the success of appellate mediation in other states compelled the conclusion that Tennessee should adopt such a procedure, the Task Force focused on the Alabama Rule as a bench-mark from which to develop a proposed Tennessee Rule.

Throughout its many sessions there was considerable debate over the role of the Administrator and whether a proposed rule should have a mandatory feature to it. Alabama's rule has both. The Task Force decided that the need for an Administrator to oversee the program was essential and that the Administrator should be an attorney who would engage in developing a selection process to identify cases most likely to benefit from mediation at the appellate level. The Administrator's task would be to develop appropriate selection criteria, and to implement and operate the selection process. Once a case was selected and designated as a case for mediation, the process would be mandatory. In addition to the Alabama experience in these areas, the Task Force considered other sources, including lengthy studies of the appellate mediation process discussed in Ruvolo and Newman and Friedman. The Task Force also reviewed the text of rules from New Mexico, North Carolina, Texas and Utah. The basis for the Task Force's recommendation on the Administrator and the mandatory nature of the Rule is discussed more fully at Part I of this Report.

Initially everyone on the Task Force agreed that the method implemented by the United States Court of Appeals for the Sixth Circuit should not be considered. This decision is discussed more fully in Part II of this Report.

The Task Force devoted significant time to studying ways to eliminate or minimize any expense and delay that a mediation program might add to the appellate process. Again, the Alabama system was instructive for positive methods to avoid costs and delays. The data considered by the Task Force and its recommendation for a Proposed Rule that is both time and cost efficient are more fully discussed in Part III of this Report.

After many meetings and intense debate covering several issues, the Task Force issued its Report to the Supreme Court on July 27, 2006, with the Proposed Rule 48 attached as Exhibit "A." It had been unanimously adopted by the Task Force. Also, the Report attached several proposed forms for consideration in implementing the Rule if adopted by the Court.

After the Task Force submitted its recommendation to the Supreme Court, it was requested by the Court to study comments received from the Bar regarding Proposed Rule 48 and to report to the Court on those comments.

The Task Force reviewed all of the comments from the Bench, Bar and Bar Associations regarding Proposed Rule 48, and identified several major areas of concern/comments. These included the mandatory nature of the proposed rule and the role of Administrator and confidentiality issues; 6th circuit program comparisons; increased costs to litigants and delay in the appeal process. Each of these concerns is addressed below.

I. THE APPELLATE MEDIATION ADMINISTRATOR AND THE MANDATORY NATURE OF PROPOSED RULE 48

A. The Literature and Experience from Other States Support the Task Force's Recommendation

Two major points raised in the comments involve the wisdom of creating an administrator for the program and the partially mandatory character of Proposed Rule 48. Ruvolo analyzes program features among the various states and reaches several conclusions about successful programs for mediated settlements at the appellate level. The first two analytical areas he targets as of prime importance are mandatory participation and paid, dedicated program administration. Regarding those issues, the article states:

1. Mandatory Participation

> Virtually all appellate mediation programs reviewed for this Article now make participation mandatory, once a case has been assigned into the program. There exist good reasons for this feature. Early voluntary appellate ADR programs were grossly underutilized. The reluctance to volunteer for ADR may have been caused by the lack of a cultural environment receptive to the idea of appellate mediation, the absence of adequate promotion and education, or the failure of confidence in the worthwhileness of the effort. Making appellate mediation mandatory breaks down these barriers to acceptance of ADR.
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> A further reason mandatory mediation seems superior is that it helps attorneys to overcome client resistance to the idea of settlement without raising a question of the attorney's loyalty to the client in suggesting mediation. Where the attorney and client disagree about the value of ADR, the attorney can deflect debate by pointing out that the court requires participation….

2. Paid, Dedicated Program Administration

> It is imperative that any court system contemplating the implementation of an appellate mediation program set aside funds necessary to hire and retain at least a part-time program administrator. The work needed to design, implement, operate, and collect data for an ADR program successfully cannot be minimized. Each established, reputable mediation program incorporates this feature….
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> Furthermore, it is in the best interests of the program to separate mediation processes from the court's adjudicative function. Without independence from the court's role in deciding cases, few litigants and their counsel will be willing to participate candidly in ADR if they fear that the panel adjudicating the appeal may become privy to what happened in mediation. Absent this separation and assured confidentiality, the parties will not approach mediation with the degree of frankness needed for success. Lastly, having a separate, professional staff dedicated to the program's operations gives the enterprise much needed gravitas within the legal community. It communicates to members of the bar and to their clients alike that the court is making a serious commitment to mediation. Investing resources in infrastructure for the program conveys a sense that the court views the program as an institution of some permanence.

Ruvolo, pp. 214-15.

While not covering all states with appellate mediation programs, Ruvolo and Newman and Friedman noted the experience of several jurisdictions and commented on whether the programs employed an administrator and the case selection process.

Oregon engages a half-time administrator and a program evaluator. While originally Oregon's cases were selected randomly, the process has evolved to a criteria based selection process. Id, at 201-02.

New Mexico employs a full time staff mediator and a part-time administrative assistant. Cases are screened for inclusion in the program and once selected, case mediation is mandatory. Id, at 205-06.

Michigan operates a program with a full-time Settlement Director. Lateral oversight is provided by a three-judge Settlement Committee appointed by the Chief Judge of the Michigan Court of Appeals. The process involves a case screening procedure that depends on the discretion of the Settlement Director following specific selection criteria. Some types of actions are categorically included in the program, such as negligence actions, automobile no-fault appeals and appeals from the granting or denial of attorney fees and sanctions. Id, at 209-10.

Hawaii employs a program administrator who selects cases on a discretionary basis. Once selected participation is mandatory. Cases not selected can request inclusion in the program. Id, at 210-12.

The Massachusetts program created a full time manager of operations and entry into the appellate mediation program is mandatory. Newman and Friedman, at 421-22.

In Nevada, the Clerk of Court notifies parties of the selection of their case for appellate mediation and the program administrator has the authority to select a mediator for the parties. Id, at 429.

The Pennsylvania Supreme Court appointed a Senior Judge to screen cases for mediation and to direct which will be mediated. The parties can also request inclusion and, for cases not selected, the judges may direct the parties to enter the program. Id, at 429-30.

While not discussed in Ruvolo or Newman and Friedman, Alabama's procedure employs a full-time administrator and an assistant. Cases are screened and participation for selected cases is mandatory. Likewise, Utah has established an Appellate Mediation Office for cases referred to mediation by the Court. Once referred, mediation is mandatory.[4] North Carolina has a consensual mediation program that was adopted in August, 2002. It was made permanent in 2004 and does not employ an administrator.[5] In Texas, the court determines whether a pending dispute is appropriate for ADR and notifies the parties that the case is to be mediated. Texas employs a procedure by which the mandate of the court requiring mediation can be reviewed.[6]

The Task Force turned to Tenn. Sup. Ct. R. 37 for information on Tennessee's experience in referring all workers' compensation appeals to mandatory mediation. The Task Force also considered the June 21, 2005 Report of Evaluation of the Workers' Compensation Appellate Mediation Program conducted by the Administrative Office of the Courts for the State of Tennessee (the "AOC 2005 Evaluation"). From June 1, 2004 through May 31, 2005, the AOC received 92 evaluations, 42 from respondent's attorney, 37 from appellant's attorney, 11 from appellant and 2 from respondent. The AOC reports the rate of successful mediation of all issues in cases at approximately 25% and stated:

> Overall, Respondents indicated that they were very satisfied with the mediation process. This includes selection, fairness, participation, confidentiality, and satisfaction with outcome. The lowest levels of satisfaction (averaging 3 (somewhat satisfied) out of 5 with 5 being very satisfied) were with the appropriateness of mediation in the case and the mandatory aspect of the program. However, 60 or 65% stated they would use the process again.[7]

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[4] See, www.utcourts.gov/mediation/coamed.htm.
[5] Information supplied by North Carolina Court of Appeals. See, mediate@coa.state.nc.us.
[6] Tex. Code Ann. § 154.001, et seq.
[7] Report of Tennessee Administrative Office of Courts, *Worker's Compensation Appellate Mediation Supreme Court Rule 37 Periodic Evaluation Report* (2005).

B. Discussion of Comments on the Role of the Administrator and the Mandatory Aspects of Proposed Rule 48

The comments on issues relating to the mandatory nature of Proposed Rule 48, the role of the Administrator and confidentiality issues are categorized as follows:

1. Because the case has been decided below, and possibly mediated below, it will be difficult for a successful conclusion at the appellate level. If forced to attend, the parties will not have a positive attitude toward settlement.

2. Private voluntary mediation is preferable. Experienced lawyers are better able to settle cases on their own.

3. No one properly researched the advisability of Rule 48 and more study is necessary.

4. Appellate cases are needed to accommodate the development of the common law.

5. An appellate mediation administrator is not necessary and Proposed Rule 48 does not establish guidelines for case selection. Specific types of cases should not be mediated, such as: parental terminations, constitutionality of statutes, APA appeals, etc.

6. The Rule should have a procedure to stay preparation of the trial transcript.

The following presentation addresses each of the above delineated categories of comments.

1. Since the case has been decided below, and possibly mediated below, it will be difficult for a successful conclusion at the appellate level. If forced to attend, the parties will not have a positive attitude toward settlement.

2. Private voluntary mediation is preferable. Experienced lawyers are better able to settle cases on their own.

The Task Force devoted considerable time to an analysis of the benefits and draw backs to voluntary vs. mandatory mediation and whether some sliding scale between the two was appropriate. The Task Force was also aware that a significant number of lawyers were in opposition to any form of mandatory mediation. Great weight was given to that fact. In the end, the literature on this issue established that an effective appellate mediation system required some mandatory element to it. Such resistance in the practitioner community apparently has not been uncommon in those states that previously

considered the adoption of an appellate mediation program and the comments made by practitioners in Tennessee are not unlike those that were prevalent elsewhere.

The screening process through the Office of the Appellate Mediation Administrator is intended to target cases that are most amenable to settlement at the appeal level. While some cases will be directed to mediation, not all will. Cases not selected for mediation retain the right to voluntarily participate in the program under Proposed Rule 48. Essentially, the Task Force concluded that a hybrid program would work best with an Administrator screening for those cases most likely to be successful for mediation.

The debate over whether mediation is an effective method of case resolution largely has been resolved in favor of the process because of its amazing success on the trial level. The argument that parties involuntarily participating in mediation will invalidate the process has simply not proven true. Moreover, the statistics of success of appellate mediation programs throughout the United States establish to the contrary that significant numbers of cases are settled through the process. Ultimately, practitioners and clients alike are satisfied with the results in many cases.

Also, the outcome in the trial court below will obviously be an important fact for all parties to consider as they approach appellate mediation. Certainly that will weigh heavily in the mediation process. Having an additional fact on the table in the mediation room, however, does not mean that the parties will be so unrealistic as to ignore it or deny its existence. The trial result should be an aid to realistic mediation and settlement.

By way of observation, it is difficult to see how a voluntary process will be more time efficient than a mandatory one, unless it should be completely extraneous to the Rules of Appellate Procedure. The disadvantage to mediation outside the auspices of a court authorized procedure would be that no stay of record preparation would occur and the need to move forward to meet the court's briefing schedule would remain. Such a plan would not be cost efficient to the parties. On the other hand, if a voluntary system were conducted within the framework of a court process, it would still be necessary to create a hiatus in record preparation and briefing in order to stave off those costs. Thus, under that theory, both a voluntary and a mandatory system will equally cause delays, if there are to be any.

3. No one properly researched the advisability of Rule 48 and more study is necessary.

The Task Force spent many long hours reviewing available materials and considering the operations and results of appellate mediation programs throughout the United States. All of us have thick folders loaded with research materials. Several members conducted their own research and distributed materials for the independent study of the group as a whole and for discussion during the meetings. All of the materials identified in the Introduction to this Report were distributed to the membership during the time of the Task Force debates. In addition, the Task Force conducted personal

interviews of the Alabama team from that state's appellate mediation office. Frankly, nothing new has been brought forth in the comments received from the bench and bar that was not thoroughly dissected by the Task Force in drafting Proposed Rule 48.

4. Appellate cases are needed to accommodate the development of the common law.

This is true. However, it should be clear that the mediation process will not stop the work of the Court of Appeals or the Supreme Court. It will simply aid in the settlement of cases. Encouragement of settlement is a proper goal in the dispute resolution process. If the parties believe they have an important issue of law to be decided by the courts, they do not have to settle. Moreover, the Proposed Rule contains a mechanism by which the parties can inform the Appellate Mediation Administrator of such issues and seek to have the case, if it was screened for mediation, redirected to the appellate track.

5. An appellate mediation administrator is not necessary and Proposed Rule 48 does not establish guidelines for case selection. Specific types of cases should not be mediated, such as: parental terminations, constitutionality of statutes, APA appeals, etc.

The Task Force quickly concluded, based on its study of the programs in other jurisdictions, that it would be a wasted effort to establish a mediation program that did not have a person in charge of the oversight function. Two alternatives, having the program administered by the Court of Appeals or the Clerk of the Court of Appeals, were quickly rejected. The literature regarding appellate mediation strongly recommended that the confidentiality of the process had to be paramount. Uniformly, those with experience in the area concluded that litigants would not feel free to disclose information about their cases that could affect the outcome on appeal unless they were absolutely assured that a solid firewall existed between them and the court and clerk systems. It became clear through the observations of Mr. Catalano that engaging personnel in the clerk's office to administer the program was unworkable and counter-productive.

The Task Force did not want to structure a program that would be ineffective from the start. The decision to recommend the establishment of a separate office for the Appellate Mediation Administrator was not a difficult one to reach in light of the goal to create a mediation system that would be workable.

In addition to the work of the Administrator in screening cases, that office would be in charge of keeping the actual mediations on time and would disseminate information to the mediator and the parties in a method to ensure confidentiality. As well, the Administrator would maintain statistics regarding the program for reporting to the Administrative Office of the Courts.

The creation of the Appellate Mediation Administrator's position is a key factor in having a successful program. The cost of the office is a necessary component in

establishing a viable process. Some comments criticized the role of the Appellate Mediation Administrator as that of a mediation czar or dictator. To the extent that the Administrator has the authority under the auspices of the rule making power of the courts to direct cases to mediation, it is true that the Administrator will exercise that authority. However, under Sup. Ct. R. 31, the trial courts have the authority to direct cases to mediation and the litigants are not in a position to disobey the court's orders in that circumstance. Here the authority is to be bestowed on an individual attorney who is trained to identify cases most likely to benefit from appellate mediation and screen them for the process. The Proposed Rule is in keeping with the experience of many of our sister states which also employ an Administrator to screen cases. The position effectively takes the screening process off the shoulders of the Court of Appeals and the Clerk's Office in order to protect confidentiality and to make good on the need to save the Court's time. The Proposed Rule has a limited appeal of the decision of the Administrator built into it. However, the expectation is that there should be little need to employ that procedure.

This issue of establishing case selection guidelines for the Administrator was also extensively discussed by the Task Force. In fact, the categories of cases noted in the comments on this issue are consistent with those reviewed by the Task Force. In addition, the Task Force considered, for example, eliminating pro se appeals from mediation and whether appeals from summary judgments should be automatically selected. However, the ultimate conclusion, after giving due consideration to the creation of lists for included and excluded types of cases, was that the Administrator would be charged with making the screening decisions on a case by case basis. Obviously, the Administrator will target specific types of cases that may have a low probability of success and will eliminate them. The Task Force agrees that there very likely are some types of cases that generally should not be subject to mediation, but decided that a blanket prohibition could very likely eliminate from consideration a case that may be benefited by the process. Also, since the Proposed Rule contains a mechanism for parties to choose mediation, the Task Force thought it unwise to make a blanket statement eliminating an entire class of cases from the process.

6. The Rule should have a procedure to stay preparation of the trial transcript.

It does. See § 5 (e). The appellate process is stayed, including preparation of the record. It should be clear that the stay includes the preparation of the trial transcript. However, in order to remove all doubt, the words "and the transcript" can be added in the section so that the second paragraph reads:

> The appellate process, including the preparation of the record and the transcript, will be stayed…

II. COMPARISON WITH THE SIXTH CIRCUIT

Many of the comments to the proposed rule contained an objection to appellate mediation because of experiences in the Sixth Circuit. Typically the comments contained an observation that appellate mediation did not work because they had been trying it in the Sixth Circuit for years without success.

The Sixth Circuit uses personnel on its permanent staff to conduct settlement conferences by telephone. Although the Sixth Circuit procedure has its defenders, the members of the Task Force came together aware of a general antipathy toward it among the lawyers in Tennessee. Thus, after considering it in one of the early sessions, the task force made a decision to recommend something entirely different.

As the Court can see, the approach in the proposed rule involves true mediation. It requires the parties to meet and negotiate in cases where there appears to be a chance that the case can be resolved.

III. DELAY AND INCREASED COSTS OF MEDIATION AT THE APPELLATE LEVEL

Delay and added costs were common objections in attorneys' responses to the Supreme Court's proposed Rule 48. Ultimately, the Rule could affect approximately 25% of all civil appellate civil cases, having the potential to add both costs and time to those cases – but to what extent? Because people objecting to proposed Rule 48 have stated that the mandatory mediation process will add delays and costs to the normal appellate process, it is important to look closely at how the time line unfolds. The time and cost impact of appellate mediation would range from (1) no time and no cost added to (2) the addition of sixty days, after the Referral to Mediation is issued, and certain costs. First, a summary of the Task Force's answer to the question. Second, the bases for those answers.

Under proposed Rule 48, the basic possibilities for added time and costs resulting from an appellate case referred to mediation (assuming no motions) are as follows:

1. **Savings** of time and cost: In successfully mediated appellate cases, parties could save up to twelve to fifteen months and the costs of the record, the briefing, the preparation for oral argument, oral argument and any additional pleadings during the course of the appeal (*e.g.*, motion for extension of time).

2. **Zero** added time and costs: All cases not selected for mediation.

3. **Minimal** added time and costs:

a. Cases in which the Appellate Mediation Administrator (AMA) has requested additional information from the parties and, upon consideration of that information, does not refer the case to mediation.
b. A case selected for mediation but reinstated on the appellate docket when the parties request reconsideration and the AMA grants the request.

c. **Some** added time and costs: Cases mediated without a successful outcome. An increase of approximately 60 days from the issuance of the Referral to Mediation and approximately $1100 to $1650 in costs.

The appeal time line under the current rules, is as follows. Assuming that a trial court judge enters his final order on May 1, 2007, the time it would take to conclude the briefing would be a minimum of eight (8) months. The case may not be docketed for oral argument for another six (6) months. The court could render its decision directly after oral argument, or it may take the case under advisement. If the latter, depending upon the complexity of the questions raised upon appeal, it could take four (4) months to a year before the parties receive the appellate court's decision. This estimate does not include mediation, and it is based on a time line that assumes the following:

1. That no party files a motion for new trial or other motion in the trial court.

2. That the Appellant files a certified transcript or a statement of evidence within ninety (90) days from the date of the filing of the notice of appeal.

3. That the trial court clerk files the record with the Appellate Court Clerk within forty-five (45) days from either the filing of the trial transcript, or the statement of evidence or the notice that there will be neither.

4. That there is no need for the record to be corrected or modified and

5. That no party seeks an extension of time during the appeal, *e.g.*, asking for more time for briefing.

As noted above, in contrast to the usual appellate time line, the Rule 48 mediation process could add as few as zero days or as much as approximately seventy (70) days to the appellate process, with the attendant costs associated with the mediation.

Thus, the Task Force recognizes that the proposed rule has the potential to add benefits, time and costs to the appeals process for approximately twenty-five per cent (25%) of the appellate cases. First, we researched other states' programs and the literature, both of which help give concrete information on appellate mediation. Second, we place the mediation in the context of the normal appeals process, to demonstrate that appellate mediation may work effectively to cut both time and costs for the parties.

In the AOC 2005 Evaluation, the AOC considered 92 evaluations. Notification of selection for mediation averaged 2 weeks. Scheduling a mediation averaged 2.8 weeks. The scheduled mediation took place 4.6 weeks later. The attorneys' fees and costs were reduced by an average of $550 (costs only) to $2,041 in 22 cases. Attorneys' fees increased by $416. Costs increased an average of $232. Fourteen cases said court time was reduced by an average of 5 months and seven felt court time increased by an average of 2 months. 60 – 65% of the respondents said they would use the process again. 89% said they would use the mediators again. The 2005 evaluation is quite similar to the evaluations of 2001, 2002, 2003, and 2004.

The major dissatisfaction of the process is with the appropriateness of the mediation. As presently constituted, Rule 37 has no screening process and no stay of the proceedings. In contrast, proposed Rule 48 provides a screening process and a stay of the proceedings.

The Task Force agrees with Ruvolo's conclusion that "Appellate mediation benefits not only the courts, but also the parties, who are able to save time and money by mediating their disputes." Thus this Task Force concluded that with proper selection criteria, a significant number of parties in the appellate process could be assisted to settle their cases without the necessity of briefing and awaiting a written opinion.

Initially, we must be clear, that we are only focusing on the 40-50% of those cases where mediation may be helpful to the parties. The other cases go right on with the appellate process of preparation of the record, briefing, oral argument and a written opinion. To measure the affect of appellate mediation, it is important to discern exactly what possible delay there would be under Proposed Rule 48.

The following appellate mediation time line assumes that there are no requests for reconsideration or motions.

1. Determining whether a case should be sent to mediation. Steps include:

    a. Appellant completes and returns docketing statement to Appellate Court Clerk [appellant's duty in the normal appeal process]. Then the Clerk promptly sends a copy to the AMA. Rule 48, section 5(a)(3).

    b. AMA reviews same and makes an initial determination, Rule 48, section 5(c), and decides

    c. EITHER that the case is not a candidate for mediation

    d. OR that the case warrants further consideration and

e. Requests additional information from the parties (mediation screening form) and notifies the Appellate Court Clerk to stay proceedings. Rule 48, section 5(c) and (e).

f. AMA reviews the information received from the parties (completed mediation screening form, attached documents and confidential statement, if submitted), Rule 48, section 6(a)(1) and

g. EITHER decides the case is not a candidate for mediation and notifies the Clerk to lift the stay, Rule 48, section 5(a)(3)

h. OR decides to send the case to mediation and issues a Referral to Mediation, Rule 48, section 6(a)(1)(ii).

[The process up to this point has taken a month or less to complete.]

2. Mediation. Steps include

    a. Within 15 days of the Referral to Mediation, parties send AMA a report on their selection of a mediator, Rule 48, section 6(c).

    b. Scheduling case for mediation, Rule 48, section 6(d).

    c. Mediating (and concluding mediation within 60 days of the Referral to Mediation), Rule 48, section 6(f).

3. Conclusion
    a. Mediator renders report within 15 days after the conclusion of the mediation, Rule 48, section 9(a), and

    b. If the mediation is successful, the case is concluded and taken off the appellate docket, Rule 48, section 9(c), OR

    c. If the mediation is not successful, the Clerk reinstates the case to the appellate docket and the time line continues. Rule 48, section 9(c)(3).

Time added for unsuccessful mediations is approximately 70 days, less if the parties do not take all the time allotted for each step.

To illustrate added time and costs, compare two groups.

Parties that do settle

If 40-60% of the parties referred to mediation settle, obviously there is a considerable cost and time savings for those parties. The settled case is resolved within 30 to 90 days from the Notice of Appeal, as opposed to a year or more. The cost is

considerably less, as the parties do not have to pay for the cost of the record or the attorneys' fees in going through the full appellate process. The preparation of a record would be from $1500 to $10,000. Attorney's fees would range from $5000 to $20,000 plus. If there is a money judgment, the interest on the judgment running at 10% will not accrue. If they have borrowed money with the hope of keeping their judgment as appellee, they will not pay for interest on that borrowed money. If the case is overturned and remanded to the trial court, they would have had further attorneys' fees or delay in seeking to be placed back in line at the trial court. If the case is a family case, they can now fashion what their family can do in the future, rather than waiting for the appellate court to affirm, or remand the case to the trial court, with modifications. For these cases, clearly, mediation has been both a time and cost saver.

Parties that do not settle:

If the other 40-60% of the parties referred to mediation do not settle, attorneys offering criticism have concerns with proposed Rule 48. It is important to note that we are dealing with approximately 25% of all appellate cases, if this program were state-wide. [The proposal is to set a pilot program in one division of the state, study the results and broaden the scope of the program, if the results are satisfactory to the Supreme Court.] As shown in the time-line, the delay could be up to 70 days.

The increased cost would be the attorneys' fees to attend the mediation and the cost of the mediator. As discussed above, there will be decreased costs for parties that are able to settle their case, when referred to mediation. They will forego the cost of the record, the costs for attorney's fees for preparation of brief, the costs for returning to the trial court, if the case is remanded, and interest on a judgment if there was a money judgment.

For those cases that are referred to mediation and do not settle, the increased costs would be as follows for an average case: Assuming that an attorney and a mediator charge $200 to $250 per hour [rates vary lower or higher in different parts of Tennessee and may depend on the type of case], mediation of the case that is doubtful of not settling would last, on average, three hours. An attorney would likely spend two hours of preparation as this mediation takes place 30 days after either a full-blown jury or bench trial or following a summary judgment. Thus, the total average cost for the non-settling case that must go forward on the regular appellate track would be an additional $1100 to $1650.

On the front end, there would be a 50/50 chance of settling the case. One must also consider the mechanism to request review of the administrator's decision to refer the matter to mediation, if the parties were not able to convince the administrator of the futility of mediation on the Screening Form. There is no incentive for the administrator to send cases to mediation, where the parties are totally opposed to settlement. Thus, it is likely the parties would work in good faith to settle the case, or at least reduce the issues or understand the risk they are taking in pursuing the appeal.

There is one other obvious savings in time or lack of delay. If 25% of the cases are not brought before the appellate court for briefing and eventual opinion, the appellate judges will have more time to devote to those cases that were never referred to mediation or that did not settle in mediation. This could result in opinions being issued on a shorter timetable. Nonetheless, the thrust of the proposed rule was not to deal with any backlog, but rather to provide a means for parties to resolve their issues more quickly and to their mutual satisfaction.

IV. COMMENTS FROM THE TENNESSEE BAR ASSOCIATION AND THE NASHVILLE BAR ASSOCIATION

In addition to the general issues discussed above in Parts I through III of this Report, the Task Force also considered the thoughtful comments and proposed revisions offered by the Tennessee Bar Association and the Nashville Bar Association. The content of the comments from the TBA and the NBA is substantially identical. The Task Force will designate which or both of the groups submitted the particular comment. Each of the Comments is discussed below:

1. (TBA and NBA) The comment states that the confidentiality provisions of "Supreme Court Rules, 31 and 37 and proposed Rule 48 could be improved." The Task Force agrees that confidentiality of the appellate mediation procedure must be a primary goal of the program. Proposed Rule 48's structural separation of the Court of Appeals and the Clerk's office from the office and duties of the Appellate Mediation Administrator blocks any flow of information to the Court about the mediation and ensures functional confidentiality. However, Proposed Rule 48 does not go beyond Tenn. R. Ev. 408 in controlling the behavior of the litigants regarding confidentiality. The Task Force does not regard the task assigned to it by the Supreme Court to include addressing the type of confidentiality issues raised by the TBA and NBA.

2. (TBA and NBA) Both recommend that the Section 5. (e) stay be eliminated to avoid delay. This has previously been addressed in this Report and is not in keeping with the adoption of an effective appellate mediation program.

The Task Force has considered the comment that the court reporter should receive notice from the Administrator regarding decisions to stay proceedings for the institution of mediation. The Task Force disagrees with that mechanism and does not recommend changing Section 5. (e) to notify the court reporter of the stay, believing the parties are the best agents to do that. The NBA also recommends that the Rule be clarified to state that the stay includes a stay of transcript preparation. The Task Force addressed that recommendation in Section I. 6. of this Report and recommends the change set out there.

3. (TBA) The Task Force does not agree with the TBA suggestion to amend Section 6.(a)(4) of the proposed Rule 48. The language change contemplates no stay in appellate proceedings. For reasons previously articulated, such a change will undermine a major component for a successful rule.

4. (TBA and NBA) The Task Force agrees it is appropriate to consider adding the following to Section 6.(a)(4)(ii):

> "The Court will not consider a Request for Reconsideration of its determination to refer a case for mediation."
>
> The Task Force also agrees it is appropriate to reword the end of Section 6)c)(iii)(2) so the last two sentences read:
>
> "The Motion and the Clerk's order shall not become part of the appellate court record. In the event an Appellate Mediator is disqualified, the parties or the Appellate Mediation Administrator shall select a replacement in accordance with this section."
>
> The Task Force recommends these changes be adopted.

5. (TBA and NBA) The Task Force disagrees with the comment that Section 6.(e) should provide a procedure for the mediator's fees to be charged as court costs. The Rule makes a provision for how such fees are to be handled between the parties.

6. (TBA and NBA) The Task Force agrees with the comment that additional training should be required for those persons listed as Roster Appellate Mediators. While the comment calls for an additional six hours of training, the Task Force believes three hours would be adequate. Accordingly, the Task Force recommends that Section 7.(a)(1) receive a new subsection iii, as follows:

> "Has completed at a minimum an additional three (3) hours of training in appellate mediation, as approved by the Alternative Dispute Resolution Commission."

7. (TBA and NBA) The Task Force agrees that the typographical error in Section 7.(f). of the proposed Rule 48 should be corrected to read: "Section 13 (Compensation)."

8. (TBA and NBA) The Task Force does not recommend changing the language of Section 8.(e)(1)(iii) to add the word "full" to the settlement authority requirement of an attending insurance representative. The issue was thoroughly discussed during the Task Force debates before proposed Rule 48 was recommended to the Supreme Court.

9. (TBA and NBA) The Task Force agrees that it is appropriate to amend Section 8.(f)(2) to clarify that the items listed are not requirements, but rather are appropriate for inclusion in a Mediation Statement. Thus, the Task Force recommends that the lead paragraph of Section 8.(f)(2) be revised as follows:

"The mediator may request the parties to prepare and submit a Mediation Statement. If a Mediation Statement is requested by the mediator, the Mediation Statement may include one or more of the following:"

10. (TBA and NBA) The Task Force agrees with the comment that the following language should be added at the end of Section 8.(g)(1): "The Clerk's order shall not become part of the appellate court's record."

The Task Force also agrees that the following language of Section 8.(g)(4):

"In making the recommendation, the Appellate Court Clerk shall state reasons for a specific allocation of costs, fees and expenses and may consider, among other things, a party's refusal to attend a mediation session or sessions, unreasonable delay in the scheduling of mediation, or otherwise unreasonable obstruction of the conduct of the program."

should be changed to:

"In making the recommendation, the Appellate Court Clerk shall state reasons for a specific allocation of costs, fees and expenses and may consider a party's refusal to schedule or attend a mediation session or sessions."

The Task Force recommends the Court consider adopting these changes.

V. OBSERVATION AND RECOMMENDATION

A. Observation.

Many fine lawyers and judges have articulated reservations about a new procedure adopting appellate mediation in Tennessee. The negative comments, in large measure, target four perceived features of the proposed rule – it is not voluntary; it requires an administrator; it will increase costs; and it will cause delays. These commentators would opt instead for a completely voluntary program not administered by a separate office. During the original meetings of the Task Force some members expressed agreement with one or more of these issues to some degree. However, after extensively discussion of all the relevant issues relating to an appellate mediation system, the consensus of the Task Force as it concluded its work on the original text of the proposed Rule 48 was that the best opportunity for a successful program, based on all we had learned in studying the questions, was one with a partial mandatory feature to it under the direction of a trained administrator.

The Task Force also determined that there is no reasonable basis to support a conclusion that the Proposed Appellate Mediation process will materially increase the cost of appeal or significantly delay the decision of the Court of Appeals on cases that do not settle. The Task Force voted unanimously to recommend Proposed Rule 48 to the Supreme Court, being fully aware at the time of the vote that the doubts raised in the

comments would be forthcoming. All of the issues now presented in the comments were fully debated in Task Force sessions and dealt with in the drafting phase of the Task Force's work. Proposed Rule 48 is the result.

To put the Task Force's efforts in perspective a concluding comment from the Ruvolo article may be instructive:

> In the closing years of the last century, the American appellate judicial process has remained the last frontier of ADR. Until the last decade or so, only the antediluvian settlement conference was available to help parties settle cases on appeal, and then only in the infrequent instance where the parties voluntarily requested one. To the contrary, appellate settlements were viewed as an oxymoron: conventional wisdom questioned how someone could expect civil litigants to resolve their legal differences after pursuing formal adjudication so doggedly through the judicial system, and particularly when one party has been declared a winner at the trial level. But perhaps fueled by the heady success of ADR at the trial level, and driven by ponderous appellate backlogs and changing mindsets about the use of courts to resolve all forms of legal disputes, ADR encampments have been erected by appellate judges and practitioners around the country, most in the form of mediation programs….[8]

B. Recommendation.

The Task Force has concluded that the perceived difficulties with proposed Rule 48, as evidenced by the majority of the comments received from the bench and bar, lie not so much with the Rule itself, but rather with a pre-conceived notion that anything other than a voluntary mediation program will effectively override our time tested appellate processes. The Task Force, after a review of all of the comments, remains steady in its recommendation that the structure of the proposed rule rests on sound footing. However, the Task Force agrees the comments of the bench and bar should be recognized and considered carefully. They deserve to be acted upon.

Therefore, the Task Force's recommendation to the Supreme Court encompasses a two-fold approach to the adoption of a successful appellate mediation program. First, in keeping with the overwhelming sentiment that a voluntary appellate mediation program is appropriate, an interim rule should be adopted as part of a pilot program in the middle grand division of the state that would put appellate mediation in effect on a strictly voluntary basis. A necessary component of the interim voluntary mediation rule will be to suspend appellate proceedings in order to save the costs of appeal while the mediation proceeds. Second, in keeping with the conviction of the Task Force that its study of many different approaches to appellate mediation in our sister states overwhelmingly supports the adoption of a program akin to proposed Rule 48, a state-wide education program should be implemented over a two-year period to make available to the bench and bar the core concepts from and fruits of the Task Force's research. At

[8] Ruvolo, pp. 178-79.

the same time, those attending the educational events will give their feedback to the Task Force members conducting the programs.

The first part of the Task Force's recommendation can be implemented by the adoption of an interim rule similar to that proposed in the attachment to Judge Franks' comments to the Supreme Court (attached, as Exhibit "A"). The institution of a limited middle Tennessee pilot program allows for: (1) manageable feedback from the mediation participants on the utility of the provisional rule, (2) data gathering and (3) statistical analysis of the program's results. The Task Force can develop forms for such reporting and data gathering. Those persons who file the joint stipulation contemplated in section (b) of Exhibit "A" should be required to submit to the Appellate Court Clerk's office the properly completed forms at the time they report as to the success or failure of the mediation. The Task Force would be responsible for reporting the results of the voluntary mediation efforts under the limited interim rule. A two-year test program for the voluntary rule will provide sufficient time to develop and report reliable statistical results.

The second part of the recommendation can be implemented through the agency of the Task Force in organizing a continuing legal education program on appellate mediation. A series of CLE presentations and publications throughout the state over the two-year operating time of the pilot program also will allow for practitioner education and feedback. A standardized questionnaire to be completed by program attendants will provide appropriate information on whether instruction on the practical applications of proposed Rule 48 has affected professional sentiment, in any way, on appellate mediation.

In order to implement these recommendations, the Task Force requests the Supreme Court to consider extending its existence for an additional two-year period to and including June 30, 2009. The Task Force then can assist the establishment and implementation of procedures for a voluntary mediation program on the appellate level and can design and conduct an education program regarding appellate mediation.

This Report is respectfully submitted by the Task Force to address comments relating to Proposed Rule 48. It is, itself, a comment on the Proposed Rule 48 and should be made a part of the public record.