

Evaluation of Supreme Court Rule 31:
A Qualitative Assessment of Mediation in Twelve Counties

Final Report Approved by the
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Evaluation of Supreme Court Rule 31: A Qualitative Assessment of Rule 31 and Private Mediation

Introduction

Section 19 of Rule 31 requires that the Rule be evaluated to assess “. . . participant satisfaction, quality of results, and [its] effect on case management.” In January of 2004, the Administrative Offices of the Courts (AOC), on behalf of the Alternative Dispute Resolution (ADR) Commission, contracted with Carol Nixon of Evaluation Design to conduct an evaluation of Rule 31.

Prior to this evaluation, however, it was clear and well-understood by many stakeholders that little if any output (e.g., numbers of cases settled by ADR) or outcome data (e.g., settlement rates, satisfaction of the parties, cost savings for courts, etc.) were available related to Rule 31. For example, although Rule 31 requires that Neutrals file “Final Reports,” these reports are not centrally located or aggregated enabling program monitoring. Similarly, court orders for ADR are not centrally located or aggregated. Although the AOC’s Civil Case Cover Sheet includes a field allowing the clerk to indicate that mediation was involved, clerks rarely know this information and thus leave the field blank.

Based upon reviews of Rule 31 materials, the literature on ADR/mediation, and discussion with Commission members, Program Staff, and Justice Holder, Ms. Nixon recommended a two-pronged project evaluation effort that included two primary goals:

Goal 1: To conduct a qualitative case study of the current status of Rule 31 implementation that would suggest quality improvement opportunities and inform ongoing program management by the ADR Commission and the AOC’s Program Manager; and

Goal 2: To develop an ongoing internal capability to measure Rule 31 outputs and outcomes to enable program management, quality improvement, accountability, and future process and outcome evaluation.

In April of 2004, the ADR Commission approved these goals as well as a draft evaluation plan. Over the next few months, a more specific evaluation protocol and measurement tools were developed and reviewed by the Commission’s Evaluation Committee. The present document describes the implementation of evaluation activities and findings related to Goal 1. The activities related to Goal 2 are presented in a separate document.

The series of reports resulting from the evaluation of Rule 31 present the findings but not include specific recommendations. The reports are intended to provide valuable information about the current status of Rule 31 so that the ADR Commission, the AOC, and the Supreme Court can utilize this information in targeting subsequent quality improvement efforts. Some issues highlighted by these reports may require further study by the Commission.

Evaluation Methodology

Data Collection Process and Tools

Various methods for collecting qualitative input from stakeholders were considered in designing this evaluation. Ultimately, it was decided that data would be collected through a combination of telephone and in-person interviews. Mailed surveys are more amenable to quantitative questions and often result in low response rates. Focus groups were determined not to be feasible due to differences in prestige and power across participants and scheduling difficulties that would negatively impact turnout.

Semi-structured interview guides were developed for several stakeholder groups: judges, clerks, attorneys, and mediators. However, as the intent was to collect qualitative information, the guides were not strictly followed during interviews thus allowing the participants to provide the most relevant feedback and direct the flow of communication. The interview guides included questions that explored many topics including:

- Use of mediation and other ADR processes,
- Availability of general civil and family Rule 31 mediators,
- Factors that promote/facilitate mediation,
- Barriers to mediation,
- Use of court-based case management,
- Differences observed across counties in use of ADR,
- Needed resources,
- Impact of Rule 31,
- Accessing pro bono or reduced fee mediation, and
- Role of the AOC in furthering ADR.

Sampling & Selection of Informants

In May of 2004, ten counties were selected for inclusion in the qualitative evaluation after roughly twenty interviews with key stakeholders across the State including present and former ADR Commission members. Two additional counties were added in July. The following counties, by Grand Region, were selected to provide a range of urban and rural counties as well as a mix of history related to mediation:

West: Shelby, Tipton, Haywood & Madison

Middle: Lewis, Davidson, & Wilson

East: Campbell, Hamilton, Knox, Hawkins & Sullivan.

Respondents within these twelve counties were identified by position (judge or clerk) or by “nomination.” Nominations of attorneys, mediators, and other persons in the community initially were made by Commission members and the AOC Program Manager. Additional nominations were made through a “snowball” method whereby each participant was asked to nominate other persons knowledgeable of ADR in their county. In some cases, respondents received multiple nominations. Across all twelve counties, 324 respondents were nominated. We did not attempt to contact all nominated respondents as a balance of stakeholders and nominators also was sought.

Data Collection & Respondents

Interviews for the qualitative portion of the evaluation of Rule 31 began in June of 2004. By the end of October 2004, approximately 199 interviews were conducted. Contacts with some persons were attempted multiple times with no return call, but very few verbally declined to participate ($n = 7$). Several were on medical leave, retired, out of town, or otherwise unavailable. The respondents by stakeholder group are shown in Figure 1 while a more detailed accounting is presented in Table 1.

Figure 1. Stakeholders Interviewed

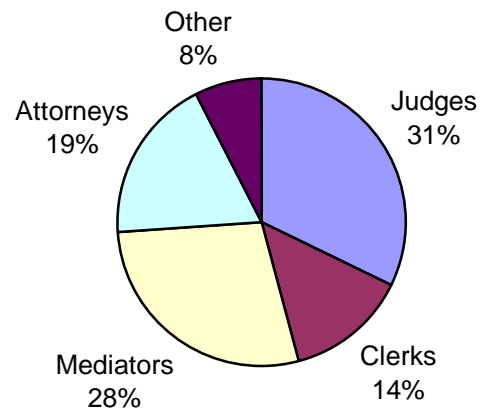


Table 1. Interviews Conducted.¹

| County | Circuit Court | Chancery Court | Juvenile Court ² | General Sessions Court | Clerks/Other | Attorneys | Civil Mediators | Family Mediators | Other | TOTALS |
|---------------------|---------------|----------------|-----------------------------|------------------------|--------------|-----------|-----------------|------------------|-----------|------------|
| Campbell | 1 | | | 1 | 2 | 2 | | | | 6 |
| Davidson | 6 | 3 | 2 | 2 | 4 | 6 | 6 | 3 | 2 | 34 |
| Hamilton | 3 | 2 | | | | 1 | 3 | 2 | 1 | 12 |
| Hawkins | 2 | 1 | 1 | 1 | 2 | 5 | 2 | 2 | | 16 |
| Haywood | 1 | 1 | | 1 | 2 | 2 | | 1 | | 8 |
| Knox | 3 | 2 | 1 | 1 | 4 | 4 | 6 | 3 | 3 | 27 |
| Lewis | 1 | | | 1 | 3 | 3 | 1 | 1 | 3 | 13 |
| Madison | 2 | | 1 | 2 | 1 | 4 | 2 | 2 | 2 | 16 |
| Shelby ³ | 6 | 3 | 1 | | 4 | 5 | 5 | 6 | 3 | 34 |
| Sullivan | 1 | 1 | 1 | 1 | 2 | 3 | 2 | 3 | | 13 |
| Tipton | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 2 | | 9 |
| Wilson | 2 | 1 | 1 | 1 | 2 | 1 | 1 | 2 | 1 | 11 |
| TOTALS | 29 | 14 | 8 | 12 | 27 | 37 | 29 | 27 | 15 | 198 |

¹ The table displays an unduplicated count. However, slightly more than 5% of the respondents reported on two counties as opposed to only one.

² In the smaller counties, juvenile cases are heard in other courts.

³ One Probate Judge was interviewed.

Results

Characteristics of Stakeholders

The vast majority of mediators who were interviewed also were attorneys (88%), a higher proportion than reflected in the AOC's mediator database in which 15% of civil and 39% of family mediators are not attorneys. The non-attorney mediators who were interviewed tended to be located in larger, more urban counties (Davidson, Knox, Hamilton) and were more often family mediators. In all counties except Shelby County, the most often used mediators were Rule 31 "listed" mediators. In contrast, the most often used civil mediators in Shelby County were not Rule 31 listed.

The most common practice area of the general civil mediators who were interviewed related to personal injury cases. Other common types of cases for mediations involved contract, commercial, employment, and malpractice cases.

Reported Mediation

In all counties, mediation was the most commonly used alternative dispute resolution process. The second most commonly used ADR process was the judicial settlement conferences. While arbitration was reported as used, it most often was described as binding arbitration that was contractually required and thus not Rule 31 arbitration (i.e., voluntary). Stakeholders noted that the general public tends to confuse mediation with binding arbitration which was reported as generally having a negative public perception. Although summary jury trials and mini-trials were reported as rarely occurring, several judges in particular expressed an interest in using these ADR processes more frequently. Case evaluation was reported as the least frequently occurring ADR process and in many counties, did not occur at all.

The extent to which mediation was used within different courts varied by county. Mediation was reported to occur more frequently in Circuit Courts. While Rule 31 ADR was reported to rarely occur in General Sessions Courts, several counties including Knox and Davidson have court-based mediation programs. General session judges also reported that they made referrals to Victim Offender Reconciliation Programs (VORPS), community-based mediation programs, and private mediators, some of which are Rule 31 listed.

Very little Rule 31 mediation is occurring in juvenile or probate cases although there are exceptions. Judges reported that Rule 31 mediation and judicial settlement conferences are used in Shelby County Probate Court in every contested will case, among others. Davidson County has a very successful court-based voluntary juvenile program. Respondents in other counties often cited a need for increased mediation in juvenile cases.

Sixty mediators reported an estimated 3,838 mediations conducted in the past year. (It is not possible to separate these into family and other civil.) Due to the parenting plan, mediators "guessed" that a higher proportion of family cases involved an order or reference as compared to other civil cases. But estimated proportions differed according to county and local rules, court type, and parts or divisions due to the preferences of specific judges.

The vast majority of case referrals for mediators came from attorneys and/or colleagues. Less than 10% came from corporate clients, judges, or client self-referrals.

Further, mediators estimated that approximately 90 or 2.3% of their mediations were conducted pro bono. Most of these were conducted through VORPS or community-based mediation programs and thus were not Rule 31 mediations. The majority of mediators had conducted no pro bono mediation in the past year although almost all expressed that they were willing to do pro bono mediations but have not been asked.

Perceptions of Alternative Dispute Resolution in the Counties

This report describes the perceptions of judges and nominated “expert” respondents in twelve counties in Tennessee. While most of the perceptions of interviewees were consistent with Rule 31, not all were. Some respondent statements are included in this report in an effort to highlight inconsistencies between respondents’ understanding of Rule 31 and what the Rule actually says. Such discrepancies provide possible targets of educational and other quality improvement efforts that might be considered by the ADR Commission.

Overall Impact of Rule 31

Respondents overwhelmingly reported that the implementation of Rule 31 had been positive. Only one person interviewed was negative about Rule 31 and mediation in general. The positive perceptions across all stakeholders are important to highlight for this report. While many recommended and suggested potential improvements that can be made, these were perceived as “fine tuning.”

Although mediation was occurring in the state before Rule 31, respondents noted that the passage of Rule 31 had accelerated the use of mediation. Several stakeholders reported being initially opposed to Rule 31 but later having favorable attitudes because “it works.” One attorney stated that he had actually seen couples hug each other after a mediation session. They are more likely to “. . . come out speaking, not hating each other.” In response to what do you see as the major benefits of mediation, one mediator said, “peace, love, happiness, and saving money.”

The most often cited benefits of mediation at the **system** level included reduced caseloads and thus less demand on court-resources. In Shelby County, over the past ten years, the number of filings in Circuit Courts has dropped from approximately 11,000 to 7,300 a year. The Chief Administrative Officer for Circuit Court attributed a big part of that drop to mediation along with other factors (i.e., orders of protection moved out of circuit and Worker’s Compensation Boards). An independent report to be disseminated in January 2005 will examine AOC data for 1995-2003 that includes filings by court as well as manner of disposition for the twelve counties included in the evaluation.

At the individual level, respondents suggested that Rule 31 and mediation in general has reduced overall costs to litigants, led to quicker resolutions of cases, improved communication between the parties, facilitated better situations for children in divorces, and resulted in higher satisfaction levels with the legal system due to less stressful, less continuous process, and more participation and control in the settlement. Respondents also noted that at a systems level, mediation is helping to “humanize” the legal system. Several mediators and attorneys suggested that

mediation may help to improve the reputations of attorneys – that they may be perceived as “kindler and gentler.”

Knowledge about Mediation

One area to focus on for “fine tuning” Rule 31 is to continue to educate attorneys, judges, and the public about Rule 31 and mediation. While many of those interviewed were very knowledgeable about mediation, several seemed to have misperceptions or inaccurate understanding of Rule 31. One mediator commented that mediation is a substitute for what lawyers should be able to do but no longer able to do. One attorney stated that the AOC ought to develop a program allowing attorneys to be able to be designated as Rule 31 mediators without the training. These perceptions illustrate the idea that simply being an attorney makes one a good mediator. Finally, one judge stated: “More effective when attorneys are not present to where the mediator can not be called as a witness or any other information from the mediation can be used in the trial.” Section 7 of Rule 31 provides that statements made in the course of Rule 31 proceedings are inadmissible under Tennessee Rule of Evidence 408. Thus the judge’s statement suggests that he/she misunderstood the provisions of Rule 31 OR that he/she was questioning whether the same provisions apply to voluntary mediation (without an order of reference) which is much more common than court-ordered mediation.

Several of those interviewed suggested that many judges and attorneys and even mediators do not fully understand mediation as a powerful tool. They tend to see mediation narrowly rather than as multidimensional. One judge eloquently provided an analogy of a golf bag – he said that too many did not use all their clubs and used their putter for driving. One family mediator noted that as a mediator, you can’t be “flat-footed” or “entrenched.” He suggested that the parties need to feel that they have been heard – there is a story telling aspect to mediation. However he noted that attorneys don’t tend to like this.

Thus, the interviews highlighted both misinformation as well as restricted information about Rule 31 and mediation in general. This theme also relates to requests by many mediators for more CLE options and improved availability as well as education and training opportunities for attorneys, judges, and the public at large. Please refer to p. 12-17 for more discussion of these issues.

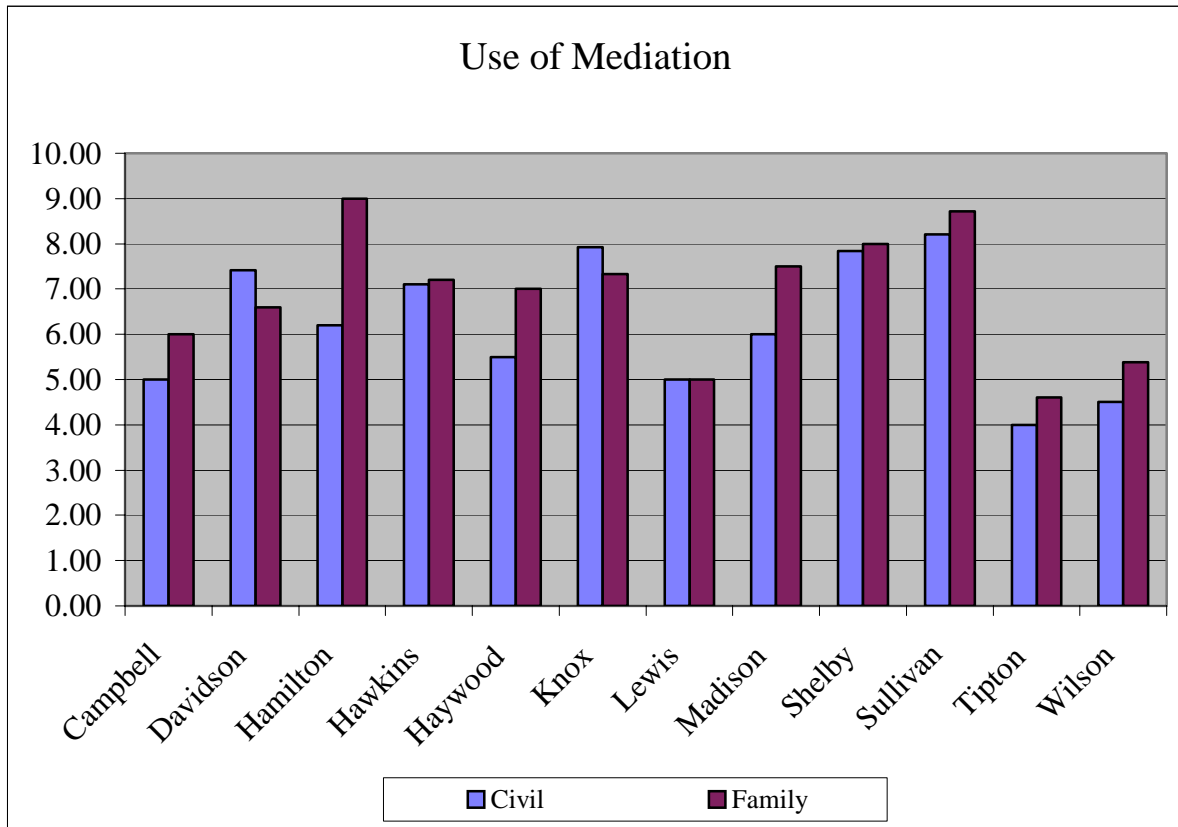
Overall Ratings of Mediation in Specific Counties

Figure 2 shows that respondents demonstrated a range of perceptions related to the extent to which mediation was occurring in their counties. Respondents were asked:

Currently, how would you characterize the use of mediation in _____ County, using a 10-point scale ranging from 1, meaning very little to no use of mediation, to 10, meaning widespread acceptance and frequent use of mediation?

Respondents rated general civil mediation highest in Hamilton and Shelby and lowest in Tipton and Wilson Counties. Respondents rated family mediation highest in Sullivan, Knox, and Shelby, and lowest in Tipton and Lewis Counties.

Figure 2. Respondents Ratings of the Use of Mediation



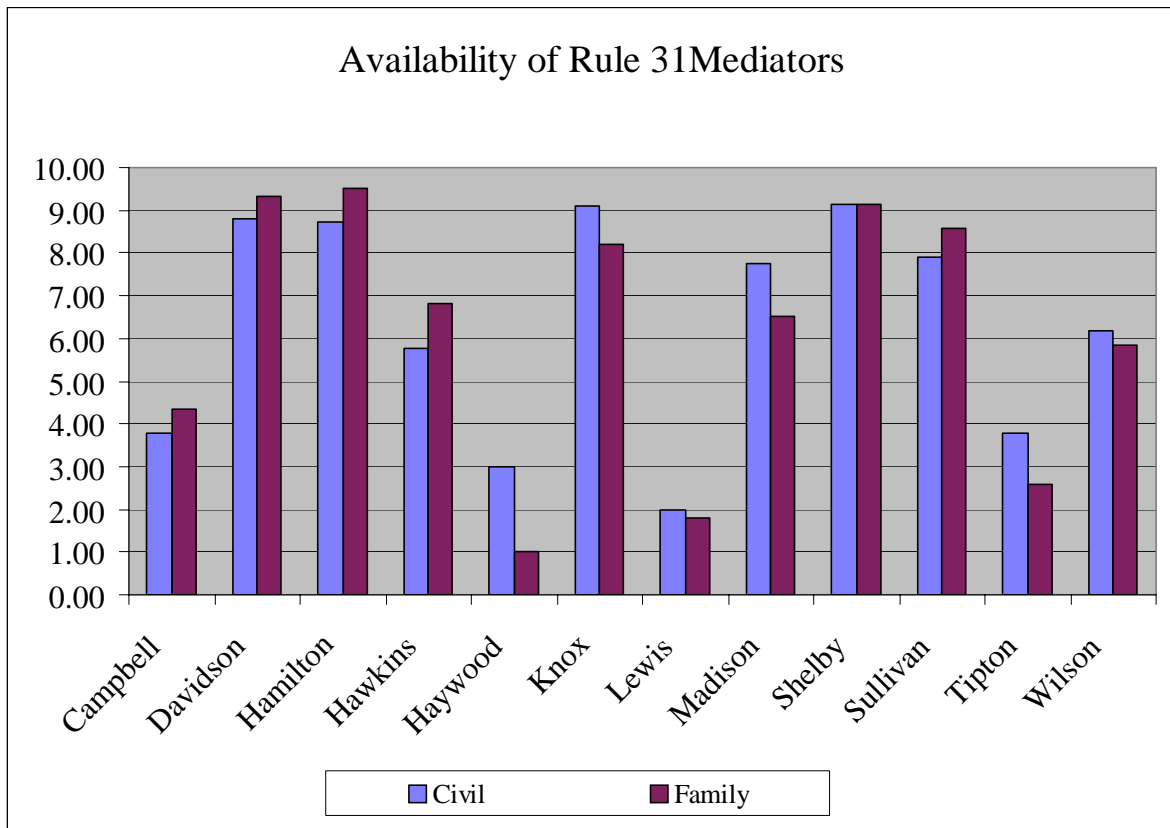
Availability of Mediators

Respondents were asked about the availability of Rule 31 general civil and family mediators in their counties. Lack of availability of mediators suggests a potential barrier utilizing alternative dispute resolution. In fact, across the counties, availability ratings are correlated with mediation ratings. The results of these items are displayed in Figure 3. Higher scores reflect greater perceived availability of mediators.

Some of the smaller, rural counties do not have many, if any, Rule 31 mediators based (primary work location) within the county. Haywood County, for example, has two Rule 31 mediators. Tipton has no Rule 31 family mediators prompting the court to appoint attorneys as special masters. Even though many Rule 31 mediators are willing to work in other counties other than their “home” county, the added travel time and expense to do so clearly serves as a barrier.

Further, in some of the smaller counties such as Tipton and Campbell, there seems to be more negotiating among lawyers, rather than with mediators, in order to try to settle cases. In these counties, several mentioned that attorney agreement on a mediator is an issue and there is often a need to bring in an outside mediator in order to maintain neutrality. A respondent in Campbell noted that many family cases are settled “on the court house steps” just before for trial. While this ultimately gets the case settled and reduces some court costs, the potential for more timely resolution and improved costs savings exists with earlier utilization of mediation.

Figure 3. Respondents Ratings of the Availability of General Civil & Family Mediators



On the other hand, many respondents in larger more populous counties noted that the mediation market was “glutted” and had become a “cottage industry.” Many asserted that although there were many listed mediators, there were not enough “good” mediators.

Factors that Facilitate Mediation

The most commonly noted factors that facilitate mediation included positive, proactive judges, “good” attorneys who are experienced in mediation and recognize its value as a tool, Rule 31 and the Parenting Plan, local rules, and desired outcomes such as quicker settlement of disputes, reduced costs, and increased party control over settlements. Many who were interviewed observed that active court-based case management was positively related to the use of ADR. Several noted that case management practices such as status conferences and setting of trials dates often prompted mediation.

A “culture” of mediation was never explicitly mentioned but certainly implied. Rule 31 and the Parenting Plan have lead to greater numbers of attorneys with positive experiences with mediation and who are entering into mediation voluntarily as opposed to being court ordered. Several judges noted that they are ordering mediation less frequently now than in the past. This pattern is consistent with the assertion of McAdoo, Welch, and Wissler (March 2004) that judicial activism and mandatory mediation leads to increased voluntary used of mediation by attorneys. It is important to note that this pattern was not observed in all counties and across all courts within counties. Some judges clearly more actively encourage mediation than others.

Barriers to Mediation

The most frequently cited barriers to mediation were cost, negative attitudes of attorneys, lack of public awareness of mediation, unrealistic expectations of litigants, and lack of preparation by attorneys. Other common themes included not mediating in good faith and/or not having persons of authority “at the table” during mediation attempts. Respondents also mentioned turf issues, for example, competition between attorneys and mediators for billable hours. Lack of education about and experience with “quality” mediation was highlighted as a barrier. Several of these issues are discussed in more detail starting on p. 12 of this report.

Cost was most often seen as a barrier in family mediation. One judge saw mediation as an added expense: “Most people can't afford to get divorced, let alone the cost of mediation.” Further, it was more often perceived as an issue when mediation started later in the litigation process thus adding to the perception that mediation was an extra step and when attorneys negatively “couched” mediation as simply a requirement.

Some respondents noted barriers such as domestic violence (DV), language, subrogation, and liability issues as barriers to mediation. The vast majority of respondents noted that mediation is not appropriate in some cases. Domestic violence is one such “barrier” highlighted by many judges, attorneys, and mediators in this study. Whereas some felt domestic violence precluded a case from mediation, others pointed to the high incidence of domestic violence in cases to underscore the need for better education and training in this area. DV training was one of the most frequently cited training needs by judges, clerks, and mediators. The literature suggests that mediation involving DV is possible and can be successful given appropriate mediation training.

Differences Across Counties

Differences across the counties also are highlighted across this report. Counties differ in the resources they have, number of cases, availability of judges, availability of community resources (e.g., VORPs, community mediation or legal services, etc.), and so on and so on. The legal systems in the major metropolitan areas, mostly notably Memphis, Nashville, and Knoxville, are starkly different than those in the more numerous rural counties of Tennessee.

Most respondents recognized that factors that facilitate ADR as well as barriers to ADR differ across counties. The most frequently cited examples included local rules, judges’ attitudes and preferences, and attorneys’ views. Mediators and attorneys who practice across multiple counties noted some contrasts. Generally, the north-eastern region of the state was noted as “more advanced” as well the more urban areas. Judges were recognized as the most prominent influence in facilitating ADR followed by local rules and attorneys. Interestingly, attorneys were noted not only to be a major positive influence in the use of ADR, but also, potentially a barrier.

Support of Mediation

Respondents were asked to rate attorney and judge support for mediation on a 10-point scale ranging from 1, “not at all supportive,” to 10, “actively promotes mediation.” As shown in Figures 4 and 5, support of mediation by attorneys and judges was perceived as being fairly

Figure 4. Support of Civil Mediation

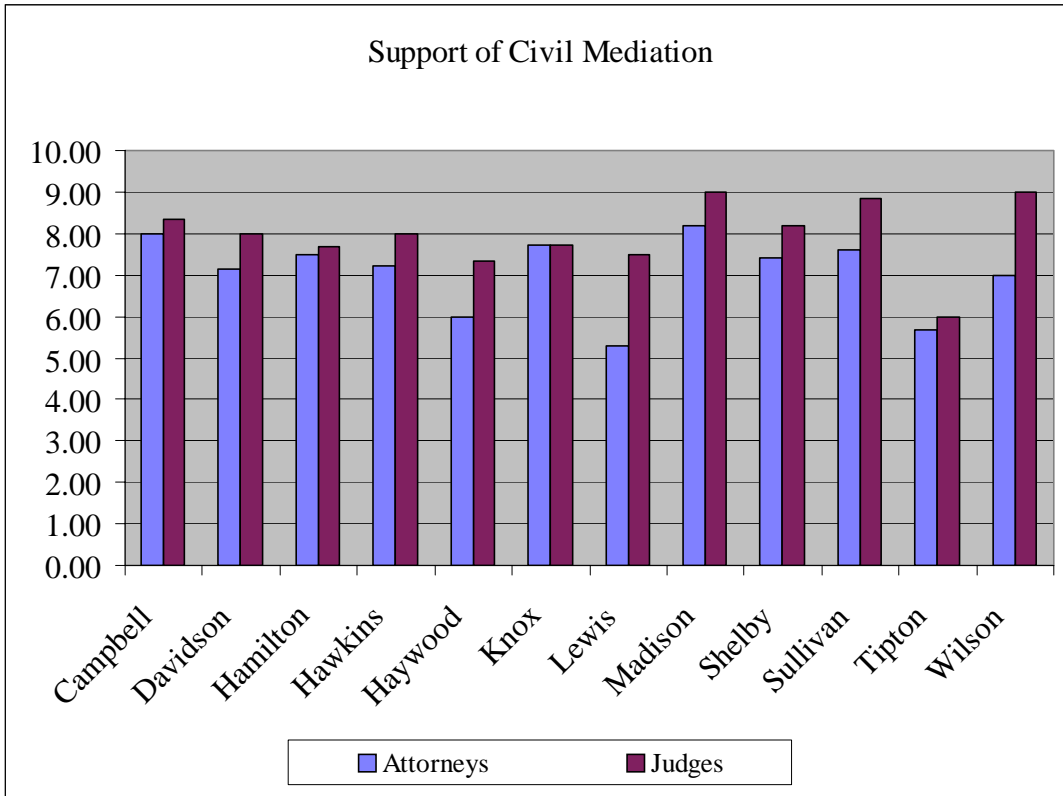
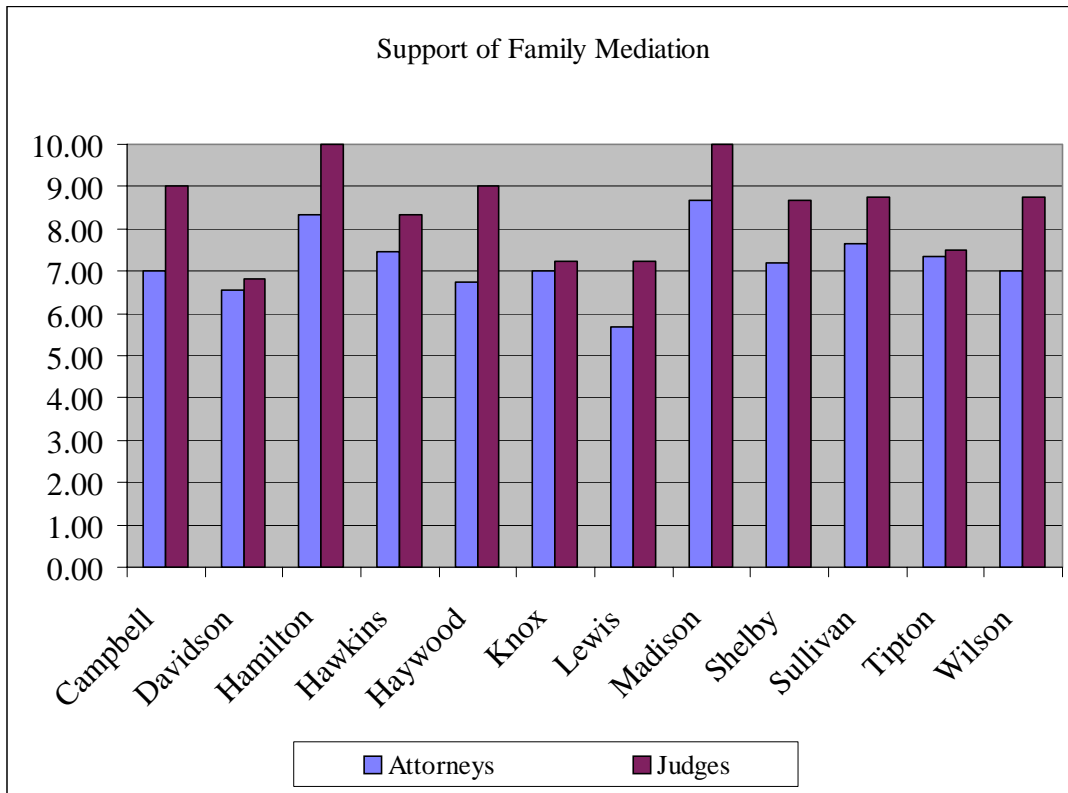


Figure 5. Support of Family Mediation



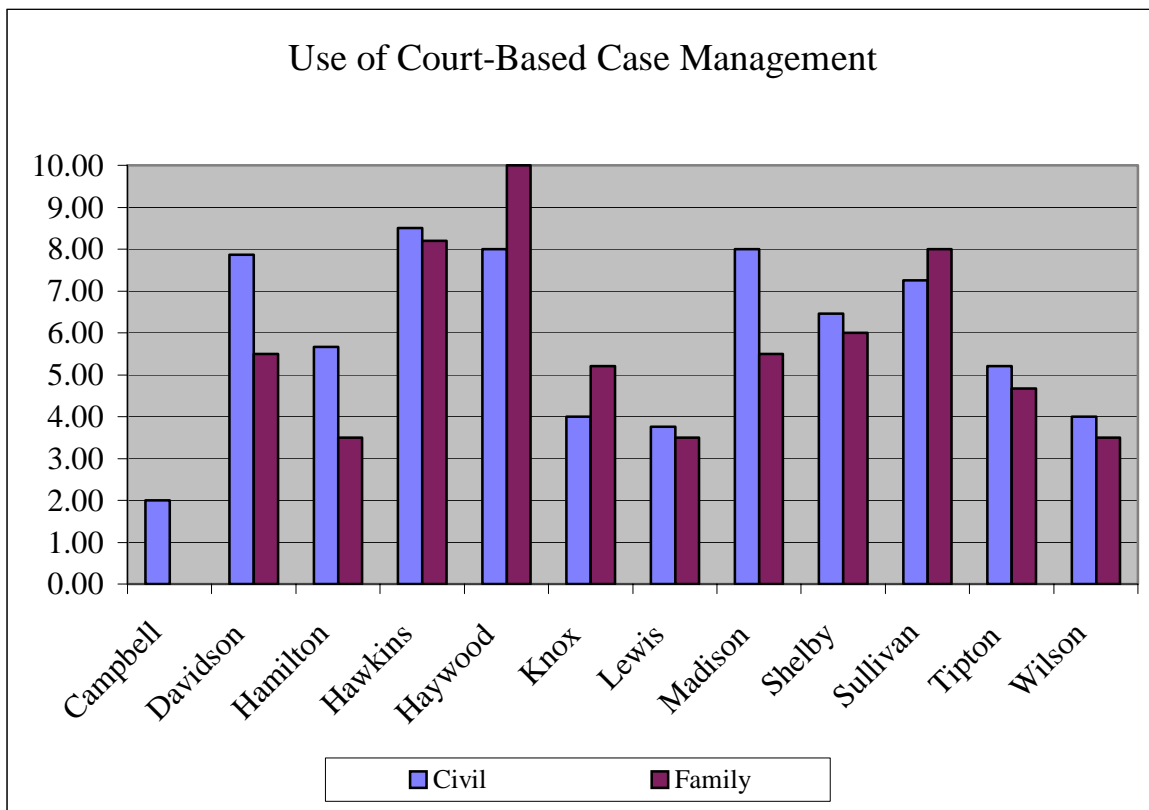
strong overall but clearly varied by county. Respondents generally perceived judges as stronger supporters of mediation than attorneys. This pattern was slightly more accentuated in family mediation as opposed to general civil mediation.

However, not all judges and attorneys actively support mediation. Many respondents noted that “old school lawyers” or those inexperienced with mediation drag their feet or refuse to mediate. Only one person that was interviewed for this evaluation, an attorney, was negative about mediation in general. The attorney stated that there is too much of it, and he didn’t feel it was serving a real purpose. He stated he “uses it because he has to not because he thinks it is good for litigants.”

Court-Based Case Management

Respondents were asked to rate the extent that court-based case management practices were used within the counties to control the timing/disposition of cases that were filed. Figure 6 shows the respondents’ case management ratings by county and type of mediation (general civil vs. family). Higher scores indicate respondent perceptions of more frequent and/or active case management practices used by the court.

Figure 6. Use of Court-Based Case Management



The majority of informants saw a strong connection between case management and the use of mediation. That is that mediation is encouraged by case management primarily because case management keeps cases moving. Many respondents stated that cases are unlikely to be mediated until identification of the issues and adequate discovery had been completed. Scheduling orders and status conferences tended to prevent attorneys from sitting on cases too long. Across counties, the majority of respondents indicated that they would like to see additional case management practices implemented in their counties.

The interviews highlighted the tremendous variance across the state in approaches to case management. By in large, case management practices are implemented and driven by the preferences of individual judges. Some judges impose or initiate very little to no management of their dockets while others use a combination of approaches. Respondents reported that differing case management practices and local rules across counties made practicing across counties and jurisdictions cumbersome and often inefficient. Some suggested that the courts make overviews of local rules more readily available. Some suggested that the AOC disseminate best practices in case management, provide additional training to judges and court staff, and consider setting minimum statewide standards that should be adopted.

Common Themes and Issues Raised by Respondents

Within this section, a number of common themes or issues that were raised by stakeholders who were interviewed are discussed in more detail. As previously mentioned, this report describes the perceptions of judges and nominated “expert” respondents in twelve counties in Tennessee. However, no attempt is made to value respondents’ perceptions nor make recommendations related to their reports as that is assumed to be a follow-up process that will be undertaken by the ADR Commission and AOC. It is important to note that the majority of mediation that occurs in Tennessee and that was referenced by those interviewed is not Rule 31 mediation by virtue of not being court-ordered. However, it also is important to highlight that many counties, courts, and/or judges have local written or unwritten rules that the stakeholders interpreted as “mandatory” mediation, especially in family cases. A summary of local written rules and comments by judges can be found in Appendix A.

ADR as Attorney Driven

Stakeholders who were interviewed overwhelmingly perceived that mediation across the state is currently attorney driven. The exceptions related to specific judges or local rules. Some of those interviewed suggested that there was nothing wrong with mediation as attorney driven while others suggested that the bench needs to take more control.

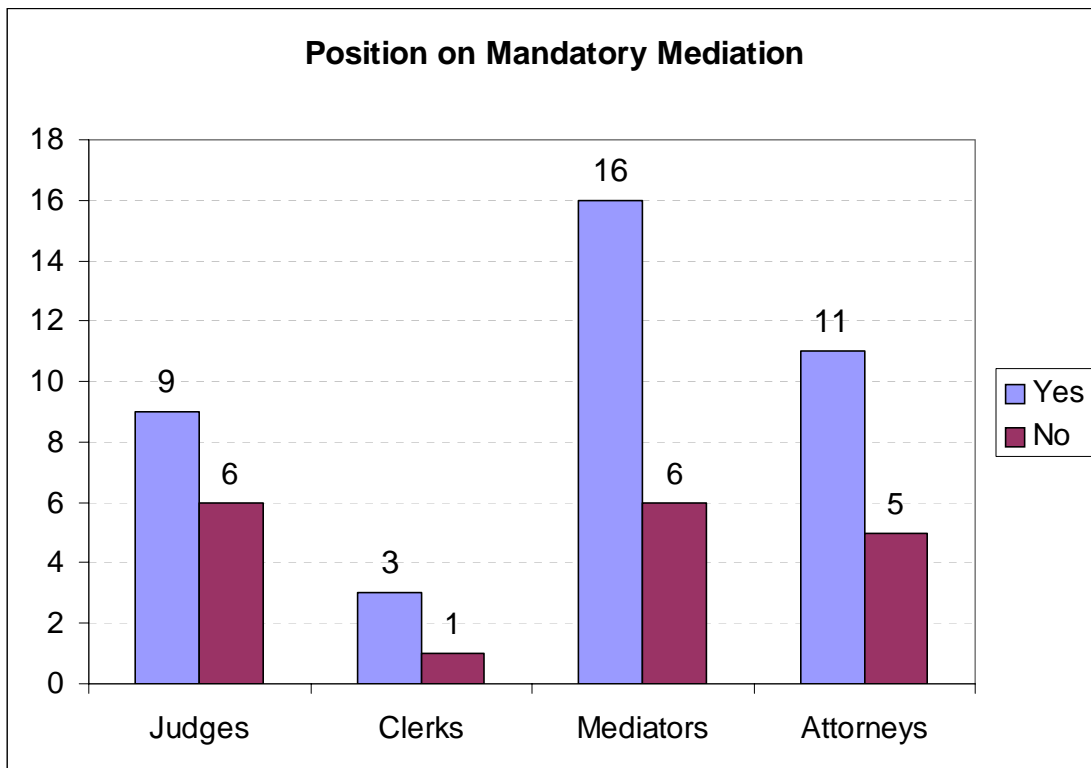
Many respondents noted that attorneys serve as the gatekeeper and that they “define” what mediation is and how the process occurs primarily by selecting mediators who “fit the mold.” One respondent described the system as a “dysfunctional family” with lawyers allowed to control the civil calendars. Some suggested that attorneys over all did not have a comprehensive understanding of mediation – that they tended to define successful mediation narrowly as “case-closed” and minimize or ignore the other potential benefits. Others suggested that attorneys sometimes abuse the mediation process for their own gain, for example, to help in discovery, to get help on their cases, or to communicate bad news to their clients.

Court-Ordered versus Voluntary Mediation

Rule 31 does not make ADR mandatory but gives courts discretion to make ADR or mediation mandatory (Section 3, b). A number of stakeholders viewed some types of mediation as currently “mandatory,” particularly mediation related to family cases. Although local written rules may suggest or strongly encourage ADR (see summary in Appendix A), perhaps the effect of active judicial case management, other attorneys practices, and other factors has led some mediators and attorneys to view mediation as mandatory. In particular referencing contested divorce cases involving minor children, many stakeholders reported that mediation was “mandatory.” The responses of stakeholders suggested that many tend to generalize and/or oversimplify state rules, written local rules, and unwritten rules of active judges.

Over two-thirds of the stakeholders who specifically discussed whether mediation should be mandatory in principle ($n = 57$), stated that mediation should be mandatory, at least in some types of cases, with judicial authority to waive the requirement on a case-by-case basis. Mandatory mediation was viewed as a way in which to strengthen judicial case management. As previously mentioned, because the interviews were not directive, not all respondents discussed this issue of voluntary versus court-ordered mediation. The breakdown of respondents by their profession is depicted in Figure 7.

Figure 7. Respondent Support of Mandatory Mediation ($n = 57$)



As mentioned, some counties presently have local written rules that require mediation in certain cases (e.g., construction contract disputes in Sullivan & Hawkins counties) or specific judges who strongly push mediation. In many cases, attorneys enter into mediation voluntarily before a

court order is issued. Respondents practicing in these counties or courtrooms did not express negativity about mediation relative to respondents referencing other counties and/or courtrooms. The only criticisms that were voiced regarding mandatory family or civil mediation were related to judges who reportedly did not consider exceptions and/or waive the requirement for mediation if just cause was argued.

In a recent article about non-family civil matters, McAdoo, Welsh, and Wissler (March 2004, *GPSolo Magazine*) recently noted that mandatory mediation programs dramatically increase the utilization of mediation. Further, they claimed that mandatory referral does not decrease participant satisfaction or settlement rates.

Timing of Mediation

Many respondents suggested that mediation generally needs to occur earlier in the litigation process. Rule 1 of the Tennessee Rules of Civil Procedure requires “. . . the just, speedy and inexpensive determination of every action.” In contested divorce cases involving children, many suggested that the parenting seminar should be required to be completed earlier (i.e., within the first 30-60 days) and that mediation should be attempted soon after (e.g., in the first 90 days after) the completion of the parenting classes. In civil and family cases, mediation that occurs earlier in the process was reported to have greater potential of saving more client costs as well as court resources. Some noted a potential conflict of interest for attorneys because getting their clients into mediation earlier may cut billable hours. Mediators frequently commented that attorneys were often not adequately preparing their clients for mediation. Mediators suggested that attorneys should have an ethical obligation to inform parties of mediation and to adequately prepare them for mediation.

Some mediation programs in other states have successfully driven mediation utilization by implementing requirements that attorneys consider mediation and/or discuss mediation with their clients. Some stakeholders in this evaluation explicitly pointed out that attorneys have a duty to represent their clients zealously and that this means exploring all available tools and options in their clients’ best interest and therefore discussing mediation as an option with their clients early in the life of the case.

Mediation Style & Approach

Several stakeholders commented that there is a restriction of tools or approaches used by many mediators. That is that most often, mediators tended to rely on one approach to mediation and to underutilize others. Although the vast majority of mediators commented that the style and approach is best determined on a case-by-case basis, the bulk of mediation that is occurring is evaluative and directive. One person commented that it was “. . . best to put people in different rooms . . . tell clients the real legal issues presented.” One attorney commented that he looked for a mediator who is more of a messenger and was able to be frank with the parties. Many attorneys said they preferred and mediators stated they most often used the shuttle method in which parties are separated.

Some of those interviewed suggested that the tendency to “over rely” on this or any one method was a result of attorney pressure as well as inadequate training and/or restricted experience of mediators.

Mediators stated that they received the vast majority of their referrals from attorneys. Many said that attorneys “demand” a directive and evaluative approach because it is quicker and offers more opportunity for discovery and case building. The statement of one domestic attorney who was interviewed was illustrative of these perceptions. The attorney commented that a lot of mediators waste too much time – “I don’t have time for garbage.”

Rule 31 Language

A dozen or so respondents suggested refinements to the language of Rule 31. Several suggested modifications requiring good faith negotiations; some suggested that the immunity provisions be extended to apply to all Rule 31 Neutrals regardless of whether the mediation was court-ordered; and several suggested that clarifications were needed regarding the enforceability of mediation agreements.

Respondents frequently brought up issues about parties not mediating in good faith. This barrier was most often related to general civil mediation and often in cases involving insurance agencies when persons with adequate decision-making authority were not “at the table” or participating in the mediation. Some suggested that this information needed to be reported to the Court.

The American Bar Association’s Resolution of Good Faith Requirements (August, 2004) pointed out that the Uniform Mediation Act (UMA) prohibits disclosure of information relating to judgments of bad faith mediation. The resolution suggested that requirements about mediation in good faith threaten the central tenants of mediation, self-determination, mediator impartiality, and confidentiality. Currently, Rule 31 does not require mediation in good faith – only that the parties appear.

Standards of Professional Conduct and Ethics Related to Rule 31

This theme clearly relates to others topics that are discussed in this section. Frequently, respondents suggested there was a need for the Commission to provide more concise and clear policy statements regarding standards of professional conduct for mediators as well as ethical issues in mediation.

Some judges and other informants reported having received some feedback that clients participating in mediation have felt “strong-armed” or forced to settle. While this evaluation did not evaluate what led to those reports, the feedback does suggest the need for closer examination of the circumstances that may lead to such perceptions.

Some mediators commented that attorneys want them to provide opinions as to the values of the case or provide predictions of what a judge or jury may do. Some felt that this violated ethical standards. Rule 31 states that “. . . while a Rule 31 Neutral should not offer a firm opinion as to how . . . will resolve the case, a Neutral may point out possible outcomes of the case and may indicate a personal view of the persuasiveness of a particular claim or defense” (Section 10, b, 3).

The draft policy statement of the Association of Conflict Resolution (Sept., 2004, *The Unauthorized Practice of Law*) states that providing an opinion of worth or judge/jury actions violates the tenet of neutrality in mediation. In addition, it suggests that the actual content and communication of mediators’ opinions *may infringe* upon the voluntary nature of the mediation

process. Cases in which the parties have unequal distribution of power and/or resources may be particularly vulnerable to losing aspects of the voluntary nature of the process.

Accountability and Reporting

A common theme, particularly across judges, was the need for increased measurement and reporting of the use and outcomes of ADR. Many acknowledged that they currently have no idea of how often ADR/mediation is used. Mediators also acknowledged the need for more information about the use and outcomes of mediation. Some courts have attempted local measurement as have some VORPS.

Many of those interviewed requested more information from the AOC about “listed” mediators. Currently, a mediator can be listed for a number of years without having every conducted a mediation. Others recommended additional accountability of Neutrals through a certification process rather than simply a listing only on degree and completion of a training course.

Equal Access to Mediation by All Litigants

Some litigants have restricted access to mediation and are discussed in the following sections.

Availability of Pro Bono or Reduced Fee Mediation Services

Many respondents asserted that low-income, pro se litigants, and/or litigants living in rural areas do not have equal access to mediation resources and stated that more attention needs to be devoted to ensure equal access to mediation services. Various ideas were suggested including the following:

- Most felt that parties should be responsible for some portion of the cost to encourage responsibility and ownership of the process and resulting outcomes;
- Attorneys lessening their fees or not attending mediation sessions – several attorneys and mediators specifically stated attorneys can often derail the mediation process and simply runs up parties’ costs;
- A more user-friendly, reliable legal aid, indigent fund process;
- A “clearinghouse” of mediators who volunteer to do pro bono or reduced fee mediation at particular sites according to a schedule;
- Mediators available at courthouses to provide immediate access to mediation in cases where all parties have appeared – this is seen as much more efficient than trying to reassemble parties at a later date thus requiring more court resources.

Cultural Issues & Language

The minority population in Tennessee is increasing. Those interviewed felt that resources (i.e., written materials and bilingual mediators) currently are inadequate to provide mediation services to minority groups. Respondents reported seeing more domestic violence within the Hispanic population. Some pilot projects have recently been funded to address some of these issues but more pilot projects as well as educational training to attorneys, judges, and mediators is desired.

Non-married couples with Children

The Parenting Plan is widely viewed as very positive. However, non-married couples with children who are arguing custody, visitation, and child support issues generally do not have access to mediation. Judges, parenting plan coordinators, VORPs staff, family mediators, and others widely agreed that this is a segment of the population that is underserved. One of the General Sessions Judges in Madison County formally had access to mediation services through a pilot project that had recently ceased. She strongly believes, however, that such mediation is needed. She noted that many of these parties have very little money, few resources and property, but needed mediation particularly related to child custody and visitation issues. She has seen a major benefit in not arguing these issues in front of a courtroom where often parties are hesitant to divulge important considerations such as abuse or drug use.

Education and Training

One frequently cited need was for additional training and education for judges and attorneys related to mediation and Rule 31 as well as improvement of available CLEs for listed mediators. Mediators, in particular, reported the need for more advanced training and CLE options. Informants suggested that training for family mediators should increase the amount and depth of training related to domestic violence (i.e., more than 4 hours needed). Several judges estimated that some sort of domestic violence occurs in 40-50% of all divorce cases.

In addition, mediators expressed the need for increased training related to legal issues for non-attorney mediators as well as issues of cultural competency and ethical issues. Further, formal opportunities for mentoring and cross-training were requested. Several expressed interest in co-mediation models, especially for use in family cases, utilizing partnerships between attorneys and psychologist/therapists. All groups requested more frequent seminar options to be held in individual regions.

Community Awareness and Understanding of Mediation

One major barrier to mediation is the lack of general public knowledge and understanding of mediation. All groups suggested that the AOC initiate efforts through marketing and PR efforts to collaborate with local media and non-profit groups, as well as with large business to promote mediation.

Many suggested the need for printed materials and videos that convey the basics of mediation that could be accessed through clerks' offices when a case is filed as well as through attorneys' offices. Of particular concern were pro se litigants who have no other source of this type of information. These materials likely will encourage better understanding of mediation, a more positive approach, and earlier attempts at mediation.

References

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Tennessee Supreme Court. (Sept. 2001). Amendment to Supreme Court Rule 31, Regarding Alternative Dispute Resolution. http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/TNRulesOfCourt/06SUPCT25_end.htm#31

Note: All local district rules can be accessed from: <http://www.tsc.state.tn.us/geninfo/courts/LocalRules/LocalRules.htm>

Appendix A. Written Local Rules Related to Alternative Dispute Resolution in the Twelve Counties *

| County | Judicial District | Civil | Family | Other |
|----------|-------------------|---|--|--|
| Sullivan | 2 nd | Construction contract disputes “. . .shall first be submitted to mediation before being set for trial.” (Rule 13) | Domestic cases involving minor children: All parent are required to attend parenting education and mediation educational seminars. (Rule 16) | |
| Hawkins | 3 rd | Construction contract disputes “. . .shall first be submitted to mediation before being set for trial.” (Rule 29) | Circuit & Chancery (Rule 28): “At any time during the divorce proceedings, parents may choose to participate in a method of ADR” Duty of clerks: to disseminate Parent Plan packet that includes parents’ guide to mediation and list of mediators available in district. Duty of attorneys to furnish copy of packet to clients and explain & assist clients in mediation process. Submit order to mediate or waiver request if no agreement on PP w/in 120 days. | |
| Knox | 6 th | | Circuit, Div. IV: Defendants who dispute temporary PPs may contact the CMC to begin ADR. (Rule 28) In post divorce filings, the previous plan will continue until education seminar and ADR is completed or waived. (Rule 29) | General Sessions: For all civil and selected criminal cases, persons will be informed of mediation option. (Rule 11) |
| Campbell | 8 th | | | |
| Hamilton | 11 th | | Will comply with all State Parenting Plan legislation. (Rule 10) | |
| Wilson | 15 th | | Circuit & Chancery: “In order to facilitate the expeditious hearing of case, to limit the expense of litigation and to enhance the goals of the judiciary all litigants are encouraged to seek mediation of cases.” In reference to scheduling mediation, mentions judicial settlement conferences only. (Rule 23) | |
| Davidson | 20 th | Circuit: A questionnaire concerning ADR will be sent to each filing party or served with the complaint. Each party will send the form back indicating whether they wish to engage in an ADR procedure. This response form will then be routed to the individual judge. (Rule 27.06) | | |

| County | Judicial District | Civil | Family | Other |
|---------|-------------------|-------|--|---|
| Lewis | 21 st | | May mediate contested temporary PP. When asked to set trial date, will consider whether mediation attempted and if appropriate. (Rule 12) | |
| Tipton | 25 th | | Chancery: Contested divorces, alimony, child support cases not set for trial until mediation and at least one pretrial conference with Chancellor. Attorneys must be present. Mediation waived only in extraordinary circumstances. If mediation is unsuccessful, cases will go to settle conference. If pretrial conference is unsuccessful, “. . . proceed, in good faith, to mediation . . .” “The mediator is to file a report, and if the mediation was unsuccessful, the mediator is to indicate if a party did not cooperate and did not participate adequately in the proceedings.” (Rule 17) Role of Attorneys in ADR: “Attorneys are expected to act as advisors and counselors and not as litigators.” | |
| Madison | 26 th | | Circuit: “Upon agreement of the parties or upon order of the court any matter may be referred to a Mediator . . .” (Rule 30) Chancery: same text (Rule 60) | |
| Haywood | 28 th | | | |
| Shelby | 30 th | | | Probate: In contested cases, the court encourages parties to attempt to resolve their differences through mediation. Chancery: “in contested divorces at least 15 days prior to the hearing attorneys shall exchange settlement offers.” (Rule 14) |

Note: Blank cells indicate that local written rules did not specifically mention ADR/mediation.