REPORT OF THE

TENNESSEE SUPREME COURT COMMISSION ON DISPUTE RESOLUTION

June 1994

TENNESSEE SUPREME COURT COMMISSION ON DISPUTE RESOLUTION

REPORT OUTLINE

EXHIBITS

REPORT SUMMARY

This report consists of four parts:

Part I describes the establishment of the Tennessee Supreme Court Commission on Dispute Resolution and the manner in which the Commission has proceeded to accomplish its mission.

Part II includes the Commission's findings and recommendations with regard to court administrative and financial support.

Part III includes the Commission's findings and recommendations with regard to case management.

Part IV includes the Commission's findings and recommendations with regard to alternative dispute resolution.

I. ESTABLISHMENT AND WORK OF THE COMMISSION

On January 24, 1992, the Tennessee Supreme Court entered an Order Establishing Commission on Dispute Resolution. Pursuant to that Order, the Commission was charged with conducting "a study of dispute resolution in Tennessee with a view toward the use and implementation of procedures to expedite and enhance the efforts of the courts to secure the just, speedy, and inexpensive determination of disputes."[1] The Order directed the Commission to consider procedures directed toward several specified goals. The Order charged the Commission with presenting a report, no later than June 30, 1994, with respect to:

(a) the potential benefits of various case management and alternative dispute resolution techniques;

(b) any recommendations the Commission may feel appropriate regarding the adoption of particular case management and/or alternative dispute resolution techniques;

(c) any recommendations the Commission may feel appropriate regarding changes in procedural rules and/or legislation; and

(d) any recommendations the Commission may think appropriate for the improvement of the administration of justice in Tennessee.

Pursuant to the Order, the Commission was constituted and first met on May 5, 1992 in Nashville.[2]

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[1] See Order, Exhibit 1.

[2] See List of Commission members, Exhibit 2, and May 5, 1992 Minutes, Exhibit 3.

Following a training session on July 17, 1992, the Commission adopted the following Mission Statement:

> The Commission understands its charge to be to prepare a report regarding the possibility of improving civil dispute resolution in Tennessee by means of initiatives falling into three distinct, but related, areas:
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> 1. use of innovative case management techniques in the context of traditional litigation; and
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> 2. use of new techniques, including ADR techniques; and
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> 3. financial and administrative support for the courts;
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> and, in the process of preparing this report, to engage in dialogue with members of the bench and bar to the end that the Commission's report may encourage consensus in the community with regard to these issues.[3]

The Commission studied the three areas identified in the Mission Statement through subcommittees identified as Case Management, Alternative Dispute Resolution, and Financial and Administrative Support.[4] In addition, with the valuable assistance of the Administrative Office of the Courts, the Commission conducted a survey of state court civil trial judges aimed at determining their current practices and attitudes about the matters before the Commission.[5]

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[3] See October 30, 1992 Minutes, Exhibit 4.

[4] See October 30, 1992 Minutes, Exhibit 4.

[5] Exhibit 5 is a report of that survey.

II. COURT ADMINISTRATIVE AND FINANCIAL SUPPORT

A. Introduction

The feasibility of improving the Tennessee civil justice system through use of modern case management and dispute resolution techniques will to at least some extent depend upon the resources available to the courts. The Commission, therefore, studied the current state of administrative and financial support for Tennessee civil trial courts.

Following the formation of this Commission, the Supreme Court appointed the Commission on the Future of the Courts in Tennessee, a group charged with taking a comprehensive look at the administration of and delivery of justice in Tennessee now and into the 21st century.

B. Findings

1. Diffusion of Authority and Funding

Although the judicial system is a co-equal branch of state government, it has little control over its own resources. As a consequence, the Tennessee court system is characterized by gross disparity in resources among the courts. Some judges have law clerks, but many have no law clerks or any comparable assistance. Some judges have the services of a full-time secretary, while others share a secretary's services with other judges, and some have no secretary at all. Some courts have state-supported law libraries and access to computerized legal databases, while others do not even

have a copy of the Tennessee Code. Two of the judges responding to the Commission's Survey even cited a need for better access to copy machines.

This lack of uniformity results from a system in which authority over, and financial support of, courts, judges and court clerks is dispersed between state and local government. Funding sources for the courts are wildly diffuse and inconsistent. Courts in different counties do not receive comparable financial support. Resources, such as office space and equipment, are determined by the county in some cases and by the state in others. Because judges and court clerks are independently elected officials, lines of authority and accountability are unclear and cooperation is sometimes a function of personal inclination.

2. Information Deficit

Only limited information concerning caseloads, case management practices, and judicial administration, generally, is available for purposes of evaluating the system, and what data is available is largely incomplete or unreliable.[6]

3. Inadequate Resources and Technology

Resources are inadequate in many courts and existing technology is not compatible across the state. The Commission Survey reveals that the resources most judges lack are computer support, including Westlaw or Lexis, secretaries, and law clerks. In addition, judges indicate that they need better court security, office machinery considered standard in a modern legal practice (such as copy and fax

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[6] Cf. Tennessee Judicial Council Weighted Caseload Report, January 24, 1992, 8-13, 23.

machines), more and better office and courtroom space, court administrative staff, and technological support.[7]

4. Role of the Administrative Office of the Courts

The Administrative Office of the Courts has begun to make progress, within the current system, in achieving parity of resources among the courts, in providing the courts with compatible and up-to-date technology, and in data collection.

C. Recommendations

The Tennessee civil justice system needs long-range planning to achieve:

1. a uniform system for funding and administration in place of the current patchwork;

2. provision of additional resources, including staff, equipment, information support and technology; and

3. parity of resources among the judicial districts.

The work of the Administrative Office of the Courts and the Commission on the Future of the Courts in achieving these goals should receive maximum support.

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[7] Commission Survey, response to question 21. See also Judicial Conference Budget Committee recommendations for 1993, which include requests for additional staff, equipment and training.

III. CASE MANAGEMENT

A. Introduction

Case management refers to the role of the judge or chancellor, as distinct from attorneys, in causing a dispute to move efficiently to final resolution. Recently, judges and lawyers have given increased attention to active judicial case management, including devices such as pretrial, scheduling, and settlement conferences, discovery limits and deadlines, innovative methods of hearing and disposing of motions, monitoring cases, and use of sanctions.

B. Findings

1. Benefits of Case Management

Judicial intervention through case management devices is likely to reduce both the duration and expense of litigation. Costs are reduced when judicial management causes settlement of a case at an earlier stage of the process, thus eliminating the transaction costs of motions and discovery that might otherwise have occurred. Costs and duration are also reduced when pretrial conferences succeed in refining issues, which in turn may reduce the number and extent of motions and discovery.[8] As the

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[8] Jaquette v. Black Hawk County, Iowa, 710 F.2d 455, 463 (8th Cir. 1983); Will, Judicial Responsibility for the Disposition of Litigation, 75 F.R.D. 117, 125 (1978); Terry Hackett, California Adopts New Case Management Rules to Reduce Delay, 75 Judicature 108 (1991); Maureen Solomon & Holly Bakke, Case Differentiation: An Approach to Individualized Case Management, 73 Judicature 17 (1989); Maureen Soloman & Douglas Somerlot, Task Force on Reduction of Litigation Cost and Delay, Judicial Administration Division, American Bar Association, Caseflow Management in the Trial Court (1987); and Lawyers Conference Task Force on Reduction of Litigation Cost and Delay, American Bar Association, Defeating Delay: Developing and Implementing a Court Delay Reduction Program (1986).

United States Supreme Court has observed, "One of the most significant insights that skilled trial judges have gained in recent years is the wisdom and necessity for early judicial intervention in the management of the litigation." Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 110 S. Ct. 482, 487 (1989).[9]

2. Federal and Tennessee Rules of Civil Procedure 16

Tennessee Rule of Civil Procedure 16 is not as effective in facilitating case management as Federal Rule of Civil Procedure 16, which was amended in 1983 to encourage and enable judges to manage litigation.[10] Tennessee continues to have a version of rule 16 like that in the original 1938 federal rules. The 1983 amendments to Federal Rule 16 were designed to authorize judges to manage the entire pretrial phase of litigation, rather than merely to address the conduct of the trial. As the 1983 federal Advisory Committee noted:

> Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.[11]

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[9] One particularly innovative technique suggested to the Commission was the use by judges of deferral registries in cases such as asbestos and silicon implant cases. Time constraints prevented the Commission from giving this issue sufficient study. However, the Commission believes the suggestion is worthy of in-depth consideration and recommends that the Supreme Court refer the study of deferral registries to either the Commission on the Future of the Courts or the Supreme Court Advisory Committee on Civil Procedure.

[10] The December 1, 1993 amendment to Fed. R. Civ. P. 16, which harmonized the rule with new federal "mandatory disclosure" discovery rules, is not suitable for Tennessee at this time.

[11] Fed. R. Civ. P. 16, advisory committee note (1983). See also Brookings Institution, Task Force Report, Justice for All: Reducing Costs and Delay in Civil Litigation 14-27 (1989).

Several features of Federal Rule 16 are significantly different from the Tennessee rule:

a. While the Tennessee pretrial conference is directed primarily at trial efficiency, the broader specified objectives of the federal pretrial conference are:

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation, and

(5) facilitating the settlement of the case.[12]

b. Suggested subjects for discussion at federal pretrial conferences were expanded in the 1983 amendment to include:

(1) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(2) the disposition of pending motions; and

(3) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.[13]

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[12] Fed. R. Civ. P. 16(a).

[13] Fed. R. Civ. P. 16(c).

case carefully and realistically in response to a settlement proposal, yet is also realistic and fair, would encourage earlier and more meaningful settlement discussions and also facilitate alternative dispute resolution.

5. The Need for Flexibility in Case Management

Effective and efficient case management requires flexibility. Differences in complexity and subject matter of lawsuits present the need for different types and amounts of judicial involvement. Tennessee judges who use case management devices indicate that their use varies with the complexity and subject matter of the case.[18] For the most part, judges know best how to manage particular cases, and should not be required to adopt particular management practices in particular cases. They should, however, be given more explicit authority, resources, and encouragement to utilize effective management practices.

6. Case Monitoring

Case monitoring is any device by which a court acts to dispose of matters on its docket without waiting for the parties' initiative. There is evidence that case monitoring can be used to ensure that cases are proceeding to disposition and that deadlines are being observed.[19] Tennessee judges vary widely in how frequently they monitor cases and in the methods they use to do so. While no amount of statistical support will insure vigorous and effective case management, effective case

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[18] Commission Survey, responses to questions 3, 5, 6, and 18.

[19] Marcia L. Goodman, Effective Case Monitoring and Timely Dispositions: The Experience of One California Court, 76 Judicature 254 (1993). See also, authorities cited at footnote 8 supra.

monitoring can be made easier if courts have ready access to information about pending cases and motions.[20]

7. Judicial Attitudes

Many Tennessee judges are amenable to case management. In their responses to the Commission survey, roughly half of the judges indicated that they currently use some case management devices, and an additional number indicated that they would do more case management if resources permitted.[21] Approximately one-third of the judges indicated that an amended Rule 16 would assist them in case management.[22]

C. Recommendations

1. Additional Resources and Training for Trial Judges

Provide Tennessee judges with additional resources and training to enable them to make effective use of case management and monitoring devices.

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[20] For example, the amount of support necessary to provide such information depends upon the individual court's caseload. The range of perceived need for statistical support for this purpose in Tennessee is indicated by the responses to the Commission Survey in which 65% of judges from the four largest single-county districts indicated that they would be assisted by better statistics about their dockets, while the positive response to this item was only 35% of judges from multi-county districts and 0% of judges from small single-county districts. Commission Survey responses to question 21(b).

[21] Commission Survey, responses to question 2.

[22] Commission Survey, responses to question 21(e).

2. Amend Tennessee Rule of Civil Procedure 16

Tennessee Rule of Civil Procedure 16 should be amended as follows:

Rule 16. SCHEDULING AND PLANNING, PRETRIAL, AND FINAL PRETRIAL CONFERENCES AND ORDERS.

Rule 16.01. Scheduling and Planning Conferences and Orders.

In any action, the court may in its discretion, or upon motion of any party, conduct a conference with the attorneys for the parties and any unrepresented parties, in person or by telephone, mail, or other suitable means, and thereafter enter a scheduling order that limits the time:

(1) to join other parties and to amend the pleadings;

(2) to file and hear motions; and

(3) to complete discovery.

The scheduling order also may include:

(1) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(2) any other matters appropriate in the circumstances of the case.

A schedule once ordered shall not be modified except by leave of the judge upon a showing of good cause.

Rule 16.02. Pretrial Conferences; Objectives.

In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to participate in a pretrial conference or conferences in person or by telephone, mail, or other suitable means, for such purposes as:

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) encouraging more thorough trial preparation; and

(5) facilitating the settlement of the case.

Rule 16.03. Subjects to be Discussed at Pretrial Conferences.

The participants at any conference under this rule may consider and take action with respect to:

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents that will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6) the advisability of referring matters to a master;

(7) the possibility of settlement or the use of extrajudicial procedures, including alternative dispute resolution, to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or a representative with authority to settle the action be present or reasonably available by telephone in order to consider possible settlement of the dispute.

Rule 16.04. Final Pretrial Conference.

Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The court may order the participants at any such conference to formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the

attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

Rule 16.05. Pretrial Orders.

After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only for good cause shown.

Rule 16.06. Sanctions.

If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37.02(2). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Commission Comment

The revisions here are similar to the 1983 revisions to Fed. R. Civ. P. 16, which were designed to make the rule more effective in encouraging and enabling judges to manage the pretrial stages of litigation. Subsection 16.01 provides for scheduling and planning conferences and orders, but unlike the federal rule, the judge's use of these devices is not mandatory. Subsections 16.02 and 16.03 expand the purposes of pretrial conferences beyond the current rule's focus on the trial to include various issues of pretrial practice. The final two sentences of subsection 16.03 clarify the authority of the judge to require the participation of persons having authority to enter into stipulations and, in an appropriate case, authority to settle the dispute. Subsection 16.03 recognizes that it is not always feasible, particularly when a governmental entity is a party, for the court to require the presence of a person with on-the-spot settlement authority, in which case the court may choose to require the participation only of a person who has a major role in recommending settlement. Subsection 16.06 specifies the judge's authority to sanction parties for failure to participate appropriately in pretrial conferences.

3. <u>Amend Tennessee Rules of Civil Procedure to provide for discovery of the fact and amount of liability insurance</u>

Tenn. R. Civ. P. 26.02(2) should provide:

<u>Insurance Agreements</u>. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment that may be

entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph an application for insurance shall not be treated as part of an insurance agreement.

4. Amend Tennessee Rule of Civil Procedure 68

Tennessee Rule of Civil Procedure 68 should be amended as follows:

Rule 68. OFFER OF SETTLEMENT

(1) In any civil action for damages, if a defendant files an offer of settlement that is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by the defendant or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and fees against the award. Where such costs and fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award. If a plaintiff files an offer of settlement that is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, the plaintiff shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the offer. If rejected, the offer is not

admissible in subsequent litigation, except for purposes of pursuing the penalties of this section.

(2) The making of an offer of settlement which is not accepted does not preclude the making of a subsequent offer. An offer must:

(a) be in writing and state that it is being made pursuant to this section;

(b) name the party making it and the party to whom it is being made; and

(c) state its total amount.

The offer shall be construed as including all damages that may be awarded in a final judgment.

(3) The offer shall be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section.

(4) An offer shall be accepted by filing a written acceptance with the court within 30 days after service of the offer. Upon filing of both the offer and acceptance, the court has full jurisdiction to enforce the settlement agreement.

(5) An offer may be withdrawn in a writing that is served before the date a written acceptance is filed. Once withdrawn, an offer is void.

(6) Upon motion made by the offeror within 30 days after the entry of judgment, or after voluntary or involuntary dismissal, the court shall determine the following:

(a) If a defendant serves an offer that is not accepted by the plaintiff, and if there is a voluntary or involuntary dismissal or if the judgment

obtained by the plaintiff is at least 25 percent less than the amount of the offer, the defendant shall be awarded reasonable costs, including investigative expenses, and attorney's fees incurred from the date the offer was served, and the court shall set off such costs and attorney's fees against the award. When such costs and attorney's fees total more than the amount of the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the award to the plaintiff.

(b) If a plaintiff serves an offer that is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorney's fees incurred from the date the offer was served.

For purposes of the determination required by paragraphs (a) and (b), the term "judgment obtained" means the amount of the net judgment entered as to each party, plus any post-offer settlement amounts by which the verdict was reduced.

(7) (a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

(b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:

(i) The then-apparent merit or lack of merit in the claim.

(ii) The number and nature of offers made by the parties.

(iii) The closeness of questions of fact and law at issue.

(iv) Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer.

(v) Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

(vi) The amount of the additional delay, cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

(vii) The circumstances of any dismissal.

(8) Evidence of an offer is admissible only in proceedings to enforce an accepted offer or to determine the imposition of sanctions under this section.

Commission Comment

This proposal represents a significant change in Tennessee law. It is designed to encourage parties realistically to evaluate the merits of a claim, while at the same time recognizing that no one can clearly foresee the eventual outcome of the case.

It is anticipated that this rule will be infrequently used in the early stages of litigation. The purpose of Rules 26-36 of the Tennessee Rules of Civil Procedure is to give the parties to litigation the opportunity to learn the strengths and weaknesses of the case in order to both evaluate the case and try it effectively. Likewise, the purpose of this Rule, and in particular the "good faith" provisions in Section 7(a), are designed

to permit fee- and cost-shifting if the recipient of the offer of settlement has been given the information necessary to evaluate the offer. Accordingly, it will be the unusual case in which an offer of settlement should be served with the complaint or with the answer because it is unlikely that the recipient of the offer will have been given information necessary to evaluate it. A party who makes an offer before his/her opponent has the necessary information risks a finding by the trial judge that the offer was not in good faith, thus wiping out the advantages provided by the rule. Prudent practitioners who seek to use this rule are encouraged to share with their adversaries the information in their possession that supports their legal and factual theories of the case so as to maximize both the likelihood of achieving a settlement or, if settlement is not reached, the likelihood of successfully using this Rule.

An offer of settlement pursuant to this Rule may be particularly useful after an unsuccessful mediation. Usually, at that stage of the litigation the parties have exchanged sufficient information to increase the likelihood of the making of a good faith offer.

IV. ALTERNATIVE DISPUTE RESOLUTION

A. Introduction

"Alternative dispute resolution" is a general term used to refer to dispute resolution procedures other than adjudication by a court. There are generally two basic ways in which parties resolve civil disputes -- adjudication and negotiation. In adjudication, the parties submit their dispute to a third person who decides upon a resolution. In negotiation, the parties work out the resolution themselves. ADR techniques are typically elaborations on one or both of the two basic types.[23]

It is probably true that the two most common forms of ADR are arbitration, an adjudicative device, and mediation, a form of assisted negotiation. In arbitration, which in a classic sense is binding, but in many contemporary court-annexed programs is non-binding, a neutral party receives presentations from the disputants and renders a decision. Arbitration differs from a court proceeding in a number of ways, including the degree of formality and flexibility involved in the disputants' presentations to the neutral. Non-binding arbitration provides the parties with an advisory decision that they may choose to accept, or it may otherwise facilitate a settlement. Mediation, on the other hand, is a non-adjudicative device in which a neutral party meets with the disputants both individually and together to encourage and facilitate their negotiation and resolution of the dispute.

> In mediation, decision making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in

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[23] Thomas R. McCoy, The Sophisticated Consumer's Guide to Alternative Dispute Resolution Techniques: What You Should Expect (or Demand) from ADR Services,

identifying issues and interests, fostering joint problem-solving, and exploring settlement alternatives.[24]

Other frequently used labels for various ADR devices include mini-trial, summary jury trial, early neutral evaluation, and moderated settlement conference. These labels are not used uniformly, however, and the same term may refer to quite different devices in different contexts. Methods of dispute resolution are ever-evolving, adding to the chaotic state of the terminology in this field. Generally, however, ADR devices can be understood as existing along a continuum from adjudication to negotiation, depending on the degree to which the neutral third party, rather than the disputants, directs the resolution of the dispute.[25]

The use of an alternative dispute resolution device may be entirely private, or it may result from a referral by a court, in which event it is known as "court-annexed" ADR. The Commission has studied the various forms of ADR, the approaches that other states have taken in adopting court-annexed ADR, and the current state of both private and court-annexed ADR in Tennessee. In addition, the Commission, after deciding to recommend a form of court-annexed ADR, considered various ethical, funding and administrative issues.

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[24] Fla. Stat. Ann. § 44.1011(2).

[25] See Dispute Resolution Continuum, Exhibit 6. For definitions of ADR devices, see proposed ADR statute, infra.

B. Findings

1. The Current Use and Demand for ADR

Both private[26] and court-annexed ADR are developing rapidly in the United States.[27] While ADR is not without its detractors,[28] the trend is clearly toward more, not less, ADR in our courts. This has and will continue to result, at least in part, from consumer demand. Although there is, as yet, little empirical data demonstrating that ADR does, in fact, result in a speedier, more expeditious, and less expensive resolution of civil disputes, there is no question that the public, and particularly the business community, thinks it does.[29] In addition, many judges have found ADR to

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[26] See 1993 Dispute Resolution Program Directory (ABA Section of Dispute Resolution), listing more than 400 dispute resolution programs operating across the country.

[27] The 1990-91 Addendum to the ABA Section on Dispute Resolution's 1989 Federal and State Legislation monograph reports that more than 100 new laws were passed by state legislatures during 1990 and 1991 to expand the use of alternatives to formal court proceedings in 25 new subject areas. The National Center for State Courts estimates that there are now as many as 1200 ADR programs in the United States to which state courts are making referrals. At least nineteen states (Arizona, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Maine, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Tennessee, Texas, Virginia, and Wisconsin) and the District of Columbia have adopted ADR legislation or established commissions or task forces to consider state connected ADR programs. See Elizabeth Plapinger and Margaret Shaw, Court ADR: Elements of Program Design, p. x, n.A6 (Center for Public Resources, 1992). Through the Civil Justice Reform Act of 1990, 28 U.S.C. § 101 et seq., court-annexed ADR is also becoming a fixture in the federal court landscape. See Cost and Delay Reform Plans Favor Use of ADR, 10 Alternatives, No. 4, p. 48 (April 1992).

[28] See, e.g., T. Eisele, Differing Visions -- Differing Values: A Comment on Judge Perkins' Reformation Model for Federal District Courts, 46 S.M.U. L. Rev. 1935 (1993); K. Dayton, The Myth of Alternative Dispute Resolution in the Federal Courts, 76 Iowa L. Rev. 889 (1991); T. Eisele, The Case Against Mandatory Court-Annexed ADR Programs, Judicature (June/July 1991); SPIDR, Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts (1991); Fiss, Against Settlement, 93 Yale L.J. 1073 (1984); Menkel-Meadow, Pursuing Settlement in An Adversary Culture: A Tale of Innovation Coopted or "The Law of ADR," 19 Fla. St. L. Rev. 1 (1991).

[29] See M. Galen, GUILTY! Too Many Lawyers, Too Much Litigation, Too Much Waste. Business is Starting to Find a Better Way, Business Week, February 13, 1992, at 60-66; Nider Releases Findings of National Survey on Public Attitudes Towards DR, Forum, Summer 1992 at 26; J. F. Henry, Built-In Protection Against the Litigation Blues," Wall St. J., July 22, 1991 at A8; The Defense Rests, The Economist, Nov. 10, 1990; D. Jacobs, Controlling Legal Costs With a Neutral Third Party, The New York Times, July 23, 1990.

be an expeditious and inexpensive means of resolving civil disputes.[30] Some studies also indicate that parties are more satisfied by resolution of their claims under ADR mechanisms than through formal adjudication.[31]

Under the auspices of the Center for Public Resources, over 500 of the country's largest corporations have signed a pledge obligating them to explore ADR to resolve disputes with other signatories.[32] Moreover, the Civil Justice Reform Act and the proliferation of commissions and task forces around the country indicate widespread belief among public policy makers -- legislators, governors and courts -- that ADR offers some hope for a civil justice system in which many people have lost faith.

Many communities across the country have established Community Justice Centers offering free or low-cost mediation for matters such as divorce and custody disputes, neighbor quarrels, landlord/tenant disagreements, and customer/merchant disputes. The most common dispute resolution method used by community justice centers is mediation, usually conducted by a trained, unpaid volunteer at little or no cost (or for a sliding scale fee) to the parties to the dispute. Studies have indicated that most walk-in disputes concern money or property and that 90% of disputes that

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[30] See United States v. Reaves, 636 F. Supp. 1575, 1579-80 (E.D. Ky. 1986) (Bertelsman, J.) (docket pressures and litigation expenses demand "more novel approaches" in "processing complex litigation"); Wayne D. Brazil, A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values, 1990 U. Chi. Legal Forum 303; Thomas D. Lambros, The Federal Rules of Civil Procedure: A New Adversarial Model For a New Era, 50 U. Pitt. L. Rev. 789 (1989); Thomas D. Lambros, The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, 103 F.R.D. 461 (1984).

[31] See infra notes 45-46.

[32] Jacobs, supra note 29. Most recently, the Center for Public Resources has sponsored a program to secure a pledge from leading law firms to designate lawyers who will be knowledgeable about ADR and "when appropriate" discuss such procedures with clients. A. DiResta, Law Firms Adopt Policy Requiring Their Litigators to Explore ADR with Clients, Litigation News, February 1993, at 3.

actually reach mediation result in mediated agreements.[33] Indications also are that complainants are highly satisfied with the outcome and procedure of community mediation.[34]

In the late 1970's, the U.S. Law Enforcement Administration Agency helped fund Justice Centers in Atlanta, Kansas City and Los Angeles. Dispute Resolution Centers in Houston link small claims courts, justices of the peace, volunteer lawyer and legal aid offices, lawyer referral services, district, county and city attorney offices, and other private service agencies.

The Justice Center of Atlanta now is administered by a separate foundation and currently has a budget of approximately $300,000 funded by the city and county governments, United Way and grants. The staff includes an executive director, a deputy director, a secretary, and three case managers who supervise a pool of between 60-100 mediators. The mediators are not all attorneys. Literature from the Atlanta Center indicates that as many as 2,000 disputes are settled annually through the Atlanta Center. The Atlanta Center also provides mediation training and consulting.

Private voluntary use of mediation is increasing in Tennessee. Major national corporations operating in Tennessee, e.g., Federal Express, International Paper and Hospital Corporation of America, have adopted policies encouraging mediation of disputes whenever possible to reduce litigation expenses. Mediation is becoming

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[33] Stevens H. Clarke, Community Justice and Victim-Offender Mediation Programs, A Working Paper for the National Symposium on Court Connected Dispute Resolution Research, State Justice Institute, September, 1993, at 4.

[34] Id. at 6.

more common and available in domestic disputes through private providers[35] and through programs sponsored by local bar associations for low-income families.[36] In addition, professional associations of mediation providers, both attorneys and non-attorneys, have begun to form in the state.[37]

Private voluntary use of binding arbitration is well-established in Tennessee as a result of contract and insurance policy arbitration clauses, but private use of early neutral evaluation and non-binding arbitration seems to be non-existent. It is arguable, however, that the Tennessee court system has for years provided a form of early neutral evaluation, or non-binding arbitration, in the form of the General Sessions Courts. Because General Sessions judgments are appealable de novo, and because General Sessions pretrial and trial procedure is "streamlined," parties often achieve the same benefits from adjudicating their dispute originally in General Sessions Courts that they would achieve from early neutral evaluation or non-binding arbitration. Raising the jurisdictional amount in General Sessions Courts, therefore, may be an efficient way to provide a proven form of ADR to more litigants.

Public resources for mediation appear to be growing in Tennessee from several sources, including the new Department of Labor workers' compensation mediation program, and community dispute resolution centers such as the Citizen's Dispute Center in Shelby County, the Conflict Resolution Program at the University of

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[35] Modern-day Mediators Resolve Disputes in "New" Ways Using Techniques with Ancient Roots, The Daily News, Memphis, TN, April 27, 1992, at 1.

[36] In addition to the Knoxville Bar Association's Mediation Service, the Association of Women Attorneys in Memphis has recently received IOLTA funding to establish a domestic mediation service for low-income families.

[37] See Teacher Sees Mediation Expanding Into Neighborhoods and Schools, The Daily News, Memphis, TN, April 27, 1992, at 9.

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Tennessee, Knoxville,[38] and the Victim-Offender Reconciliation Programs in Cumberland, Anderson, Knox and Davidson counties.[39] In May, 1993, the Tennessee legislature enacted two initiatives designed to foster mediation of disputes. The "Victim-Offender Mediation Center Act of 1993," P.C. 420, Tenn. Code Ann. § 16-20-101 et seq., encourages creation of victim-offender mediation centers partially funded by the State, authorizes the Supreme Court to promulgate rules for such mediation centers, creates immunity for personnel of such centers, and creates a privilege for communications between the centers and disputants engaged in victim-offender mediations. The new Tenn. Code Ann. § 36-4-130, P.C. 245, extends a privilege to communications between mediators and clients in divorce mediation.

The availability of and demand for ADR may increase significantly in Tennessee as a result of the expansion of court-annexed ADR in the federal district courts pursuant to the Civil Justice Reform Act of 1990. In addition, the Tennessee legal profession is becoming more aware of ADR from several sources. Tennessee attorneys often become involved in litigation in the many nearby states, particularly Florida, Georgia, North Carolina and Texas, that have adopted extensive court-annexed ADR systems. National providers of continuing legal education, such as the American Arbitration Association and the National Business Institute, Inc., as well as the Tennessee Bar Association, have begun to offer programs on ADR in the state. In the Commission's survey of trial judges, approximately half of those responding

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[38] A pilot Appropriate Dispute Resolution Program, co-sponsored by the Knox County General Sessions Court, the University of Tennessee College of Law, the Knoxville Bar Association Mediation Service, and the Conflict Resolution Program, began in September, 1993.

[39] In addition, the judges and chancellors of the Twentieth Judicial District in Davidson County on December 21, 1993, adopted a local rule providing for court-supervised settlement conferences before a judge or chancellor who will not preside at the trial.

indicated a willingness to refer cases to ADR if the resources for doing so were available.[40]

2. Models of Court-Annexed ADR

Several patterns have emerged in the way states have adopted court-annexed ADR. In some states, rather extensive statutory schemes both authorize court-annexed ADR and delineate details of the ADR system.[41] More recently, legislatures have enacted enabling legislation that authorizes the respective supreme courts to use their rule-making power to adopt ADR regimes.[42] The very extensive ADR scheme in Florida is governed by various statutory provisions and implementing rules promulgated by the Court.[43]

Whether adopted by legislation or by rule-making, court-annexed ADR systems typically address the following issues:

a. the types of cases that are referred to ADR and whether the reference is mandatory or within the discretion of the trial judge;

b. which forms of ADR are available for reference and how the particular form is selected for the case;

c. procedures and timing of an ADR reference;

d. procedures and grounds for parties to object to an ADR reference;

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[40] Commission Survey, responses to question 2(g).

[41] See, e.g., Tex. Code Ann. § 154.001 et seq.

[42] See, e.g., 1993 GA H.B. 143 (passed 3/10/1993) (allows local court systems to set up non-binding mediation program); Ind. Code §§ 34-4-2.5, 34-4-42 & Ind. Alternative Dispute Resolution Rules; Minn. Stat. Ann. § 484.76.

[43] Fla. Stat. Ann. § 44.1011, 44.102 et seq.; Fla. RCP 1.700 et seq.

e. funding of ADR programs (filing fees);

f. compensation of neutrals;

g. selection and qualifications of neutrals;

h. confidentiality and inadmissibility of statements made during ADR proceedings;

i. immunity of neutrals; and

j. role of counsel in ADR proceedings.

3. **Benefits of ADR**

Properly designed and implemented, ADR mechanisms can offer a number of benefits to the existing system of dispute resolution in Tennessee. On the other hand, care must be taken to avoid increasing the cost and delay of dispute resolution.

** Increased Access To Justice

The possibility of improving access to the dispute resolution system is closely related to two other perceived benefits offered by ADR -- reduced costs and faster resolution of disputes. Litigation is too often prohibitively expensive. Indeed, filing fees alone can discourage proceeding in the public system.[44] As a result, many disputes are simply not worth trying to resolve in an orderly way. Boundary line problems, tree limb complaints, barking dog cases, consumer complaints, certain landlord tenant arguments, and other disputes of similar ilk are often not worth the filing fee, let alone attorney's fees. Perhaps many of these disputes truly should be beneath the notice of the formal adjudicatory system. Some of them, however, can lead to violent forms of

[44] Filing fees in General Sessions courts in Tennessee's four largest counties range from $47.50 to $65.00 for a single defendant. Add a defendant, and filing fees range from $60.00 to $77.50.

resolution, petty tyranny, and other forms of injustice, and it is the belief of the Commission that public fora for resolving these disputes are needed.

A system that provides a mechanism for the resolution of such disputes would, in addition to resolving small disputes, provide people with an alternative to "taking the law into their own hands." Even where dispute resolution programs are run on a shoe string budget, employ lay mediators, and have no power to issue compulsory process or enter judgments, they give people a needed outlet, a place to air their troubles, and result in a high degree of "consumer satisfaction."[45]

In larger cases, procedures that assist the courts and counsel in evaluating disputes at the earliest possible moment, and thereby reduce expense and delay, can only improve access. If in the average case fewer attorney hours are necessary to resolve the dispute, then average transaction costs will be reduced and more people will presumably be able to afford to seek justice, at least through the ADR level.

** Reduced Expense

Adding a pretrial ADR procedure may in some cases actually increase initial costs. Experience in other jurisdictions suggests, however, that such procedures result in early settlement. While over 90% of cases eventually settle without ADR, very many of these settle after extensive and expensive discovery, and indeed after unnecessary trial preparation.

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[45] Stevens H. Clarke, Community Justice and Victim-Offender Mediation Programs, A Working Paper for the National Symposium on Court Connected Dispute Resolution Research, State Justice Institute, September, 1993, at 6 ("All the reviewed studies found high levels of complainant satisfaction with the outcome and procedure of community mediation.").

** A More Expeditious System

Generally, if a pretrial procedure can resolve a case, then the total time the parties spend waiting for an outcome is reduced. Here again, however, there may be cases where an outcome is delayed by ADR.

** Better Utilization of Judicial Time

If cases that are not going to settle expeditiously by themselves can be identified, courts will be better able to devote time and resources to disputes in which questions of law, unresolvable issues of fact, or novel issues of policy or law must be decided (either on motion or by trial). Early consideration of ADR in connection with the formulation of a plan for managing a particular dispute, an approach sometimes referred to as "differential case management," will by its very nature tend to identify cases that must be resolved in the traditional way and those that the parties, with the help of ADR, may be able to resolve on their own.

** Reduction of Trauma and Disruption

ADR may also reduce stress attendant in court proceedings. This potential benefit may be more easily attained in the domestic relations area than in other areas. Mediation of domestic disputes may allow disputants and perhaps more importantly, children, to minimize the hurt and anguish that too often follow an adversary determination of a case. In addition, child custody solutions reached by the parties may work better than those imposed by a court following an adversary proceeding.[46]

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[46] Empirical studies show that family dispute mediation results in high settlement rates, litigant cost savings, high levels of user satisfaction and short-term improvements in compliance, relitigation and family adjustment. Jessica Pearson, Family Mediation, A Working Paper for the National Symposium on Court Connected Dispute Resolution Research, State Justice Institute, September, 1993. See generally Steven T. Knappel, Comment, Promise and Problems in Divorce Mediation, 1991 J. Dispute Resolution 129.

Even in the business arena, unresolved legal disputes can cause substantial trauma and disruption.

** Participant Satisfaction

To the extent that the present system can be improved to allow for greater access, to reduce costs, delay, and in some cases unpleasantness, and to maximize the valuable resource of judicial time, "consumers" will come away from the system happier. In addition, people are generally happier with, and less alienated by, dispositions when they have had a role in formulating those dispositions or when they have had an opportunity to tell some neutral person their side of the dispute.[47] Certain ADR mechanisms encourage the participation of litigants and ADR mechanisms generally allow the telling of each litigant's "side" to a neutral who can then help the parties fashion a result. Satisfaction also may be increased by the selection of a neutral who has some particular expertise in the subject matter of the dispute, giving the participants increased confidence in the process to which they have been subjected.

Lawyers participating in such systems may also find increased satisfaction from doing so. Many practitioners are frustrated by the expense and delay often encountered in litigation, and many lawyers who have experience in ADR regard it as a helpful adjunct to the existing system in facilitating earlier settlement of disputes with higher client satisfaction.

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[47] A recent empirical study indicates that parties often benefit from ADR even though their initial participation is not voluntary. See McEwen & Milburn, Explaining a Paradox of Mediation, 9 Negotiation J. 23 (1993) (discussing the reasons that "reluctant parties often use mediation effectively and evaluate their mediation experiences positively").

4. The Need for Flexibility in Court-Annexed ADR

** ADR Must Not Interfere With the Normative Function of the Courts

Our civil judicial system serves a function other than private dispute resolution. Courts make law and interpret legislative provisions, and in so doing determines rules that govern conduct. The adversary system serves an important role in the development of these normative pronouncements. Any system of court-annexed ADR, therefore, should be sufficiently flexible to avoid mandating ADR for cases that ought to be resolved by a judicial pronouncement because the dispute implicates significant public interests.

** Court-Annexed ADR Must Avoid Increasing Cost and Delay

ADR will not reduce cost and delay for all disputes. Inappropriate use of ADR may only increase cost and delay in particular cases. Any system of court mandated ADR, therefore, should include a significant degree of judicial discretion, party input, and sound guidelines for the selection of cases for ADR and for selection of the particular ADR device that is used.[48]

5. Ethical Considerations Raised By Attorneys Acting as Dispute Resolution Neutrals

The intensifying need for the services of dispute resolution neutrals has caused considerable confusion about the appropriateness of nonattorneys serving as neutrals, attorneys serving as neutrals while also maintaining a traditional law practice, the applicability and meaning of various sections of the Code of Professional

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[48] See Frank E.A. Sander & Stephen B. Goldberg, Making the Right Choice, 79 A.B.A.J. 66 (1993).

Responsibility in the context of a licensed attorney serving as a neutral, and the jurisdiction of the Board of Professional Responsibility over an attorney's activities as a neutral.

The Commission endorses two basic principles from which consistent answers to many of the questions may be deduced:

a. First, in certain situations, service as a neutral does not require the special legal expertise or ethical standards of a licensed attorney. Parties to a dispute must assess their own needs and desires in the selection of a neutral and must remain free to choose a neutral who is not a licensed attorney in the state. Thus, individuals who are not licensed attorneys in Tennessee may serve as neutrals without implicating the ban (Supreme Court Rule 7, §1.01) on unlicensed practice of law in the state as long as they comply with the standards defined in Tennessee Formal Ethics Opinion 90-F-124.[49]

b. Second, it is clear that a licensed attorney serving as a neutral is not representing a client in the traditional role of a licensed attorney. A general conception of this traditional role as representative and advisor currently forms the basis for the various provisions of the Code of Professional Responsibility. Nonetheless, service as a neutral is an appropriate role for a licensed attorney to perform in his or her capacity as a licensed attorney. When the parties to a dispute choose a licensed attorney to serve as a neutral, it should be presumed

[49] This opinion holds that certain non-lawyer mediators were not engaged in the practice of law under guidelines that prevented them from giving legal advice and required them to make clear to the parties involved that they were not lawyers and would not be giving legal advice. The provisions of that opinion also emphasized that the same constraints of the Code of Professional Responsibility on lawyers entering into partnerships or other businesses with non-lawyers remain applicable to non-lawyers and lawyers mediating in association with each other.

that they are seeking out the special legal expertise and professional integrity of a licensed attorney. In certain situations, those are the very attributes of a neutral that will maximize the likelihood of success for the dispute resolution process. A licensed attorney may be an especially effective neutral because he or she can better discuss the strengths and weaknesses in each party's case and warn of potential consequences should the parties fail to resolve the dispute. Legal expertise may be critical in crafting the basic elements of any settlement agreement reached by the parties in the dispute resolution proceeding. Thus, when a licensed attorney serves as a neutral he or she should be governed by applicable provisions of the Code of Professional Responsibility and should remain subject to the disciplinary jurisdiction of the Board of Professional Responsibility.

These two principles may be summarized as follows. When an individual who is not a licensed attorney in the state serves as a neutral, he or she is not engaged in the "practice of law" as that term is used in Supreme Court Rule 7 concerning licensing requirements as long as the standards set out in Formal Ethics Opinion 90-F-124 are followed. When an attorney licensed in the state of Tennessee under Rule 7 serves as a neutral, he or she is engaged in the "practice of law" as that term is used in Supreme Court Rules 8 and 9 regulating the professional ethics of licensed attorneys.

These principles confirm the basic conclusion of Formal Ethics Opinion 90-F-124, as well as the basic conclusion of Formal Ethics Opinion 93-F-131 that a licensed attorney who offers his or her services as a neutral while maintaining a traditional law practice is not engaging in "another profession or business" under DR-102(E) and thus

may indicate both activities on a letterhead or other public notices. Further, these principles confirm the statement in Formal Ethics Opinion 93-F-131 that "a licensed attorney, acting as an arbitrator or mediator, is governed by the Code of Professional Responsibility."

Finally, these two principles suggest that the various provisions of the current Code of Professional Responsibility were not drafted with service as a neutral in mind. Thus, it follows that the specific language of existing Code sections (and older Formal Ethics Opinions) should be read where possible to impose appropriate ethical restraints on a licensed attorney acting in the new and previously uncontemplated role of dispute resolution neutral.

It is the Commission's view that the existing Code sections should be revised where necessary and substantially supplemented to provide ethical guides and restraints appropriate for licensed attorneys acting as neutrals. For example, the existing sections of the Code are of little use in determining the extent to which a licensed attorney acting as a mediator should be permitted to draft the settlement agreement produced by mediations. Similarly, existing sections are of little use on questions such as the mediator's obligation to suggest that each party seek independent legal advice, the mediator's obligation to disclose potential conflicts of interest, and the mediator's obligation to refrain from future representation of one of the parties in a traditional lawyer's role.

This latter question is one the Commission has considered at some length. It is the consensus of the Commission that at the least, a lawyer neutral should be barred from representing any party to an ADR process in the dispute that is the subject of the ADR process. It is also the Commission's view that lawyer neutrals should not use the

process to solicit, encourage, or otherwise seek additional or future professional work or referrals from parties to the process. Generally speaking, the Commission believes that there should be definite limits on the ability of lawyers to accept work from parties to ADR processes when, or after, they have been engaged as neutrals in those processes.[50]

The Commission encourages generally the revision and supplementation of the Code of Professional Responsibility to provide appropriate ethical guidance for licensed attorneys acting as neutrals. In addition, the Commission specifically proposes the adoption of two new ethics provisions, one governing attorneys acting as neutrals and one requiring attorneys to inform clients adequately of the availability, advantages and disadvantages of alternative dispute resolution processes. Finally, the Commission proposes the integration of dispute resolution as a certified specialty consistent with the Supreme Court's July 1, 1993 Order recognizing certification as specialists in certain areas of practice.

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[50] In an earlier draft of its report, the Commission proposed a rule that would foreclose a lawyer who has served as a dispute resolution neutral from representing any party to the process in any other legal matter that also involves any other party to the original process for five (5) years following conclusion of the lawyer's services in the original matter and which would foreclose the lawyer's representing any party to the process in any matter for two (2) years following the conclusion of the lawyer's services as a neutral in the original matter without the written consent of all other parties to the original matter.

The Tennessee Bar Association's Alternative Dispute Resolution Committee objected to this rule, pointing out that this approach could disqualify not only individual neutrals, but also persons practicing with such neutrals (i.e., law partners and associates) as well. The TBA suggested restricting certain parts of the proposed rule to individual lawyer neutrals and not to partners or associates of that individual lawyer neutral. A majority of the Commission was unable to accept this approach.

Under the circumstances, the Commission makes no recommendation on this point at this time, but leaves it, along with the other issues noted above, to the Board of Professional Responsibility. The Commission understands that the American Bar Association Section of Dispute Resolution, the Society of Professionals in Dispute Resolution, and the American Arbitration Association are looking at these and other ethical issues, and recommends that the Board of Professional Responsibility consult the standards adopted by those bodies, as well as any others, in connection with its consideration of this issue.

C. Recommendations

1. Expand Availability of General Sessions Courts

In light of the apparent function of General Sessions Courts in providing a form of early neutral evaluation, the Commission recommends that the Commission on the Future of the Courts consider raising the General Sessions Courts' jurisdictional amount either statewide or in certain counties.[51]

2. Court-Annexed ADR Statute and Rules

Just as there is no dispute resolution device that is ideal for all disputes, there is no ideal court-annexed ADR program for all judicial systems. The incremental benefits of ADR over traditional adjudication will depend upon the particular strengths and weaknesses of the existing system and upon the resources that are available for implementing the ADR mechanisms. Court-annexed ADR, therefore, should be introduced in Tennessee by authorizing trial courts, in their discretion and with meaningful opportunities for party input, to require parties to participate in non-binding ADR proceedings. This approach will allow court-annexed ADR to develop in Tennessee through the actual experiences of judges, litigants and attorneys. Judges will be enabled to adapt their use of ADR not only to particular cases, but also to the particular needs and resources in their districts.

[51] The Commission recognizes in this regard that General Sessions Courts in many counties are at or above capacity and that raising jurisdictional limits must be considered along with the present demands being placed on these courts.

In the following proposed statute, ADR rules, and ethical rules, the Commission has attempted to:

(1) provide for the necessary judicial authority;

(2) incorporate quality and cost controls; and

(3) maximize flexibility with regard to both individual judicial discretion and the ability to amend these provisions when it is desirable to do so.

ALTERNATIVE DISPUTE RESOLUTION ACT

§ 1. Pursuant to the provisions of this Act and rules to be adopted by the Supreme Court, a court may order the parties to an eligible civil action to participate in an alternative dispute resolution procedure.

§ 2. Definitions:

(a) "Alternative dispute resolution procedure" is any process designed to aid parties in resolving their disputes outside of a formal judicial proceeding, and includes judicial settlement conferences, mediation, arbitration, case evaluation, mini-trial and summary jury trial.

(b) "Court" includes only Circuit, Chancery, Law & Equity, Probate, and any Juvenile or General Sessions court to the extent of its probate and domestic relations jurisdiction.

(c) "Eligible civil action" includes all civil actions except forfeitures of seized property, civil commitments, domestic relations cases in which physical abuse is a present threat, and habeas corpus and extraordinary writs. The term "extraordinary writs" does not encompass claims or applications for injunctive relief.

(d) "Mediation" is an informal process in which a neutral person, called a mediator, conducts discussions among the disputing parties designed to enable them to reach a mutually acceptable agreement among themselves on all or any part of the issues in dispute.

(e) A "judicial settlement conference" is a mediation conducted by a judicial officer other than the judge before whom the case will be tried.

(f) "Non-binding arbitration" is a process in which a neutral person or a panel, called an arbitrator or an arbitration panel, considers the facts and arguments presented by the parties and renders a decision. The decision is non-binding.

(g) "Case evaluation" is a process in which a neutral person or a panel, called an evaluator or evaluation panel, after receiving brief presentations by the parties summarizing their positions, identifies the central issues in dispute as well as areas of agreement, provides the parties with an assessment of the relative strengths and weaknesses of their case and may offer a valuation of the case.

(h) "Mini-trial" is a settlement process in which each side presents an abbreviated summary of its case to the parties or representatives of the parties who are authorized to settle the case. A neutral person may preside over the proceeding. Following the presentation, the parties or their representatives seek a negotiated settlement of the dispute.

(i) "Summary jury trial" is an abbreviated trial with a jury in which the litigants present their evidence in an expedited fashion. The litigants and the jury are guided by a presiding neutral person. After an advisory verdict from the jury, the presiding neutral person may assist the litigants in a negotiated settlement of their controversy.

§ 3. A court, without the consent of the parties, may make an order directing the parties to an eligible civil action to participate in a judicial settlement conference, mediation, or case evaluation. A court, with the consent of the parties, may make an order directing the parties to participate in non-binding arbitration, mini-trial, summary jury trial, or an alternative dispute resolution procedure not specified in this Act.

§ 4. Evidence of conduct or statements made in the course of court-ordered ADR proceedings shall be inadmissible to the same extent as conduct or statements are inadmissible under Tennessee Rule of Evidence 408.

§ 5. Persons acting as neutrals pursuant to a court-ordered ADR proceeding shall have immunity in the same manner and to the same extent as a judge in the State of Tennessee.

§ 6. A mediator, settlement judge, or other dispute resolution neutral shall preserve and maintain the confidentiality of all ADR proceedings except where required by law to disclose information.

ALTERNATIVE DISPUTE RESOLUTION RULES

Rule 1. These rules are adopted pursuant to [the Act] and govern proceedings under that Act.

Rule 2. Motion and Order to Participate in Alternative Dispute Resolution (ADR).

(a) At any time after responses to a complaint have been filed by all defendants, a court may, on its own motion or on the motion of a party, order the parties to participate in an alternative dispute resolution procedure authorized by [the Act].

(b) Before ordering the parties to participate in an ADR procedure, the court shall confer with the attorneys for the parties and any unrepresented parties with regard to whether (1) ADR is appropriate, and (2) if so, the most appropriate ADR procedure for the case.

(c) If appropriate, the court may require that a party or a representative with authority to settle the action be present or reasonably available by telephone for ADR proceedings.

Commission Comment

This rule creates broad authority for courts to order parties to participate in ADR, but the exercise of this authority will, as a practical matter, be limited by the availability of neutrals. The only authority for requiring parties to pay for ADR is that found in ADR Rule 7, which provides for the court to tax up to eight hours of neutral

service as costs. The use of ADR, therefore, will depend upon the availability of volunteer neutrals, court staff neutrals, and funds to compensate neutrals. With regard to subsection (c), it is not always feasible, particularly when a governmental entity is a party, for the court to require the presence of a person with on-the-spot settlement authority, in which case the court may choose to require the participation only of a person who has a major role in recommending settlement.

Rule 3. Lists of Court-Approved Neutrals

The court clerks for each judicial district shall maintain and make available to the public a list of neutrals approved by the Dispute Resolution Board.

Rule 4. Selection of Neutrals

Within 15 days of the court's order directing a dispute resolution procedure, other than a judicial settlement conference, the parties must either agree on a dispute resolution neutral and submit that neutral's name and qualifications to the court for its approval, or notify the court that no agreement has been reached. In the event no agreement is reached by the parties, or in the event the court fails to approve the parties' selection, the court will designate 3 neutrals approved by the Dispute Resolution Board (with one additional such neutral designated for each additional party over 2) for the parties' consideration and each party shall have one strike. The judge shall appoint the neutral from those remaining unless valid and timely objection is made by one of the parties. If an objection is made and upheld, the process will be repeated. A person selected to serve under this process may choose not to serve for any reason, in which case the process will be repeated.

Rule 5. Qualifications of Court-Approved Neutrals

The Dispute Resolution Board shall establish minimum standards and procedures for qualifications, professional conduct, discipline, and training for court-approved neutrals.

Commission Comment

The Commission recommends that the Dispute Resolution Board work with the Commission on Continuing Legal Education (CCLE) to establish requirements for neutrals to be included on court-approved lists of those who may be selected as neutrals in dispute resolution procedures ordered without consent of the parties. The requirements may vary for approval for different types of ADR procedures, e.g. general mediation, family mediation, arbitration, case evaluation. The Dispute Resolution Board shall provide the court clerks for each judicial district with the names of those individuals who have met the requirements to be selected by courts pursuant to ADR Rule 5, without the agreement of the parties, to serve as dispute resolution neutrals. This process should be separate and apart from the standards for certification as a specialist in the law as provided in the Supreme Court's July 1, 1993 Order.

Rule 6. Compensation of Neutrals

Subject to the availability of funds, the court may compensate certified neutrals in an amount not to exceed eight hours at the hourly rate set by the Division of Dispute Resolution of the Administrative Office of the Courts, and such compensation shall be taxed as costs pursuant to Tenn. R. Civ. P. 54.01(1), and shall be deemed

costs pursuant to Tenn. R. Civ. P. 68. Any additional compensation of neutrals is subject to agreement of the parties.

Rule 7. Sanctions

If either a party or the party's attorney, without good cause, fails to comply with an order made pursuant to Rule 2(a), or fails to pay the neutral's fee, the court may impose sanctions upon the party or the party's counsel, including but not limited to the payment of reasonable attorney fees, approved neutral fees and costs incurred by reason of the failure to attend the process; contempt; or any other lawful sanction.

Commission Comment

States have authorized and courts have imposed a variety of sanctions on parties' failure to attend and/or participate in good faith in court-ordered dispute resolution. These sanctions include the imposition of costs and attorney fees for the ADR process, the exclusion of evidence, citation for contempt, and in egregious cases dismissal of the action.

Some states require mere participation (e.g., North Carolina) while others require good faith participation (e.g., Florida). The simplest approach is to require only attendance by the parties and their attorneys and payment of the neutral's fee. The requirement that parties participate in good faith may encourage further litigation over the meaning of that term as well as pose a challenge to the confidentiality of the proceedings when the court is asked to make the good faith determination.

The Commission recognizes that the success of court-ordered dispute resolution depends in large part on the willing participation of the parties, a factor that

no sanction will guarantee. Therefore, the Commission proposes adoption of the above rule, patterned after North Carolina Rule 5 of Rules Implementing Court Ordered Mediated Settlement Conferences.

ETHICAL RULES

1. DR ____.

(A) A lawyer may act as a mediator, arbitrator, or other dispute resolution neutral for multiple parties in any matter if:

(1) The lawyer clearly explains to the parties that the lawyer is not representing any of them and that traditional protections of representation such as the attorney-client privilege will not apply; and

(2) The lawyer suggests that each party consult independent counsel for legal advice and describes the advantages of seeking this counsel; and

(3) The lawyer gives legal opinions to a party only in the presence of all parties, providing, however, that a prediction of litigation outcome by a lawyer acting as a dispute resolution neutral shall not for purposes of this section constitute the provision of a legal opinion; and

(4) The lawyer fully discloses to all parties any potential conflicts of interest, including circumstances in which the lawyer has previously represented any party to the process in court or in any legal matter.

(B) A lawyer serving as a dispute resolution neutral may draft a settlement agreement but must advise and encourage all parties to seek independent legal counsel before executing it.

(C) A lawyer serving as a dispute resolution neutral may not accept as payment any fee that is in any way contingent upon the successful resolution of the dispute.

(D) A lawyer shall withdraw as a dispute resolution neutral if any of the parties requests, or if any of the conditions stated in (A)-(C) above are no longer satisfied.

Upon withdrawal the lawyer may not act on behalf of any of the parties in the matter that was the subject of the resolution process.

Commission Comment

The Commission's goal is in part to encourage lawyers to mediate, arbitrate and evaluate disputes consistent with principles of honesty and competency embodied in the Code, yet without the constraints of client loyalty and partisanship that are applicable to the traditional roles of counselor and advocate. This proposed ethics rule is based in part on the provision adopted by the Oregon Supreme Court in 1986. Oregon adopted its provision as DR 5-106.

2. DR ___.

In any matter that is reasonably likely to lead to litigation, a lawyer has the duty to advise a client about the accessibility, advantages and disadvantages of all other available forms of dispute resolution.

3. Certification as Specialists in the Law

The Commission recommends that mediation and other forms of dispute resolution be included in the certification process developed as a result of the Supreme Court's July 1, 1993 Order recognizing certification as specialists in certain areas of the law, and that a lawyer's advertisements as a dispute resolution neutral conform to the amended Rule 8 of the Code of Professional Responsibility. Private certification organizations could include any legitimate attorney dispute resolution professional association that becomes accredited by the American Bar Association or

that meets accreditation standards developed by the Commission on Continuing Legal Education.

4. **Community Justice Centers**

The Commission recommends that the Supreme Court encourage and support the establishment in Tennessee communities of Community Justice Centers offering free or low-cost mediation for small disputes such as landlord-tenant, consumer-merchant, and employer-employee matters, as well as domestic and neighborhood issues. Funds from the legislature or accumulated through the filing fees proposed by the Commission can be granted by the Division of Dispute Resolution to communities who submit a proposal for a Center.

The Commission recommends that the Supreme Court use the Justice Center of Atlanta as a model for establishing these centers in Tennessee. It is presumed that these Community Justice Centers will serve many segments of society and it is assumed that they will be established with support from the legal community and business community, as well as any existing legal services entity and social service agencies. In addition to public funding, communities are encouraged to request financial and in-kind support from local Chambers of Commerce, bar associations, trade associations, and charitable organizations. Technical assistance should be provided by the Division of Dispute Resolution.

The Commission recommends that each Community Justice Center be allowed to set its own standards or training requirements for its mediators. In addition to serving those who seek out the Center for dispute resolution, it is also anticipated that

the courts, and in particular the General Sessions courts, as well as district attorney offices, may refer appropriate disputes to the Centers.

5. Funding

Funds will be needed for implementation of the Commission's proposals, including administering the process of approving of court-appointed neutrals, compensating those neutrals, and assisting communities establishing Community Justice Centers. The Commission below proposes several sources for these funds.

The State and local governments may also fund court-annexed ADR by hiring staff neutrals or by providing additional funds for the payment of independent neutrals. The Commission would particularly urge public funding of mediators for divorce and child custody disputes involving low income disputants.

a. Certification fees

First, the Commission recommends that funds for the administration of the approval of neutrals be generated through a fee charged those who apply and qualify for that approval, as well as through renewal fees. In the future, additional fees may be generated from training and CLE programs.

b. ADR Fund from Statewide Filing Fees

Second, the Commission proposes statewide filing fees to create an ADR Fund administered by the Division of Dispute Resolution. The Fund will be distributed to courts upon request for the purpose of compensating neutrals within the limits set by the Division and the ADR Rules. The Fund will also receive court costs collected from the parties representing neutral compensation paid from this fund (see proposed ADR Rule 7). Depending upon the amount and applicability of the filing fees, the Fund may

be quite small in the beginning and courts may not be able, without additional local funding, to provide for ADR in as many cases as they would like. As time progresses, filing fees and collections of court costs replenish and increase the Fund so that more ADR may be paid for by the court. Eventually, the filing fees may be reduced.

The Commission proposes adoption of the following filing fee legislation:

§8-21-408 -- Dispute Resolution Fees.--

(a) In each new case filed, circuit court clerks, clerks and masters of chancery courts, probate court clerks, clerks of law & equity courts, and clerks of juvenile courts or general sessions courts with probate or domestic relations jurisdiction shall demand and receive a fee of $5 in addition to the fees allowed for services as prescribed in Part 4 of this Chapter.

(b) All fees collected pursuant to this section shall be deposited in the state treasury and designated for payment of court-appointed or court-approved dispute resolution neutrals and other dispute resolution uses as authorized and administered by the Division of Dispute Resolution of the Administrative Office of the Courts in accordance with rules promulgated pursuant to [Dispute Resolution Act].

c. Sessions Filing Fees for Community Justice Centers

Community Justice Centers should be funded by a combination of state, local and private grants along the lines of the current Victim-Offender Reconciliation Program.

The Commission recommends that as part of this combination of funding, a statute be adopted authorizing counties working alone or together in regional cooperatives to impose a filing fee on all cases filed in general sessions courts to be used to fund local or regional Community Justice Centers. In light of the unavailability of data concerning the number of general sessions filings in each county, the Commission further recommends that the Administrative Office of the Courts be asked to perform a study to ascertain the appropriate fee to be imposed for this purpose.

6. Division of Dispute Resolution

The Commission proposes that a Division of Dispute Resolution be established within the Administrative Office of the Courts and that a director be hired to implement the recommendations of this report, determine hourly rates for court-approved neutrals, distribute to courts the list of court-approved neutrals, collect and distribute the filing fees and court costs assessed for payment of neutrals, oversee the monitoring of ADR programs, and oversee the award of seed grants for Community Justice Centers, as well as to serve as a resource to courts in the implementation of dispute resolution programs. It is hoped that the Division could eventually be fully funded by the neutral approval fees and the portion of the case charges allocated for administration, but it is recognized that some initial funding may be necessary either from the Supreme Court's budget or from grant funding or other resources. This proposed Division of Dispute Resolution is patterned on similar ones established in Florida, Oregon, Ohio and, most recently, Georgia.

7. Dispute Resolution Board

To assist and work with the Division of Dispute Resolution and the Supreme Court, the Commission proposes the establishment by Supreme Court rule of a permanent Dispute Resolution Board similar to those established in Oregon and in Georgia. The Board will be responsible for setting the criteria for inclusion of neutrals on court-approved lists and administering those approvals. The Board will also set criteria for attorney certification as specialists in dispute resolution.

The Commission recommends that the Court appoint members to rotating two year renewable terms, and that these members receive no salary but that they receive

compensation for their reasonable out-of-pocket expenses of participation. The Commission proposes that the members include representatives from the bench, the bar, and the general public.

EXHIBIT 1

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

IN RE: TENNESSEE BAR ASSOCIATION, Petitioner.

ORDER ESTABLISHING COMMISSION ON DISPUTE RESOLUTION

Having considered the petition of the Tennessee Bar Association, together with the Interim Report of the Special Committee on Alternative Dispute Resolution attached thereto, the Court concludes that the petition is well-founded and should be granted. It is, accordingly,

ORDERED that:

1. The Supreme Court Commission on Dispute Resolution is hereby established.

2. The Commission will conduct a study of dispute resolution in Tennessee with a view toward the use and implementation of procedures to expedite and enhance the efforts of the courts to secure the just, speedy, and inexpensive determination of disputes. In this connection, the Commission will consider procedures which have the potential to:

(a) improve access to the dispute resolution system;

(b) reduce costs;

EXHIBIT 1

(c) expedite the resolution of disputes;

(d) improve the utilization of judicial resources;

(e) minimize the trauma attendant in certain domestic relations litigation; and

(f) increase lawyer and litigant satisfaction with the dispute resolution process.

3. The Commission will prepare and present to the Court, no later than June 30, 1994, a report with respect to the following matters:

(a) the potential benefits of various case management and alternative dispute resolution techniques;

(b) any recommendations the Commission may feel appropriate regarding the adoption of particular case management and/or alternative dispute resolution techniques;

(c) any recommendations the Commission may feel appropriate regarding changes in procedural rules and/or legislation; and

(d) any recommendations the Commission may think appropriate for the improvement of the administration of justice in Tennessee.

4. The Commission will consist of 12 members and a chairperson chosen by the Chief Justice, as follows:

(a) three practicing lawyers, to be selected from a list of nine lawyers recommended by the President of the Tennessee Bar Association;

(b) three practicing lawyers to be selected from a list of nine lawyers recommended by the President of the Tennessee Trial Lawyers Association;

(c) three active members of the Tennessee Judicial Conference, to be selected from a list of nine judges recommended by the President of the Judicial Conference;

(d) one active member of the Tennessee General Sessions Judges Conference, to be selected from a list of three judges recommended by the President of the General Sessions Judges Conference; and

(e) two law school faculty members, to be selected from law schools within the state of Tennessee.

5. In addition, there may be as many as five ex-officio members of the Commission. The Governor of Tennessee, the Attorney General of Tennessee, the Speaker of the Senate, and the Speaker of the House will be invited to serve, or to designate a person to serve, as ex-officio members of the Commission. In addition, the Administrative

Director of the Courts, or a designee, will serve as an ex-officio member of the Commission.

6. The Commission may, within the limits of available funds, appoint a reporter and such clerical staff as may be appropriate.

7. The Court is pleased to appoint Shelby Grubbs of Chattanooga to serve as the initial chairperson of the Commission.

ENTER, this 24th day of January, 1992.

FOR THE COURT:

Lyle Reid
Chief Justice

EXHIBIT 2

TENNESSEE SUPREME COURT COMMISSION ON DISPUTE RESOLUTION

Chair

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The Honorable A. A. Birch *
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The Honorable Marietta Shipley
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Barbara Bennett
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Nashville, TN 37240

* Supreme Court Liaison
** Ex Officio Member

EXHIBIT 3

MINUTES
TENNESSEE SUPREME COURT COMMISSION ON DISPUTE RESOLUTION

MAY 5, 1992

The first meeting of the Commission was held at 10:00 a.m., May 5, 1992, at the offices of Boult, Cummings, Conners & Berry, Nashville, Tennessee. Present were: Shelby Grubbs, Chairman, Hon. George H. Brown, Jr., W. J. Michael Cody, Donna R. Davis, John A. Day, Lawrence Dessem, Mary M. Farmer, Arnold Goldin, J. Wallace Harvill, Hon. Klyne Lauderback, Thomas R. McCoy, Jean Nelson, Hon. Marietta Shipley, and June F. Entman, Reporter.

1. The members introduced themselves and discussed generally their experiences with, interests in, and ideas about alternative dispute resolution.

2. The Commission agreed with the Chairman's proposal to invite Barbara Bennett, Assistant General Counsel, Vanderbilt University, to serve as an additional Reporter to the Commission.

3. The Commission noted that the Tennessee Defense Lawyers Association and the American Corporate Counsel Association had asked the Supreme Court to allow them to designate members to the Commission. It was noted that the Commission was sensitive to the views of these organizations. It was also noted that representatives of these organizations would be invited from time to time to appear before the Commission. The Commission members were not, however, inclined to recommend to the Court any addition to the membership of the Commission, given logistical difficulties presented by a larger Commission.

4. The Commission members agreed that it would be a good idea to develop means to disseminate information about the Commission's work, etc.

5. Following discussion of the purposes, methods, and funding of the Commission's work, the Commission determined that it needs to begin with its own education. The Commission will meet in Nashville on July 17, 1992, for a seminar to be planned by Thomas McCoy and Shelby Grubbs.

6. The meeting adjourned at 1:00 p.m.

June F. Entman

June F. Entman, Reporter

517/MIN

EXHIBIT 4

MINUTES
TENNESSEE SUPREME COURT COMMISSION ON DISPUTE RESOLUTION

October 30, 1992

The Commission met at 12:30 p.m., October 30, 1992 at the offices of Harwell Martin & Stegall, Nashville, Tennessee. Present were: Shelby Grubbs, Chairman, Hon. George H. Brown, Jr., W.J. Michael Cody, Donna R. Davis, John A. Day, R. Lawrence Dessem, Mary M. Farmer, J. Wallace Harvill, Hon. Klyne Lauderback, Thomas R. McCoy, Hon. Marietta Shipley, David H. Welles, and Reporters, Barbara Bennett and June Entman.

1. Following an extensive discussion of the Commission's mission and the procedures by which it will carry out that mission, the following was approved:

Mission Statement

The Commission understands its charge to be to prepare a report regarding the possibility of improving civil dispute resolution in Tennessee by means of initiatives falling into three distinct, but related, areas:

1. use of innovative case management techniques in the context of traditional litigation; and

2. use of new techniques, including ADR techniques; and

3. financial and administrative support for the courts;

and, in the process of preparing this report, to engage in dialogue with members of the bench and bar to the end that the Commission's report may encourage consensus in the community with regard to these issues.

2. The Commission created the following subcommittees:

1. Case Management: M. Shipley, Chair; J. Entman, J. Day, L. Dessem, A. Goldin.

2. ADR: T. McCoy, Chair; B. Bennett, G. Brown, D. Davis, K. Lauderback.

3. Financial and Administrative Support: M. Farmer, Chair; M. Cody, W. Harvell, W. Rosenbaum, D. Welles.

3. The Commission adopted the following procedures and schedule:

March 5, 1993 - Each subcommittee will submit (a) a "baseline" report describing the resources currently available and the work currently in progress by other groups (including the Tennessee Bar Association's ADR committee and the Civil Justice Refrom Act Advisory Groups) and (b) tentative proposals for focusing the Commission's efforts in the subcommittee's assigned area.

Late March, 1993 - The Commission will meet to discuss the subcommittees' proposals.

By the end of 1993 - First draft of report circulated for Commission discussion.

Early, 1994 - Circulate a draft Commission Report to bench and bar for comment.

June 30, 1994 - Submission of Report to Supreme Court.

4. The meeting adjourned at 4:30 p.m.

June F. Entman

June F. Entman, Reporter

EXHIBIT 5

Exhibit 5

TENNESSEE SUPREME COURT COMMISSION ON DISPUTE RESOLUTION

JUDICIAL SURVEY -- PARTIAL SUMMARY OF RESPONSES

(based upon 49 completed responses to the survey)

2. Case management actions that judges do take or would take if resources permitted:

	LARGE	MULTI	SINGLE
a. Require scheduling order adherence	**Do - Would** 50% 25% 75%	**Do - Would** 43% 22% 65%	**Do - Would** 67% 0% 67%
b. Set & enforce discovery limits	50% 15% 65%	53% 13% 66%	83% 0% 83%
c. Hold non-final pretrials	35% 20% 55%	43% 22% 65%	50% 0% 50%
d. Hold sched. conferences	20% 15% 35%	39% 13% 52%	83% 0% 83%
e. Hold final pretrial conf.	35% 20% 55%	53% 22% 75%	67% 17% 84%
f. Rule promptly on motions	95% 0% 95%	100% 0% 100%	100% 0% 100%
g. Refer to ADR	20% 45% 65%	9% 39% 48%	17% 33% 51%
h. Court or clerk set trial date	35% 5% 40%	74% 9% 83%	100% 0% 100%

	LARGE		MULTI		SINGLE	
	Do	Would	Do	Would	Do	Would
i. Hold parties to initial trial date	50%	5%	74%	4%	67%	0%
	55%		78%		67%	
j. Conduct or facilitate settlement conf.	30%	15%	39%	17%	33%	0%
	45%		56%		33%	
k. Use sanctions to manage pretrial process	55%	0%	43%	0%	67%	0%
	55%		43%		67%	
3. Case manage. depends on case type	70%		70%		67%	
5. & 6. Complex cases treated differently	100%		93%		50%	
5. & 6. Cases treated differently based on subject matter	33%		53%		100%	
18. Pretrials orders required in some cases	70%		61%		50%	
21. Changes that would assist in case management:						
a. Computers & Fax	65%		70%		50%	
b. Stats re. docket	65%		35%		0%	
c. Law Clerk	45%		65%		67%	
d. Additional staff	40%		4%		17%	
e. Amend Rule 16	40%		39%		33%	
f. Better prepared attorneys	65%		48%		33%	

		LARGE	MULTI	SINGLE
g.	Better law library	15%	39%	17%
h.	Better staff training	30%	40%	33%
i.	Better judge training	20%	4%	33%
j.	Improved staff salaries	40%	17%	33%

EXHIBIT 6

Exhibit 6

DISPUTE RESOLUTION CONTINUUM