

REPORT TO TENNESSEE SUPREME COURT  
FROM TASK FORCE TO STUDY APPELLATE MEDIATION  
APPOINTED TO STUDY A RULE FOR APPELLATE MEDIATION  
July 27, 2006

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This report is submitted by the Task Force to Study Appellate Mediation appointed to study a proposed rule to establish an Appellate Mediation Process for the state of Tennessee. Attached to the Report are a proposed rule by which mediation of civil cases pending before the Tennessee Court of Appeals would be implemented and proposed forms to implement the Rule. The purposes of this report are to (1) provide comments on some of the Sections of the proposed rule, (2) recommend methods to implement a Pilot Program for the rule, and (3) recommend that the current Workers Compensation Mediation Program under Supreme Court Rule 37 be considered by the Court for revision to make that rule consistent with this rule, if adopted.

1. The Task Force modeled the proposed rule on the Alabama Rule for Appellate Mediation. Before doing so, the Task Force reviewed rules in existence from several states and concluded that the Alabama Rule provided the best model of the elements that would best suit a Tennessee rule. The Task Force also met with officials from Alabama who administer the program there. The Task Force appreciates the invaluable assistance provided by them in helping us to better understand the program and some of the practical problems associated with implementing an Appellate Mediation procedure.
2. The proposed rule is written to apply to all civil appeals. However, it relies extensively on a screening process by which an Administrator hired by the Supreme Court will review information submitted by the parties to an appeal before selecting any particular case as appropriate for a referral to mediation. The Task Force recognizes that there may be classes of cases that simply do not lend themselves to appellate mediation, such as cases involving termination of parental rights, pro se cases, cases in which constitutional issues are raised and so forth. Even so, the Task Force, after considerable debate, concluded it best to leave the selection decision to the Administrator in all cases. The Administrator should develop selection criteria for the screening process, but also should have the discretion to recognize that there will be rare cases that should be chosen for mediation, even though the criteria would otherwise exclude them.
3. Confidentiality is a major component of the proposed rule. Every effort has been made to build into the rule procedures to block leakage of any case substantive information to the Court of Appeals or the Appellate Court Clerk's office.
4. The pilot project will necessitate hiring an Appellate Mediation Administrator and appropriate such support staff as may be necessary functioning separately from the Court of Appeals and the Appellate Court Clerk's office. The Task Force suggests the Administrator could best function out of the Administrative Office of

the Courts, at least initially. The Administrator should be a lawyer and should be hired on a full time basis. The Task Force recommends a starting salary of \$75,000.00 a year. Since the Task Force also recommends that the proposed rule be tested by a Pilot Project, some amount of grant money may be available to fund the Administrator's salary and program expenses during the Pilot Project phase. However, the Task Force recommends that the Court include in its 2007-08 budget sufficient funds to permit implementation of the Pilot Project.

5. The Task Force was keenly aware of two overarching concerns in drafting the proposed rule: first, the need to avoid delays in the appeal process and, second, the need to create a procedure that is lawyer and party friendly. The first concern was met by placing a sixty day limit on the mediation process from start to finish. Statistics from other jurisdictions indicate that some 25 to 30% of cases settle in the appellate mediation process, resulting in a corresponding reduction in the workload of the appellate courts. The Task Force believes that the time savings to the Court of Appeals by the lowered workload will result in a quicker appeal process overall and should offset any delays created by the mediation process. The second concern was addressed by placing the duty on the Administrator to notify lawyers of their obligations should a case be referred to mediation through the selection process and to provide a series of simple to use approved forms for practitioners to streamline the program.
6. Case screening should move efficiently. In Alabama, the screening process results in the referral of approximately half of the appellate cases to mediation and, of those, 50% are successfully mediated to settlement. The proposed rule anticipates a two pronged decision making process by the Administrator. The first involves a provisional review of the case for mediation based on rudimentary information available to the Administrator. This initial, provisional case selection decision will be made by the Administrator very soon after the filing of the notice of appeal and, for cases selected for a more thorough review for mediation, will cause the issuance of a notice to stay the appeal to the parties, the Trial Court Clerk and the Appellate Court Clerk. The purpose for the rapid issuance of the provisional notice to stay the appeal is to put a hold on transcript preparation and avoid the costs and burdens associated with it. The Task Force believes the savings to the parties of those costs could be a significant motivating factor in the mediation process. Cases that are not selected for further mediation consideration at the initial review will continue on the normal appeal track without interruption. The Administrator will send requests for further information to the parties regarding those cases selected for further review in the screening process. Once the Administrator receives the additional information from the parties, the final screening decision will be made. If, at this stage, the case is not selected for mediation, notice will be sent to the parties, the Trial Court Clerk and the Appellate Court Clerk causing the case to resume the normal appeal track. As to those cases selected for mediation the notice to stay the appeal will remain in effect.

7. The decision to refer the case to mediation is subject to review by a senior judge not otherwise involved in the appellate process. The Task Force debated at length whether any appeal of a decision made by the Administrator to refer a case to mediation should be permitted. It concluded that a limited appeal process was appropriate. Under the proposed rule a senior judge will act as the “Motions Judge” to hear such an appeal and certain other matters permitted under the rule. The purpose for placing a senior judge in this role is to assure that no substantive information about the case is revealed to any Court of Appeals Judge or Supreme Court Justice who might ultimately sit on the case.
8. The Task Force debated at some length whether a mediator approved for appellate mediation should undergo additional training. Although there were differing views on the issue, the Task Force concluded that, by requiring an appellate mediator to be Rule 31 approved, sufficient training will have been received.
9. The Task Force also discussed whether initial and annual fees should be assessed a mediator approved for appellate mediation. Since an appellate mediator will only be listed on the approved roster if the mediator is current on all Rule 31 requirements, including the payment of Rule 31 fees, the Task Force believes the decision whether to assess additional fees for listing as an appellate mediator to be one for the Court.
10. The proposed rule does contemplate that, in appropriate cases, appellate mediations should be conducted on a *pro bono* basis. The Task Force recommends that the Administrator develop guidelines for the selection and assignment of *pro bono* cases.
11. The proposed rule contains a provisional Section detailing a recommended Pilot Project. The Task Force suggests a fifteen month phased Pilot Project, as follows:
  - a. Begin in the middle grand division only, for a period of six months.
  - b. Add the eastern division from the seventh through the ninth month.
  - c. Add the western division from the tenth through the fifteenth month.
12. The proposed rule contains an evaluation procedure for the Pilot Project period and, thereafter, for the permanent operation of the appellate mediation process.
13. The Task Force recommends that future oversight of the rule be placed under the auspices of the Alternative Dispute Resolution Commission. The ADRC should be involved in evaluations of both the Pilot Project and the ongoing permanent operations under the Rule. As well the ADRC should be involved in decision making regarding the assessment of fees to mediators for listing on the appellate mediator roster.

14. The Task Force recommends that Rule 37 involving Workers Compensation appeal mediations be studied to make its provisions consistent with this proposed rule. At the very least, the Task Force suggests that a screening program would be beneficial to the operation of Rule 37.