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February 13, 2007

Mr. Michael W. Catalano, Clerk
Tennessee Court of Appeals
100 Supreme Court of Appeals
401 7th Avenue, North
Nashville, TN 37219-0606

RE: Proposed Provisional Supreme Court Rule 48

Dear Mr. Catalano:

As a Supreme Court Rule 31 Civil Mediator and a Family Mediator I have read with interest the Provisional Rule 48. I applaud the efforts of the Court to seek a resolution of cases more efficiently and economically; however, I question whether or not the procedure will result in a more timely final resolution of civil cases.

The various time lines seem reasonable; however, it has been my experience that numerous factors delay the mediation process. In reading the proposal I was uncertain as to the time afforded to the Appellate Mediation Administrator for pre-screening of a case. Is there a definite time set forth that I missed. If not, what is the projected time?

Also, what is the criteria that is going to be developed to determine whether the Appellate Mediation Administrator determines whether a case should be considered for appellate mediation? Have such guidelines been formulated? I look forward to receiving more information concerning the proposed rule.

With best personal regards, I am

Yours truly,

CAMERON & GOUGER

By: J. Harvey Cameron
J. Harvey Cameron

JHC/clt

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February 14, 2007

FEB 15 2007

Michael Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN. 37219-1407

Re: Proposed Revision of Rule 48 of the Rules of the Tennessee Supreme Court

Dear Mr. Catalano:

I am writing in reference to the Proposed Revision of Rule 48 of the Rules of the Tennessee Supreme Court. While I appreciate the effort of the courts to encourage the parties to resolve their differences through Alternative Dispute Resolution including mediation, I would respectfully suggest that this rule, as proposed, will lengthen the time required for resolution of civil cases and will add greatly to the expense of the appellate process.

By the time a judgment is appealed, the parties have had a trial and have had the benefit of the opinion of the trier of fact, whether that was a judge or jury. Prior to the trial in the matter, the parties have had the option various forms of alternative dispute resolution. If events transpire at trial which cause the parties' counsel to believe that there is a likelihood of the judgment being reversed on appeal, then the parties have ample valid reasons for entering into negotiations voluntarily by mutual agreement. In cases where there does not appear to be a substantial likelihood that the verdict or judgment will be reversed on appeal there is very little incentive for the prevailing party to negotiate to accept a lessor amount or to pay sums that they were not required to pay. The delay inherent in the appeals process should never be stated as a reason to accept an amount different than the judgment. Any party using the delay of the Appellate process or the expense of the appellate process as a negotiating tactic to gain an advantage would appear to be impermissibly using the legal system to delay to gain an advantage.

This rule will delay resolution of cases. Any period when the case is stayed will be directly reflected in the progress of the case unless a rule is implemented that requires the appellate court to render a decision within a set period of time from the filing of the notice of appeal. There is no provision to require judges to expedite their decision to make up for the time the matter was stayed.

Preparation for mediation, done correctly, is a significant commitment of time. To prepare a pre-mediation statement and have a client meeting to discuss the process will require a minimum of four hours of time. The mediation will require a minimum of four hours. If an attorney is charging an hourly fee the client must pay that expense. In contingency fee cases the lawyer is losing their valuable time. We must value the lawyers time and I would suggest it is worth more than $1,000.00. The mediation must be paid for their time and travel. I would expect the expense to be a minimum of $1,500.00. These are expenses that the court will impose on unwilling participants.

It is reasonable to expect a certain percentage of cases on appeal will be settled because counsel for the respective parties recognizes weakness in their position and the possibility of a reversal. Mandatory mediation or a system that requires a party to proceed to mediation against their consent will not improve the likelihood of settlements. Forcing parties to mediate at a considerable expense and a considerable delay in time invites disrespect in the systems of the courts. It makes the courts appear to be coercing the parties to resolve their claim rather than, allowing them to have their day in court.

Very truly yours,

Neal Agee, Jr.

NA/aw

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FEB 16 2007

February 15, 2007

Mr. Mike Catalano
Appellate Court Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Dear Mr. Catalano:

I believe the **Proposed Provisional Rule 48** of the Tennessee Supreme Court regarding post-file mediation is one of the worst and most ill-conceived plans I have heard of in many years.

It should not be adopted. No one should have mediation forced upon them.

There have been many opportunities for mediation before reaching the appellate level if the parties wished it or possibly mediation has been had before with no success. If one side of the litigation, or both sides as is sometimes the case, feels the result in the lower court was wrong strongly enough to appeal, that party or parties wants the opportunity to be heard by the court and not by an individual. Each wants a COURT'S opinion.

This ill-conceived plan would impose a new layer of unnecessary expense on the people of Tennessee. It would create further delays and dissatisfaction with our judicial process and would soon develop another semi-bureaucracy which is certainly unneeded, unnecessary and undesirable as well as expensive.

One comment heard was that the "judges are getting lazier and lazier". The public's opinion of the judicial system should not be lowered. The courts need all the respect and support possible.

If this proposal should have come from the judiciary, that should be brought to the public's attention so it might be considered when such individual comes up for approval or disapproval.

I hope there will be enough attorneys and citizens who read the proposal to see its absurdity and vote against it.

Yours very truly,

Paul Campbell, Jr.

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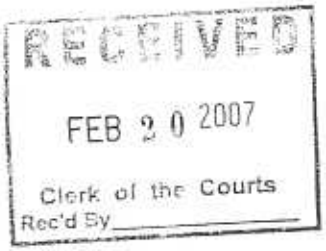
February 19, 2007



Michael W. Catalano
Clerk of the Appellate Courts
Supreme Court Building
401 7th Avenue, North
Nashville, TN 37219

Re: Proposed Supreme Court Rule 48
Mandatory Appellate Mediation

Dear Mr. Catalano:

The purpose of this letter is to register my strong objection to the imposition of mandatory mediation on cases appealed to the Tennessee Court of Appeals.

First, let me say, that I support voluntary mediation of any case whether it be in the trial courts, the Court of Appeal or the Supreme Court of Tennessee, if the lawyers and the parties have agreed to such.

My opposition to mandatory mediation is primarily based on the fact it imposes an unnecessary additional burden on Tennessee litigants. It has been my experience, over the years, that so-called middle class litigants in Tennessee are reaching the point where it is difficult for them to financially afford to litigate, even when they have obviously valid causes of action. Imposing another level of costs would have a chilling effect on those who already have a difficult time in seeking justice.

I can foresee instances in which people would forego valid appeals due to inability to pay for the mediation process. This is certainly not in the best interest of the people of Tennessee or the cause of justice.

Whatever the cost of this program might be, I would suggest that the funds utilized to implement it be distributed to the three sections of the Court of Appeals to allow them to hire additional personnel, if such is needed due to their caseload.

I would appreciate you conveying these thoughts to the Supreme Court of Tennessee.

Very truly yours,

WILLIS & KNIGHT, PLC

William R. Willis, Jr.

WRW:vsc

wrw.07/Catalano.ltr.2.16.07.wpd

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February 16, 2007

Michael W. Catalano, Clerk
Appellate Court
407 7th Avenue N.
Suite 100
Supreme Court Building
Nashville, TN 37219-1406

RE: **Proposed Tenn. S. Ct. R. 48 – Mandatory Appellate Mediation**

Dear Mr. Catalano:

As a practicing lawyer, I am submitting my comments regarding the proposed Mandatory Appellate Mediation Rule.

As a bottom line, I think this is one of the most absurd proposals I have ever seen in my almost 40 years as a practicing lawyer. I think that mandatory mediation at any level is unnecessary, but particularly at the appellate level. It has been my experience that once the parties have decided to appeal a case, the possibility of resolution by mediation is slim.

I see no benefit at all to require mediation at the appellate level. To the contrary, there are many negatives.

If mandatory appellate mediation is required, all parties will have additional expense (mediator costs and attorney fees), the appellate process will be delayed, and I understand there will be additional staffing costs.

I must respectfully urge that this proposed Rule be rejected.

Respectfully submitted,

Dalton L. Townsend

DLT/ts

LAW OFFICES
ORTALE, KELLEY, HERBERT & CRAWFORD

RE: Proposed Tenn. S. Ct. R. 48 - Mandatory Appellate Mediation

Dear Mike:

I am have been requested to make a comment concerning the proposed Tennessee Supreme Court Rule requiring mandatory mediation on all cases filed with the Court of Appeals. I am strongly opposed to the proposed rule.

I have handled several cases in the Sixth Circuit over 30 years and have participated in their required mediation program. I have never been successful in resolving one of those cases through the process of mediation. Also, I am generally opposed to mandatory mediation. I think that if the attorneys handling the appeal feel that there is a reasonable chance of settlement, the parties can always agree on a private mediation. In fact, I have in the past successfully through private mediation settled cases where appeals have been pending. Thank you.

Very truly yours,

ORTALE KELLEY HERBERT & CRAWFORD

/s/ Tom Corts

Tom Corts

HODGES DOUGHTY & CARSON
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February 19, 2007

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Mike Catalano, Clerk
Tennessee Appellate Court
100 Supreme Court Building
401 – 7th Avenue North
Nashville, TN 37219-1407

Dear Mr. Catalano:

I am writing to comment on the proposed Rule 48 regarding appellate mediation. I have some experience in appellate court mediation, as that is a practice employed by the United States Court of Appeals for the Sixth Circuit. In my opinion, our state court system does not need appellate mediation. I base my opinion upon (a) the fact that appellate mediation, in my experience, is wholly ineffective and (b) we do not need another step in the process that adds to the already burdensome expense of litigation.

I believe that the vast majority of cases that are suitable candidates for mediation go through that process at the trial court level and, if they are capable of being resolved, they are resolved in that context. Once a case is in the appellate system, I believe it is typically a case that will not lend itself to mediation for a variety of reasons.

I appreciate the opportunity to voice my opinion.

Yours truly,

HODGES DOUGHTY & CARSON

Thomas H. Dickenson

THD/sm
Q:\Sharon\LETTERS\A\Appellate Clk.doc

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February 19, 2007

Michael W. Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Dear Mr. Catalano:

I have received the proposed provisional Rule 48 of the Tennessee Supreme Court regarding post-trial mediation. As an approved mediator for the United States District Court for the Eastern District of Tennessee, Southern Division, and a former Rule 31 Tennessee Supreme Court Mediator, I believe in the process. However, I think revising our appellate procedure to provide for court-ordered mediation at the appellate court level is a serious mistake.

Parties are always free to mediate and/or to settle their disputes. At the post-trial stage, mediation has either been rejected, or has failed, the case has been tried, and at least one party feels aggrieved by the trial result. I think to give an administrator power to order the parties to return to mediation at that stage is extremely ill-conceived. I believe it will only further serve to drive up court costs and the overall costs of litigation and create further delays and dissatisfaction with our judicial process. Although I feel sure the proposal was well intentioned, I think enacting it would be an enormous mistake.

Yours very truly,

CAMPBELL & CAMPBELL

By: Doug M. Campbell

DMC:smg

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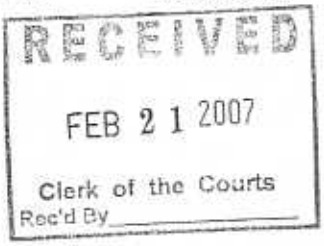
February 19, 2007



Michael Catalano
Tennessee Court of Appeals
401 7th Avenue North
Room 100
Nashville, TN 37219-1407

Re: Proposed Tenn. S. Ct. R. 48 - Mandatory Appellate Mediation

Dear Mike:

It has come to my attention that the Tennessee Supreme Court has requested comments from the legal community regarding a proposed mandatory appellate mediation rule. Even though I spend a great deal of time these days conducting mediation, I am opposed to a requirement that it be mandatory, and in talking with other lawyers here in my office and in Memphis generally, that is the opinion I pick up from them.

I simply wanted to write and register this comment for the file.

Sincerely,

W.J. Michael Cody

WJMC/bd

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February 21, 2007

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville TN 37219-1407

Re: Proposed TN S. Ct. R. 48 – Mandatory Appellate Mediation

Dear Mr. Catalano:

I am writing concerning the proposed Tennessee Supreme Court Rule 48. Let me begin by saying that I have been practicing law in Columbia and the Middle Tennessee area for over 50 years. I have been a Rule 31 Mediator. Though I am not now doing litigation my practice has primarily been litigation and appellate work both civil and criminal.

I do not believe adopting this rule is a wise move. In my opinion it will not expedite the appellate process but will only cause delays. It will further cause more expense to the attorneys involved in the appeal and to their clients. I believe that chances of successful mediation at the appellate level are much less than the chances of mediation at the pre-trial level. Once the final judgment or order has been entered the parties are in a gridlock mode and it will be most difficult for a Mediator to reach a successful conclusion. I have talk to several lawyers and Judges at the Maury County Bar and not one has been in favor of this rule.

Thank you for asking for my comments.

Very truly yours,

Jerry C. Colley

JCC/gdg

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FEB 22 2007

February 20, 2007

Mr. Michael Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue, North
Nashville, TN 37219-1407

Dear Mr. Catalano:

In response to the request for comments by the Tennessee Supreme Court regarding proposed *Tenn. S. Ct. R. 48 – Mandatory Appellate Mediation*, I'm forwarding you this letter.

Having practiced law for more than thirty-five years in the State of Tennessee with a focus on litigation, I believe that I am qualified to share my views with the Court.

I have been and continue to be an advocate who supports arbitration, mediation, and any efficient way to resolve disputes. However, I oppose the proposed Mandatory Appellate Mediation Rule. While I appreciate the Task Force which has worked on this matter, I do not think adoption of this Rule is well advised.

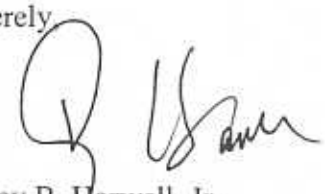
I suggest that mediation is always available; if parties believe that mediation may lead to a resolution of a matter, it is currently available. Also, I note that Judges and Appellate lawyers have not requested the Rule, and ten-plus years ago Appellate Judges rejected Mandatory Appellate Mediation.

By the time a case has reached the Appellate Court, every opportunity for ADR has been available and likely has been pursued. A mandated mediation at the Appellate level just creates unnecessary delay and will add to the cost of appeals.

I seriously doubt that mandatory mediation will lead to a significant percentage of cases that are resolved. To the contrary, I suggest that few cases will be resolved if this Rule is adopted and the cost and delay will far out weigh the benefit regarding those few cases.

I respectfully submit the adoption of proposed Rule 48 is not in the interest of the litigants, the lawyers, or the Administration of Justice of the State of Tennessee.

Sincerely,



Aubrey B. Harwell, Jr.

ABHJR/cbs

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[1] Certified Medical Malpractice Specialist - Tennessee Commission on Continuing Legal Education and Specialization and American Board of Professional Liability Attorneys

[2] Certified Civil Trial Specialist - Tennessee Commission on Continuing Legal Education and Specialization and National Board of Trial Advocacy

[3] Tennessee Supreme Court Rule 31 Listed Mediator

[4] Licensed also in Mississippi
[5] Licensed also in Arkansas
[6] Licensed also in Florida
[7] Also Registered Nurse

FEB 23 2007

February 21, 2007

Mr. Mike Catalano
Clerk of the Appellate Courts
401 7th Avenue
Nashville, TN 37219

Re: Proposed Tenn. S. Ct. R. 48 – Mandatory Appellate Mediation

Dear Mr. Catalano:

I am writing regarding the referenced proposed rule.

I am opposed to this rule. I have experience with the Sixth Circuit Rule, and have not found it to be availing. I am also a Supreme Court listed Alternate Dispute Resolution Neutral, and am quite familiar with the process. Most cases that find their way to the Appellate Courts are not amenable to mediation, and is a waste of time and resources to require that the process be utilized.

I am writing this letter in individual capacity as a practicing lawyer only.

Please contact me if you have questions or need additional information.

Yours very truly,

THE HARDISON LAW FIRM, P.C.

DAVID M. COOK

DMC/db

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February 20, 2007

Mr. Mike Catalano
Appellate Court Clerk
Tennessee Supreme Court/
Tennessee Court of Appeals
Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

FEB 23 2007

RE: Proposed Tennessee Supreme Court Rule 48 – Mandatory Appellate Mediation

Dear Mr. Catalano:

Please accept this letter as a comment to the Tennessee Supreme Court regarding proposed Tennessee Supreme Court Rule 48 – Mandatory Appellate Mediation.

I have practiced law in Tennessee for 29 years, focusing my practice on trial and appellate advocacy. I have reviewed the proposal for mandatory appellate mediation, and I strongly oppose it.

In my opinion, mandatory appellate mediation will create delays in the appellate process and increase costs to clients, while providing little or no benefit to the litigants. My personal experience for the past three decades is that by the time a case is on appeal, it is extremely unlikely that mediation will resolve the remaining issues. In the rare case where mediation might be helpful, we lawyers already have this option. To require mediation in every appeal will simply be to add another bureaucratic barrier we lawyers and our clients must overcome in order to bring a case to a conclusion.

I hope the Supreme Court will reject the proposed amendment.

My thanks to you and the Court for your consideration.

Respectfully submitted,

THOMASON, HENDRIX, HARVEY,
JOHNSON & MITCHELL

Bill Haltom

William H. Haltom, Jr.

WHH/jbp

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**IN RE: PROPOSED PROVISIONAL RULE 48
RULES OF THE TENNESSEE SUPREME COURT**

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN. 37219-1407

On February 13, 2007, the members of 15th Judicial District Bar Association, having reviewed the Proposed Provisional Rule 48, voted to send the following written comments regarding their opinion of the Proposed Provisional Rule 48 as follows:

The 15th Judicial District Bar Association is opposed to the Provisional Rule as written.

We oppose any rule requiring mediation on appeal unless such mediation is conducted by agreement of the parties.

We are opposed to a plan requiring the parties to mediate without their consent and at their expense.

We believe that the plan will not make resolution of civil appeals more efficient or economical.

We believe that it will make the appellate process more expensive and will delay resolution of civil appeals.

We do support a program of mediation on appeal if done by the consent of the parties.

Respectfully submitted,

Timothy Davis, President
15th Judicial District Bar Association

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ROBERT J. WARNER, JR.
OF COUNSEL

FEB 27 2007

February 26, 2007

Mr. Mike Catalano
Clerk of the Appellate Court
Supreme Court Building
401 North 7th Avenue North
Nashville, Tennessee 37219

Re: T. S. Ct. R. 48 -
Mandatory Appellate Mediation

Dear Mr. Catalano:

I am writing this letter to object to the proposed Mandatory Mediation rule.

It is my understanding that no appellate judge or lawyer regularly representing clients before the Court of Appeals has proposed that the Court adopt this rule . To my knowledge no one solicited or gathered data to show that this rule is needed.

It is clear that there is no basis to assume that mediation will be any more successful following a judgment in the trial court than it was before. Only a small fraction of appeals will be amenable to successful mediation. Voluntary mediation in the trial courts has been successful in part because it is voluntary and not mandatory.

Of course, appellate mediation will add significantly to costs of the Court of Appeals and such monies could better be used elsewhere.

I will be happy to discuss this matter at any time.

Very truly yours,

C. Hayes Cooney

CHC/jb

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February 27, 2007

FEB 2 8 2007

Mike Catalino, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 Seventh Avenue, North
Nashville, TN 37219-1407

Re: Proposed Provisional Rule 48

Mr. Catalino:

I was surprised recently to learn of Proposed Provisional Rule 48. I have served as a Rule 31 mediator since 1997 and have never had a party to an appeal request my services, other than pursuant to Rule 37.

My batting average for successful Rule 37 mediations is, for those familiar with baseball terminology, well below the "Mendoza line."[1] My experience with Rule 37 mediations is that the vast majority of participants simply go through the motions, showing up long enough to complain about the expense, but so the mediator can make his or report and the appeal can proceed. Based on that experience, it is not clear why the Supreme Court saw the need to create a Task Force to develop Proposed Provisional Rule 48. There hasn't been any clamor for appellate mediation in our area.

However, having reviewed Proposed Provisional Rule 48, beyond what I have already said, I am opposed for the following reasons:

First, by the time a case is docketed for appeal these days, it is likely mediation has already been used, unsuccessfully, either by agreement or by order of the court, in the vast majority of cases. Thus, if mediation fails pre-trial, there is little reason to believe it will be successful post-trial. To me an appeal signals one side, and perhaps both, is firmly invested in the case, in more ways than one, and determined to see the matter through.

Second, the Rule is deficient because it lacks criteria and/or guidelines to be employed by the "Appellate Mediation Administrator" to determine ". . . whether the case should be further considered for appellate mediation." If I am correct, that means the selection of cases to be referred is subjective, an unfortunate circumstance considering Rules 9 and 11 of the Rules of Appellate Procedure contain very specific criteria the Courts of Appeal and Supreme Court use to select the cases they will hear.

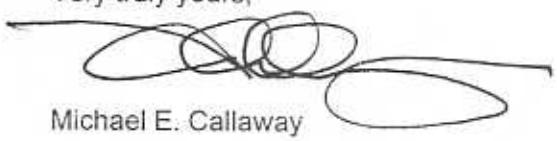
---

[1] A batting average of less than .200.

Finally, I would prefer to see, and have long supported, a program that would provide Law Clerks to the Trial Judges of our State. I believe money would better be spent for that purpose, and the public would derive more benefit, than for the Court to create a new office in the AOC.

I am

Very truly yours,



Michael E. Callaway

MEC:rw

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February 27, 2007

FEB 28 2007

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Proposed Tenn. S. Ct R. 48 – Mandatory Appellate Mediation

Dear Mr. Catalano:

This is to comment regarding the proposed Supreme Court rule captioned above.

At the outset, I would say that, in my opinion, this proposed rule is not a good idea. This is based upon my some 50 years experience in trial and appellate practice as well as over 12 years experience as a mediator in several hundred cases. The primary reasons for my negative opinion are, in no particular order, as follows:

- I have a basic distaste for mandatory ADR. My mediation experience has shown that, in those cases where mediation has been ordered by a court without the agreement of the parties, one or more will attend the mediation in body but not with a positive attitude toward settlement.

- Under current Rule 31, mediation is available to the parties at any stage of the litigation proceedings, including in the appellate courts.

- Mandatory mediation would inject an additional layer of procedure to an already required time-consuming process. This would involve the courts, the clerks' offices, and significantly add to the expenses incurred by the parties.

- My experience has been that, in most instances, by the time the parties reach the appellate courts, settlement prospects have already been exhausted.

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- The parties and their attorneys are in the best position to evaluate the mediation prospects, and I have observed that when such prospects are positive, they quite willingly agree to mediation.

- Rule 31, as it presently exists, provides for mediation and certain other ADR proceedings to be ordered by any court, including the appellate courts. Accordingly, on a case-by-case basis, mediation can already be required. I see no compelling reason to go any further on this point.

In summary, I see this as a bad idea which will impede the desired process of moving litigation through the courts by adding time and expense, and, at the same time, will not improve the prospects for mediated settlements beyond the current programs.

Thank you very much for considering these comments.

Yours very truly,

Robert R. Campbell

RRC:jdk

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February 28, 2007

The Honorable Mike Catalano
Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Provisional Rule 48

Dear Mr. Catalano:

Following are my comments concerning the proposed provisional Supreme Court Rule 48 and to state my opposition to the rule.

First, I practice both in the United States Court of Appeals for the Sixth Circuit and in our state's appellate courts. In 1995, then Chief Judge Gilbert Merritt of the United States Court of Appeals introduced to Tennessee Appellate Judges the idea of appellate mediation following the Sixth Circuit mediation program. Respectfully, my experience with the Sixth Circuit mandated mediation program is that it is, for the most part, a waste of time, interrupting the lawyers who can more appropriately dedicate time to writing the appellate briefs. No case I have been involved in has been successfully mediated using the Sixth Circuit's mediation procedure.

My understanding that the task force considering and drafting the appellate mediation rule proposed has followed Alabama's recently adopted system. What follows are specific comments concerning the proposed rule:

1. By the time civil cases now reach the appellate courts, most have had voluntary or court-ordered mediation attempts prior to the trial and, often, voluntary efforts afterwards. Therefore, further mediation of disputes during appeal can occur presently without the necessity of a new rule.

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2. A mandated mediation process will only increase expenses to litigants as it requires preparation of a "separate confidential statement" and arguments to the Administrator as to whether the appeal should be referred to mediation. This only increases the hours of time spent by counsel and costs to litigants.

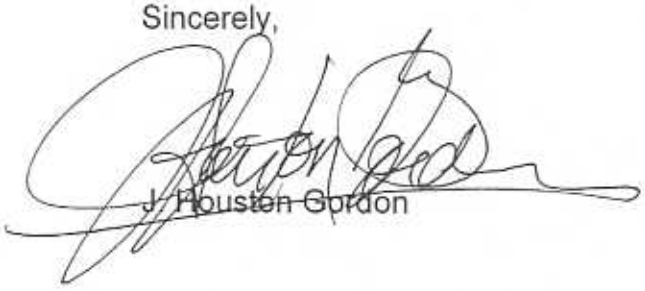
3. The process of the Administrator's referring a case to mediation will, in my opinion, create delay in having the case ultimately resolved by the courts. In short, the Administrator can force the parties to mediation even though the parties and their attorneys may have already attempted mediation and/or recognized that there is no way that mediation is going to resolve the matter. This seems to me to simply create another bureaucratic delay in obtaining finality and relief for injured or damaged parties. In certain cases involving litigation between corporations, insurance companies, and the like, delay may not be harmful. With real people who are in need of resolution of their disputes and, in particular, for those who have suffered physical, emotional or financial wrong at the hands of others, the delay only exacerbates the injury.

4. This exacerbation caused by an additional layer of procedure is only made more apparent when there is a delay in determining who would be an "acceptable Mediator," the inability to agree upon a mediator, and the challenging of the qualifications of the mediator, etc.

In short, as an attorney who represents clients in the trial courts and appellate courts of this state, it is my belief that a mandatory appellate mediation rule would result in another unnecessary layer of administrative procedure and will not better serve the interest of expediting resolution of disputes. It will delay resolution. Importantly, those litigants likely to be harmed by delays created by a mandated mediation process are those who are most vulnerable to being further harmed by delay.

Kindest regards.

Sincerely,



J. Houston Gordon

JHG/km

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February 28, 2007

Mike Catalano, Clerk
TENNESSEE SUPREME COURT
MIDDLE DIVISION
Supreme Court Building
401 Seventh Avenue, North
Nashville, Tennessee 37219-1407

Re: Proposed Tenn. S. Ct. R. 48 -- Mandatory Appellate Mediation

Dear Mr. Catalano:

I am writing to comment on proposed Tenn. S. Ct. R. 48 and to urge the Court not to adopt a rule mandating appellate mediation.

Twenty years ago, mediation was rare. There were few trained mediators and litigants resolved cases through traditional settlement negotiations. Now, certified mediators are readily available and mediation has become the norm. In the great majority of my cases, for example, the parties voluntarily elect to mediate and most of those cases are successfully resolved.

Although I am often a proponent of voluntary mediation at the trial court level, I am opposed to mandatory mediation at the appellate level, for several reasons. First, it is unnecessary because mediation is so readily available. Any party who wishes to mediate certainly has the opportunity to do so.

More importantly, mediation should be voluntary. The success of the mediation process is due in part to its voluntary nature; mandating mediation, especially for parties who have already mediated unsuccessfully at the trial court level, will reduce its effectiveness. Mediation should also be voluntary because it is an important strategic decision that is better left to the sound judgment of experienced trial lawyers who can advise their clients, based on the facts and circumstances of the case, whether mediation is advisable. Mediation can be valuable but it is

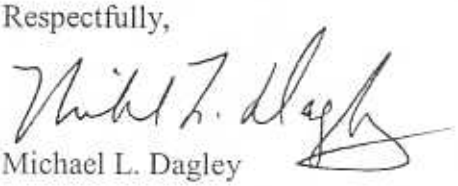
not always in a party's best interest, and thus the judgment whether to mediate should be reserved to the parties and their counsel.

From a practical standpoint, the disadvantages outweigh the advantages. Cost and delay are significant issues in our judicial system. Injecting another layer of mandatory mediation will increase cost and exacerbate delay, the disadvantages of which far outweigh the advantage of the occasional case that might be settled.

Finally, from a policy perspective, we should be cautious about adopting "mandatory" measures. As we have learned from the federal experience with mandatory sentencing guidelines, stripping discretion from our judicial system can have unfortunate consequences. The judicial system is better served if experienced trial lawyers exercise professional judgment to advise their clients based on the exigencies and particularized facts of each case.

Thank you for the opportunity to provide these comments, which are mine and not necessarily those of my firm, to the Tennessee Supreme Court.

Respectfully,



Michael L. Dagley

MLD/sdt

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February 28, 2007

VIA FIRST CLASS MAIL

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Provisional Supreme Court Rule 48

Dear Mike:

I write to offer my comments in opposition to the adoption of the proposed Supreme Court Rule 48.

In the first place, I consider the rule to be wholly unnecessary. Cases that reach the Appellate Courts are in a totally different posture than at earlier stages in the litigation. At those earlier stages in the litigation, the litigants and their attorneys have had ample opportunities for old-fashioned negotiations as well as access to multiple forms of alternative dispute resolutions. It is extremely rare in today's environment for a case to go to trial without having first been through at least one mediation. I have been involved in cases that have gone through as many as three mediations prior to trial, sometimes at the request of the Court. In most of the cases, however, mediation came about at the suggestion of the parties or their counsel. If the case is not settled prior to trial, during trial, or post trial, it is not because the parties have not considered their settlement opportunities but because they need the Court to make a decision.

I am also opposed to mandatory mediation in general. Mediation works when the parties both desire to attempt to resolve their differences. There is absolutely nothing to prevent the parties from engaging in voluntary mediation

during the appellate process. I recognize that that seldom happens for the reasons stated in my previous paragraph.

In addition, I do not see how the proposed rule can avoid adding to the expense and delay that is already a serious problem for all parties to litigation. In addition to the expense to the litigators, the rule establishes yet another office, the "Appellate Mediation Office" and "Appellate Mediation Administrator," adding to the cost of the administration of the Courts.

Finally, I have practiced in the state and federal courts for almost forty years and participated in the mediation program of the Sixth Circuit Court of Appeals. I have never found that program to be successful for the simple reason that by the time the parties were on appeal they knew exactly what they needed someone else to decide for them, whether it was an interpretation of the law or the application of the law to the facts of the case.

Respectfully,

James M. Doran, Jr.

JMD/ecm

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February 26, 2007

STEPHEN T. GREER

RUSSELL ANNE SWAFFORD
Rule 31 Family Mediator

ELIZABETH GREER ADAMS

OF COUNSEL:
THOMAS A. GREER, JR.
Retired Circuit Judge

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Mr. Michael Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue, North
Nashville, TN 37219

Re: Proposed Tennessee Supreme Court Rule 48

Dear Mr. Catalano:

I am writing you to express my comments and sentiments on the proposed *Rule 48* to the *Tennessee Supreme Court Rules*. I have had an opportunity to review that proposed rule, and wished to voice my opinion concerning that proposal.

As I understand the rule, I see this proposed rule as an unnecessary rule that will only add expense and delay to the appellate process. Mediation at the trial court level is a common, every day occurrence, and many times results in the resolution of a case. However, mediation at that level is voluntary. Furthermore, in my opinion, if a mediation at the trial court level has not been successful in resolving a case, and the case has gone through trial, it is highly doubtful to me that mediation would be an effective alternative dispute resolution process at the appellate level.

The lawyers who are representing the parties are in the best position to know whether or not a possible mediation might result in successfully resolving a case. As I understand the rule, an administrative personnel would be delegated the authority to determine whether or not a case would be required to be mediated. In my opinion, it would be impossible for any administrative personnel, unfamiliar with not only the facts and law of the case, but also the dynamics of the parties involved, to be in a position to determine whether or not a case should go through mediation.

The cost of appeals is already a tremendous burden to litigants. Adding another administrative step in the process would only add to the expense. If this trend continues, the appellate process would only be available to the wealthy.

I do not know what the proposal is concerning the cost of such a program, but I cannot imagine but that it will create a substantial expense to the budget for the Administrative Office of the Courts. I currently serve as President of the Tennessee Trial Lawyers Association, and our association was in full support last year of the budget that included a substantial pay raise for our judiciary. The salary increase was well deserved and long overdue. Although I cannot and do not speak for the Tennessee Trial Lawyers Association in this respect, given that our association has taken no official action on this issue, from a personal standpoint, I would not feel comfortable supporting legislative funding for the implementation of mandatory appellate mediation.

I have been practicing law for almost 34 years, and I have practiced before the Court of Appeals, Court of Criminal Appeals and the Tennessee Supreme Court on many occasions. We have an excellent method in place for selecting our Appellate Judges, and I am very proud of our appellate court system. I simply see no reason to complicate the process by a rule of mandatory mediation controlled by appointed administrative personnel.

I would appreciate your passing these comments on to the Tennessee Supreme Court for their consideration on this very important issue. If there is anything further that I can provide in this respect, please let me know.

Thank you.

Sincerely,

LAW OFFICES OF
STEPHEN T. GREER, P.C.

By: _____
Stephen T. Greer

STG/cw

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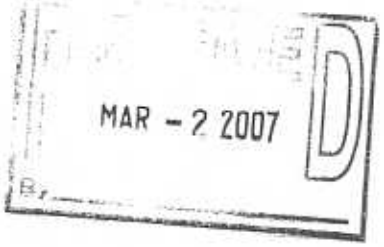
JOHN P. DAVIS, JR. (1923-1977)

March 1, 2007



Michael W. Catalano, Clerk
Appellate Court
407 7th Avenue North, Suite 100
Supreme Court Building
Nashville, TN 37214-1406

Re: Proposed Tennessee Supreme Court Rule 48 – Mandatory Appellate Mediation

Dear Mr. Catalano:

Please accept my comments regarding the proposed Mandatory Appellate Mediation Rule. I am a practicing lawyer in Knoxville, Tennessee in the areas of medical malpractice, land use and employment law.

It is my belief that mandatory mediation at any level of litigation is unnecessary, but it is particularly unnecessary at the appellate level, especially in my practice. It has been my experience that once the parties are at the appellate level, all means and manners of approaching settlement have already been exhausted.

Appellate lawyers and Judges have not requested this rule. In fact, appellate mediation is currently available when the parties desire to pursue it and there is currently a rule in place at the appellate level allowing for mediation. Mandatory appellate mediation would create unnecessary delay in the appellate process. Mandatory appellate mediation will add significantly to the cost of appeals. Mandatory appellate mediation will take appeals away from the lawyers and place them in the hands of an employee of the Administrative Office of the Courts. This employee, whose job security will depend upon requiring as many appellate mediations as possible, will have no judicial oversight and will impose mediation based upon only sketchy information about the case. Further, funding such a proposal will be a waste of resources in my opinion and there has been no data or demonstration that this radical change in the appellate practice will practically benefit the parties in many cases or that it will improve the appellate decision-making process.

I respectfully request that this proposed rule be rejected.

Respectfully submitted,

Wayne A. Kline

WAK/rjt

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March 1, 2007

Mr. Mike Catalano, Clerk
Tennessee Appellate Court
100 Supreme Court bldg.
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Nashville, Tennessee 37219-1407

In re: **Proposed Tennessee Supreme Court Rule 48**

Dear Mr. Catalano:

Please note that the undersigned opposes the institution of the referenced rule, which proposes a mandatory appellate mediation rule. We have had experience with a similar rule in the United States Court of Appeals for the Sixth Circuit and have found it to be largely unwieldy, unworkable, and a waste of time. At the time the Sixth Circuit rule was instituted, mediation was not as widely used as it is today, which perhaps justified the institution of that court's rule. Today, however, the vast majority of the cases that reach the Tennessee Court of Appeals have been mediated, albeit unsuccessfully, to some degree. In our view, the judicial resources saved by mandatory mediation will be consumed by the need to have a bureaucracy to deal with the mandatory mediation program. It will also increase the costs we would have to pass along to our clients.

It is also our understanding that if the parties request mediation on the appellate level, the Court of Appeals accommodates that request. If a rule is necessary, we suggest a more modest rule that provides a framework for voluntary mediation on the appellate level.

Please relay these comments on to the Supreme Court for their consideration.

Sincerely yours,

Sam D. Elliott
For Gearhiser, Peters, Lockaby, Cavett & Elliott, PLLC

SDE:mkt

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OFFICE HOURS BY APPOINTMENT ONLY

February 28, 2007

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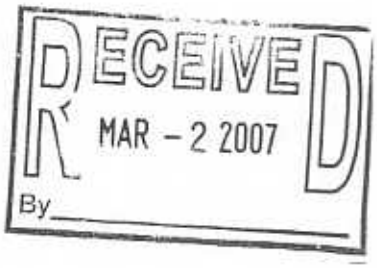

RE: Required Appellate mediation

Dear Sir:

I am in opposition to the proposed Rule 48 change. I have been doing this for approximately 38 years and can't help but feel that mandatory appellate mediation will only create unnecessary delays at a point in time where it will, most likely, not be effective. I likewise feel that adding to staff and improving electronic filing in the appellate Courts can only better spend the costs of such.

Very truly yours,

Jesse Farr

JOF/jh

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ROBERT E. ALDERSON (RET.)
CLINTON V. BUTLER, JR. (RET.)

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WRITER'S DIRECT DIAL NUMBER

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March 1, 2007

Mr. Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Provisional Rule 48, Rules of the Tennessee Supreme Court

Dear Mr. Catalano:

The purpose of this letter is to provide my comments concerning the proposed rule dealing with appellate mediation. Voluntary mediation, and in some instances trial court mandated mediation, has proven to be a most beneficial tool for the speedy and efficient resolution of many cases that would otherwise have gone to trial. I do not, however, share the same feeling about the potential for beneficial results for appellate mediation proposed under Rule 48.

I have experienced the mandatory mediation process adopted by the Sixth Circuit, and in each instance it has been nothing more than a time consuming additional expense. It has been my experience that at the appellate level, cases that are settled usually are the result of the desire of the parties rather than as the product of any mandatory process.

I have not spoken to any attorney engaged in frequent appellate practice, nor any member of the judiciary in an appellate position who has felt a need for or expressed favorable comments for appellate mediation. It is my belief that our current appellate system is neither ineffective nor inefficient; and since it has served me well my entire career, I find no compelling reason to want to revise the system by injecting another potential for delay and expense through mandated mediation.

The creation of the Office of the Appellate Mediation Administrator will obviously bring increased costs which must be borne either by the litigant or by the taxpayer. There will be additional documents required, such as the case screening form, and in most cases a mediation statement. I foresee numerous requests for a waiver of mediation fees, both by pro se litigants or those proceeding on a pauper's oath and by many individuals who lack insurance coverage. This will increase the burden for pro bono service already imposed upon Rule 31 mediators.

Because of the stays that will become automatic upon mandated mediation, there is an obvious delay in the final resolution of civil cases. The proposed rule, if adopted, will create more problems and additional expense for what I feel will be the rare case that settles at that stage.

I have not been made aware of any survey submitted to the bench or the bar seeking their input with respect to the need for Rule 48, and I suspect that simply making the rule available for comment will not produce the volume of response that could have been obtained through questionnaires. There may be a number of points that the Supreme Court and its task force could make that might alter my opinion, but I have not read any articles pointing out the need for this new procedure.

I am concerned about the selection of cases by the Appellate Mediation Administrator, and unless it is vastly different from the Sixth Circuit, I would expect that the decision to mandate mediation will not be based upon the degree of knowledge of the case and its settlement potential that is possessed by the attorneys involved in the appellate process. It is my recommendation that mediation at the appellate level be left to completely voluntary mediation.

With best regards, I remain

Yours very truly,

RAINEY, KIZER, REVIERE & BELL, P.L.C.

Thomas H. Rainey

Thomas H. Rainey

THR:rlm

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE:)
)
PROPOSED PROVISIONAL RULE 48)
RULES OF THE TENNESSEE SUPREME)
COURT)

COMMENTS

This comment is in response to the Court's solicitation concerning the Proposed Provisional Rule 48. I appreciate the opportunity to provide this Court with my thoughts and observations in this regard.

As a matter of background, I have been practicing law in the State of Tennessee for 40 years and that entire career has been spent in trial and appellate practice. This practice has been both in State and Federal Courts, Trial and Appellate. Upon graduating from law school, I served as a law clerk for the Tennessee Supreme Court for a year before going into private practice. I am a member of a number of professional organizations and have served on the Board of Governors of the Tennessee Bar Association for a number of years. I have been a Fellow in the American College of Trial Lawyers since 1991 and an advocate certified by the National Board of Trial Advocacy since 1995. I also served as Special Judge on the Tennessee Court of Appeals.

I have read the Proposed Provisional Supreme Court Rule 48 which was filed on December 13, 2006. I have the following comments:

1. No need exists for this Rule, making Appellate mediation mandatory. Appellate mediation is currently available when parties desire to request and pursue it.

2. The stated purpose and goals of the Rule in Section 1 are to make civil case appeals ". . . more efficient and economical." The Rule is specifically not intended to lengthen the time

required for resolution of civil cases. Nevertheless, section 5 provides for a notice to the Appellate Court Clerk to stay the proceedings on appeal. This will delay the final resolution of civil cases in a majority of the cases pending.

3. I have had experience in the Federal Appellate System with mediation and, of course, extensive experience with mediation at the trial level in State Court. I have not found that mediation at the Appellate level has been helpful in any regard. At the Trial level, it can be helpful in a few cases, but typically it is used by one or both of the parties as a means of discovery of the other party's decisions and evaluation of the case. If mediation has not been successful before the Appellate process begins, there is little reason to believe it will be successful at this level.

4. Litigation is already too expensive for Tennesseans except for the wealthy and corporations. Adding fees for a mediator, attorney's fees for all parties, and other expenses, just adds to the cost for parties to litigate their differences. Any benefit will be greatly outweighed by the detriment caused by these additional costs of appeal.

5. The power given the Appellate Mediation Administrator is too great. The stay will be nearly sixty days in any event, and the Administrator can get an extension of that time from the Court which, I predict, will happen with regularity. The Court will exercise very little judicial oversight over this Administrator, whose office will grow in personnel and budget and, presumed, importance.

6. The Appellate process in Tennessee presently has works well. I see no reason to add a layer to that process. If the caseload in the Court of Appeals is burdensome, or disproportionate between Sections, this can be alleviated by scheduling judges in different Sections or adding judges to the Court.

7. Appeals cases need to be decided and published to accommodate the development of the common law. Mediation will establish no precedent to guide practicing lawyers.

In conclusion, I am opposed to Proposed Rule 48. I realize the Rule makes provision for only a Pilot Project at this time. However, even that seems to me to be a waste of time and funds which could be better used for the benefit of the Appellate Court. Again I thank the Court for the opportunity to express my views and, respectfully, I am

Very truly yours,

Walter W. Bussart

WWB/dhl

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MARK STEWART
DAVID STEWART

March 1, 2007

MAR - 5 2007

Mike Catalano
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

RE: Proposed Provisional Rule 48, Rules of Tennessee Supreme Court.

Dear Mr. Catalano:

This letter is to voice my opposition to the proposed provisional rule 48. After reviewing the provisional rule and discussing its potential impact with my colleagues, it became readily apparent that the rule would be detrimental in many respects.

It appears to me that section 5 of the proposed rule fails to establish any real guidelines with regard to which cases should be shuffled off to the mediation process. As a result, many cases would be subjected to mediation despite the fact that the parties mediated the same issues prior to trial. However, even if a set of guidelines were established, mediation process would still be subject to a variety of pit falls. Notably, the mediation requirement would drive the cost of appeal upward for litigants. The increased cost would be attributable not only to the cost of the mediator, but also, the additional burden placed on each party's counsel to properly prepare for the mediation. In reality, most civil litigants have already expended substantial time and money to attempt a mutually agreeable settlement. More importantly, civil litigants have often waited patiently as their case moves through discovery, motions, and ultimately trial. As you know this can take quite some time. I believe it would be unjust to ask such a litigant to face an additional delay at the appellate level. The proposed rule would certainly force such an additional delay because it provides that "all appellate schedules, including record preparation, are stayed" during the appellate mediation process. My concern with regard to this delay is compounded as I read section 6 of the proposed rule. Section 6 only imposes the loose rule that the mediation administrator shall "promptly" review the completed mediation case screening forms. I certainly do not believe that the mediation administrator would intentionally allow any cases to languish, however, the reality exists that if his or her office is inundated with mediation case screening forms or in the event the mediation administrator's office is understaffed, then there is no concrete time requirement to ensure cases move promptly through the system.

Additionally, I harbor a concern regarding the cost of establishing and running an office as required by this rule. As I previously mentioned, I believe that adequate staffing would be essential. In order to provide the number of individuals needed to process cases promptly and also provide facilities, equipment, and other support, I can only imagine that the cost would be tremendous. As an attorney who is called upon to represent many indigent clients as a result of the instigation of dependency and neglect proceedings or criminal prosecution, I feel compelled to point out that the funding necessary to implement this proposed rule could be utilized to provide for indigent individuals and the programs that serve them.

Once again, it is my firm belief that implementation of the proposed rule 48 would be detrimental to litigants, attorneys, and the administration of justice.

Sincerely,

David L. Stewart

DLS:jp

JOHN D. KITCH
ATTORNEY AT LAW

MAR - 5 2007

March 1, 2007

Michael W. Catalano
Appellate Court Clerk
401 7th Avenue North
100 Supreme Court Building
Nashville, Tennessee 37219

Re: Comments to Proposed Rule 48

Dear Mr. Catalano:

Please accept this letter as my comments concerning Proposed Rule 48 regarding appellate mediation.

Mediation can be an effective method for resolving disputes in appropriate cases and I understand the desire to make the appellate process more efficient and more economical. However, in my view Proposed Rule 48 would not successfully accomplish either goal. Lawyers and clients can mediate already if they choose, and I see no need for a new and costly level of administration to force litigants to mediation.

By definition the process described in Proposed Rule 48 will extend the time required to resolve cases and will cost money that in my view could be spent to greater effect elsewhere. The process can't help but take more time, as it adds a layer to the appellate process. It also requires the hiring of a new staff administrator and support staff, requiring office space and other costly resources. With respect, I do not see the benefit outweighing the cost in time and money, especially since we already can mediate our cases if we think mediation appropriate.

Additionally, I do not believe that mediation ever should be anything but voluntary and consensual. I urge the Court to let the lawyers and their clients continue to decide whether mediation

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is feasible by leaving it a voluntary decision. The lawyers and their clients are in a far better position than a stranger to the case to know whether mediation has any likelihood of success; they will have lived with the case for months or years and will have an understanding of the intangible elements of the case far superior to that of any administrator looking at a few documents.

Having said all this I would welcome a rule that establishes guidelines for voluntary mediation, including the capacity to ask for a stay as necessary and appropriate, but without any added layer of administration. Please feel free to contact me if I may answer any questions or be of some help, and thank you.

Sincerely,

John D. Kitch

JDK/mtf

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*ALSO ADMITTED IN GEORGIA

March 5, 2007

Mr. Mike Catalano, Clerk
Tennessee Appellate Court
100 Supreme Court bldg.
401 7th Ave. North
Nashville, Tennessee 37219-1407

In re: **Proposed Tennessee Supreme Court Rule 48**

Dear Mr. Catalano:

I oppose the institution of the referenced rule, which proposes a mandatory appellate mediation rule. We have had experience with a similar rule in the United States Court of Appeals for the Sixth Circuit and have found it to be largely unwieldy, unworkable, and a waste of time. The vast majority of the cases that reach the Tennessee Court of Appeals have been mediated, albeit unsuccessfully, to some degree. In my view, the judicial resources saved by mandatory mediation will be consumed by the need to have a bureaucracy to deal with the mandatory mediation program. It will also increase the costs we would have to pass along to our clients.

Please relay these comments on to the Supreme Court for their consideration.

Sincerely yours,

Charles J. Gearhiser
For Gearhiser, Peters, Lockaby, Cavett & Elliott, PLLC

CJG:mkt

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MAR - 6 2007

March 5, 2007

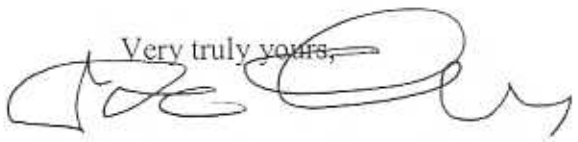
Mike Cataleno, Clerk
Tennessee Appellate Courts
100 Supreme Court Bldg.
401 17th Avenue N.
Nashville, TN 37219-1417

Dear Sir:

This is to register my opposition to the proposal to require mediation procedure in civil cases on appeal.

Having graduated from Cumberland Law School in 1932, I took the Bar and began practice in my family firm . . and law practice has changed!

Very truly yours,



Jac Chambliss

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March 8, 2007

Michael W. Catalano
Clerk of the Appellate Courts
Supreme Court Bldg.
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Proposed Tennessee Supreme Court Rule 48 – Mandatory Appellate Mediation

Dear Mr. Catalano:

As an attorney who has actively practiced in the trial and appellate courts of Tennessee for almost 35 years, I feel compelled to comment on proposed Tennessee Supreme Court Rule 48 concerning mandatory appellate mediation.

I have carefully reviewed the full text of the proposed rule and know that many talented and thoughtful people have participated in the drafting of this proposal, however, after reviewing the rule and discussing it with a number of my colleagues, I must express my opposition to its adoption.

The adoption of the rule doesn't create any remedies that are not already available to the litigants if they mutually desire appellate mediation. As you know, many of the cases that are on appeal have already gone through unsuccessful mediations prior to trial. I believe that the attorneys who have been involved with the suit from its inception through trial and into the appellate process are best able to determine whether a case on appeal is amenable to mediation. I do not believe that attorneys and clients who are forced to mediate a case on appeal at significantly increased costs to the parties are very likely to be receptive to the mediator's efforts.

Creating mandatory appellate mediation not only would increase the costs of an appeal but it would also create additional delays in the appellate process and therefore extend the time for bringing the litigation to its ultimate conclusion. Many of the cases that I am involved with take two to three years to get to trial and I am fundamentally opposed to any process that would lengthen the appellate review of lower court decisions.

Not only would mandatory appellate mediation increase the cost to the parties, I am sure that it would result in a substantial cost increase to the appellate courts who would have to provide additional staff and other resources to implement and maintain the system. I am also fundamentally opposed to any process that increases the costs of litigation.

Finally, I believe that most appellate cases which necessarily turn on questions of law do not usually involve issues that are suitable for mediation. To create a mandatory system for all appellate cases to go to mediation when only a very small percentage are likely to be settled does not seem to me to be a prudent decision and none of the attorneys who regularly practice in the appellate courts that I have discussed the matter with are supportive of the proposed rule.

My comments are intended to be constructive and I hope that they will be considered.

Very truly yours,

Robert L. Trentham

RLT/mh

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FAMILY MEDIATOR

March 8, 2007

Mr. Michael W. Catalano
Appellate Court Clerk
Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Proposed Tenn. S. Ct. R. 48 - Mandatory Appellate Mediation

Dear Mike:

I am writing to **oppose** mandatory appellate mediation and proposed Tenn. S. Ct. R. 48. This is a very bad idea, and I believe most lawyers who have considered the issue will oppose it also.

I have had several experiences with the mandatory mediation required by the Sixth Circuit, almost all of them unpleasant, and some of them counterproductive. At the present time, most cases are mediated prior to trial. It is very expensive for clients to be required to expend many additional hours going through mediation again. By the time a case reaches the Court of Appeals, usually there are one or two discrete legal issues to be resolved. Factual disputes have been resolved by the trial court, and are seldom overturned on appeal.

My impression in the Sixth Circuit was that mediators were graded or evaluated on how many cases they settled. This resulted in severe badgering of the parties, even when it became apparent that, for whatever reason, the parties wanted to the judges to decide the case. A winning party in the trial court is usually less interested in mediation than the losing party, and does not appreciate insinuations that the Court will not smile upon his position unless he spends more time and money in mediation. There were subtle threats that the Court

would punish attorneys who declined to compromise their positions in mediation. Ini my opinion, this is not how our judicial system should work.

I very much favor **pre-trial** mediation because it offers a less expensive and more pragmatic way to resolve disputes. **Post-trial** mediation, however, is the opposite. It is an attempt to force litigants to bear additional expense in order to relieve the appellate court of work. After trial, the factual disputes have been resolved.

I am not aware that any lawyers or lawyer organizations have requested mandatory mediation in the appellate courts. Frankly, I do not understand the motivation or impetus for such suggestions. Parties at this time can settle or mediate disputes that are in the appellate courts if they choose to do so.

Finally, it seems that mandatory or enforced mediation would reduce the role of appellate courts in the important development of law. It will become much more difficult for new statutes or regulations to be interpreted if a mediator is beating up on litigants to resolve the issues prior to appellate consideration.

Mandatory appellate mediation is a very bad idea that interferes with normal judicial processes as known and understood in this state and country.

Very Truly Yours,

John W. Wagster

JWW/cpa
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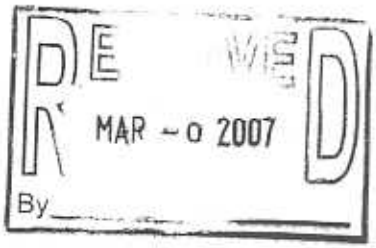

March 9, 2007

VIA FACSIMILE & U.S. MAIL

Mr. Michael W. Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Provisional Rule 48 Rules of the Tennessee Supreme Court

Dear Mr. Catalano:

Pursuant to the Tennessee Supreme Court's Order soliciting comments on the Proposed Provisional Rule 48 Rules of the Tennessee Supreme Court, the Knoxville Bar Association submitted the Proposed Rule 48 to its Professionalism Committee for review. Consistent with the Professionalism Committee's review and recommendations to the KBA Executive Committee, the Knoxville Bar Association submits the following comments to the Court for its consideration and possible action:

1. The Knoxville Bar Association does not favor mediation at the appellate level which is mandatory rather than optional to the parties.

2. The Knoxville Bar Association does not favor additional expense to the Court system, taxpayers and potentially litigants, which are all concerns associated with the proposed mediation process.

3. The Knoxville Bar Association does not favor a process by which the length of time will be increased for resolution of an appeal.

Several issues were identified regarding the mandatory component of the proposed rule. There certainly is a general consensus that mediation is a useful and productive tool, particularly in the pre-trial stages of litigation. Most litigants will either have participated in or consciously chosen not to participate in mediation prior to a trial on the merits. The mandatory aspect of Proposed Provisional Rule 48 and the potential increase in costs, expenses and time expended to obtain a final resolution are all concerns.

The Knoxville Bar Association respectfully submits the foregoing comments for the Court's further consideration. As always, we appreciate the opportunity to comment on proposed rules promulgated by the Tennessee Supreme Court.

With kind regards,

Sincerely yours,

Ruth T. Ellis, President
Knoxville Bar Association

cc: KBA Executive Committee
KBA Professionalism Committee

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+FORMER CIRCUIT COURT JUDGE
RULE 31 LISTED GENERAL CIVIL/
FAMILY MEDIATOR

March 9, 2007

Michael W. Catalano
Appellate Court Clerk
Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Proposed Tenn. S. Ct. R. 48 - Mandatory Appellate Mediation

Dear Mr. Catalano:

It is my firm belief that mandatory appellate mediation in Tennessee is a bad idea. Although I don't practice law in federal court anymore, some of my friends have told me about bad experiences with mandatory appellate mediation in federal court.

Most of my cases are mediated prior to trial and many are settled through mediation. Lawyers can mediate cases on appeal at this time if they want to, but in my opinion, appellate mediation should not be mandatory. Mediation, whether pre-trial or post-trial, is very expensive. Clients should not be forced to bear the additional expense of mandatory appellate mediation. Fortunately, in Tennessee we do have very good appellate judges and our system of justice is working well without mandatory appellate mediation.

Sincerely,

HOLLINS, WAGSTER, YARBROUGH,
WEATHERLY & RAYBIN, P.C.

John J. Hollins

JJH:vb

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KELLY & KELLY, P.C.

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TELEPHONE 423/942-6911

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March 9, 2007

Honorable Michael W. Catalano
Clerk of the Appellate Courts
State of Tennessee
100 Supreme Court Building
401 7th Avenue, North
Nashville, Tennessee 37219-1407

RE: Proposed Tenn. S. Ct. R. 48 – Mandatory Appellate Mediation

Dear Mr. Catalano:

I will begin by saying that I am an advocate of mediation. Over the last many years, I have been involved in numerous mediations representing both plaintiffs and defendants, and I have also served as the mediator in many cases. With that having been said, I am opposed to proposed Tenn. S. Ct. R. 48. It is my understanding that Tennessee's Appellate Judges considered and rejected appellate mediation in 1995. A great majority of the trial lawyers that I know are also opposed to this proposed rule. To my knowledge, there has never been any data gathered by lawyers or judges across this State to determine whether Tennessee needs mandatory appellate mediation.

In my opinion, mandatory appellate mediation will create unnecessary delay in the appellate process. There is a very good likelihood that in many of the cases that are appealed, mediation was conducted before the actual trial of the case. One would assume that there would be no more likelihood of a successful mediation following a judgment than before the case was tried.

Mandatory appellate mediation would add significantly to the cost of appeals. This would particularly affect plaintiffs in tort cases where the defendant is insured. The insurance carrier would be at an economic advantage and would be afforded another opportunity to place a financial squeeze on the plaintiff to compromise the claim for less than its true value. This is certainly not the justice that we should be striving for in our system.

I am uncertain as to what the proposal is concerning the cost of such a program. I would think that it would create a substantial expense to the budget for the Administrative Office of the Courts.

I have been practicing law for nearly thirty-three years, and I have practiced before the Court of Appeals, the Court of Criminal Appeals, and the Tennessee Supreme Court on numerous occasions. I personally feel that we have an excellent process in place for selecting our appellate judges, and I am very proud of our appellate court system. I personally see no reason to complicate the process by a rule of mandatory mediation controlled by appointed administrative personnel.

I will appreciate you passing these comments on to the Justices of the Tennessee Supreme Court for their consideration of this important issue.

Sincerely,

KELLY & KELLY, P.C.

By: _____
Edwin Z. Kelly, Jr.

/msm

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TONI A. COZART
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March 8, 2007

Mike Catalano
Clerk Appellate Courts
401 7th Avenue North
Nashville, TN 37219

RE: Proposed Tenn. S. Ct. R. 48 - Mandatory Appellate Mediation

Dear Mr. Catalano:

I am responding to the information previously received regarding mediation and the appellate procedure. If I understand correctly, the comments should be directed toward mandatory mediation as opposed to voluntary mediation when the parties desire to pursue it.

I handle many personal injury cases in Davidson and surrounding counties and have some thoughts on mandatory mediation at the appellate level. I know that mediation is extremely expensive and time consuming. It would be my thoughts that mandatory appellate mediation would create some delay in the appellate process. My concern is once there has been a judgment in the trial court, how much one party or the other would be willing to discuss mediation, particularly the attorney that has the judgment.

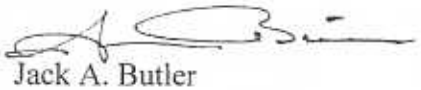
Mandatory appellate mediation would also add significant costs to appeals due to the assembling of all of the documents. I am putting a mediation together now in a rather complicated case, and the cost of the required notebooks themselves have run over $100. In addition thereto, there are literally hundreds of copies that may have to be made for these mediations, and it is nothing for one of us to prepare a mediation presentation that cost well in excess of $300 to $500, depending on the number of documents, etc.

My next concern would be that the mediation would be taken away from attorneys and placed in the hands of an employee of the Administrative Office of The Court. While I realize this is a most competent and well run office, I would have some concern about a person who has not been in the legal field mediating a case where there has already been a judgment.

At any rate, these are my comments. I hope that I have not offended anyone by making these. I have tried to be as forthright as possible, and I hope that I have.

Thanking you for allowing me to comment on the mandatory appellate mediation.

Yours very truly,



Jack A. Butler

JAB/tc

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JOHN J. HOLLINS, JR.*
PATRICK T. MCNALLY**
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RUSS HELDMAN+
VINCENT P. WYATT

*RULE 31 LISTED FAMILY MEDIATOR
**ALSO LICENSED IN KENTUCKY
+FORMER CIRCUIT COURT JUDGE
RULE 31 LISTED GENERAL CIVIL/ FAMILY MEDIATOR

March 9, 2007

Michael W. Catalano
Appellate Court Clerk
Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Proposed Tenn. S. Ct. R. 48 - Mandatory Appellate Mediation

Dear Mr. Catalano:

It is my firm belief that mandatory appellate mediation in Tennessee is a bad idea. Although I don't practice law in federal court anymore, some of my friends have told me about bad experiences with mandatory appellate mediation in federal court.

Most of my cases are mediated prior to trial and many are settled through mediation. Lawyers can mediate cases on appeal at this time if they want to, but in my opinion, appellate mediation should not be mandatory. Mediation, whether pre-trial or post-trial, is very expensive. Clients should not be forced to bear the additional expense of mandatory appellate mediation. Fortunately, in Tennessee we do have very good appellate judges and our system of justice is working well without mandatory appellate mediation.

Sincerely,

HOLLINS, WAGSTER, YARBROUGH,
WEATHERLY & RAYBIN, P.C.

John J. Hollins

JJH:vb

Thomas H. Peebles, III
Attorney at Law
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Mediations & Arbitrations
Rule 31 General Civil Mediator

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March 12, 2007

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Provisional Rule 48

Dear Sir:

The Tennessee Supreme Court has requested comments on the above proposed Rule and I appreciate the opportunity to do so.

I practiced law in Nashville from February 1963 until my retirement in December 2002. My practice was devoted entirely to civil litigation at the trial and appellate levels. In 1995, I began conducting mediations. After the Court adopted Rule 31, I complied with the requirements of the Rule and was designated a Rule 31 general civil mediator in 1997, a status I have maintained to date.

I am no longer engaged in the active practice of law and have no plans to resume my role as an advocate in any court. However, I have continued to conduct mediations. At this point, I am unable to state how many mediations I have participated in either as a lawyer representing a party or as a mediator, but I have been there many times in one capacity or the other.

Most of the mediations I have conducted have been at the trial level in cases where the attorneys agreed to participate in the mediation process. While I have not kept score, I am comfortable in saying that a high percentage of those cases were settled.

My experience with court-ordered mediations has been quite different. Very few have been successful. In my view, ordering lawyers and their clients to participate in a mediation is to some extent inconsistent with the relaxed, informal nature of the mediation process.

With all respect, I am very much opposed to adoption of proposed Rule 48 and do not believe its adoption would be well received by those members of the Bar engaged in civil litigation at the appellate level. I am not aware of any appellate lawyers or, for that matter, Judges, who advocate such a rule.

I do not believe the proposed Rule is necessary. Long before mediation became prevalent in this state, lawyers settled cases on appeal and/or after judgment in the trial court in order to avoid the filing of an appeal. They can do so now with or without the assistance of a mediator.

The most objectionable aspect of the proposed Rule is that it delegates authority to an Appellate Mediation Administrator to determine which cases are suitable for mediation and to order those deemed appropriate to mediation. Section 5 of the proposed Rule purports to establish a screening process, presumably designed to provide the Administrator with information to be used in making this determination. Certain forms are required to be completed by the parties and returned to, and reviewed by, the Administrator. Section 5(d)1 of the proposed Rule says that none of the forms "shall" contain information relating to the parties' *positions on settlement or any substantive matter that is the subject of the appeal; that the* exclusive purpose of the forms is, basically, record keeping.

On the basis of a docketing form, which must be completed by Appellant, the Administrator is to conclude whether the case should be "further considered" for mediation. If the case is chosen for further consideration, the parties are required to complete and furnish to the Administrator a "Mediation Case-Screening Form" along with some other specified documents. At this point, any party may also provide a statement of any compelling reasons why the case should or should not be referred to mediation. And, any party may submit a separate confidential statement.

There must be some logic behind the screening process scenario but, I confess, the rationale escapes me. It appears to me that the parties are required to furnish very little information upon which the Administrator can make a rational decision, however, regardless of how much information is furnished the Administrator, the lawyers who have handled the case for months, if not years, before it reaches the appellate level are in a far better position to know whether there is any realistic chance of resolving the case through mediation.

It is readily apparent that the proposed Rule, if adopted, will increase the costs incurred by the parties. Lawyers will charge clients for their time in completing forms, heretofore unknown to the appellate process in this state. If ordered to mediate, the attorneys will charge for their time in preparing confidential mediation statements and attending the mediation. And, then there is the expense of the mediator. Most mediators with whom I am acquainted charge $200.00 per hour for reviewing the parties' submissions and conducting the mediation. A few charge substantially more per hour. Some mediations last a few hours, others a few days.

I do not know how much it would cost to establish, maintain and staff an appellate mediation office, but I should think it will be quite expensive.

If it is the desire of the Court to encourage meaningful mediation at the appellate level, I suggest a more modest, simple and far less expensive approach:

1. Let it be known in some appropriate fashion that the Court looks with favor upon and encourages appellate mediation.

2. Within a reasonable time after the filing of a notice of appeal, require the parties to file a notice with the Appellate Court Clerk's office indicating that they either agree or do not agree to mediation.

3. If the notice indicates an agreement to mediate, stay appellate proceedings for a reasonable period of time.

4. On or before the expiration of the allotted time, require the parties to file with the Appellate Court Clerk's office a notice confirming that the case has been mediated and that the case was or was not settled.

5. If the notice indicates that no settlement was reached, the Clerk's office is to promptly notify the parties that the stay has been lifted.

The above approach can certainly be refined and improved upon. It may not result in as many mediations as proposed Rule 48 but where the parties have agreed to mediate, I suggest it is much more likely that a higher percent of the cases will be resolved.

Of course, under Section 6(4)(i) of proposed Rule 48, if all parties request mediation the Administrator is required to refer the case to mediation but, at that stage of the process, the expense of completing the various forms would have already been incurred. The approach I am suggesting would not require the expense of an Appellate Mediation Office or the employment of an Administrator and staff. It would leave the decision as to whether mediation is appropriate where it should be – in the hands of the parties and their attorneys and probably would result in less delay in the appellate process than proposed Rule 48.

I will be glad to try to answer any questions the members of the Task Force may have.

Very truly yours,

Thomas H. Peebles, III

THPIII/lw

COURT OF APPEALS

STATE OF TENNESSEE

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March 12, 2007

Michael W. Catalano
Clerk of the Appellate Courts
Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

Re: Proposed Tennessee Supreme Court Rule 48

Dear Mr. Catalano:

The Tennessee Court of Appeals appreciates being provided an opportunity to comment on proposed Tennessee Supreme Court Rule 48 which, if adopted, would create a mandatory appellate mediation program. (Judges Clement, Kirby and Lee, who are our representatives on the Task Force, did not take part in our deliberations, and the expressions in this letter are only from the other members of the Court). The proposed Rule has the potential of affecting every case appealed to the Court of Appeals. We have great respect for the Task Force that prepared the proposed rules. However, at this time we think that consideration should be given to less burdensome and less costly alternatives.

In contemplating a rule, we respectfully ask the Supreme Court to consider the following general points:

1. Neither the Court of Appeals nor any of the lawyers who regularly argue cases before the Court of Appeals, requested this Rule.

2. Lawyers themselves in consultation with their clients, are in the best position to determine whether an attempt at mediation following a final trial court judgment will be worthwhile.

3. In its present form, the proposed Rule would result in significant delay and an expense, which will make it more difficult for litigants to obtain appellate judicial review. Many litigants, as a practical matter, will not be able to afford the cost of an unsuccessful mediation and then the cost of an appeal. If these litigants are forced to mediate, then they have no alternative other than to accept the results of the mediation, because they will not be able to appeal further.

4. The cost to taxpayers in setting up the bureaucracy needed to operate a mandatory mediation program is significant. These resources, if available,

could better be spent providing the Court of Appeals with additional resources to enable us to consider and decide appeals more expeditiously and efficiently.

5. As a matter of policy, we believe all courts should be cautious about taking strategic decisions away from lawyers and turning them over to State employees who know far less about the case than the lawyers.

The Court of Appeals favors mediation on appeal, and is aware that a small but significant number of appeals have been, and are currently being resolved through informal settlements.

As an alternative to the Rule, the Court of Appeals respectfully requests the Supreme Court to consider adopting a voluntary mediation rule, along the lines suggested in the proposed draft of such a rule which is attached to this letter. Mediation under this procedure would be less burdensome and leave the strategic decisions in the hands of the lawyers. It would also avoid the additional cost to the litigants than under the proposed Rule and would not necessitate the expense of hiring additional State employees to operate the mandatory Appellate Mediation Program.

Thank you for passing along these comments to the Tennessee Supreme Court. Please do not hesitate to contact me if the Court of Appeals can be of any further assistance or provide any additional information.

Very truly yours,

Herschel P. Franks

HPF:mb
Attachment.

Proposed Tenn. R. App. P. ____

(a) Within five (5) days following receipt of the notice of appeal in all cases appealed to the Court of Appeals, the clerk of the appellate court shall notify the parties or their counsel that, consistent with the requirements of this rule, they may jointly request a suspension of the processing of the appeal for the purpose of engaging in voluntary mediation.

(b) Parties desiring to engage in voluntary mediation shall file a joint stipulation requesting suspension of the appeal with the clerk of the appellate court within fifteen (15) days after the date of the notice provided for in Section (a). Upon the filing of a timely joint stipulation, the time for preparing the transcript or statement of the evidence, the record on appeal, and the briefs shall be suspended for no more than sixty (60) days to enable the parties to mediate their dispute.

(c) If the voluntary mediation is successful, the parties shall file a notice of voluntary dismissal of the appeal in accordance with Tenn. R. App. P. 15(a) within five (5) days following the conclusion of the mediation. The notice of voluntary dismissal shall provide for the taxation of costs. If the voluntary mediation is not successful, the parties shall file a notice with the clerk of the appellate court within five (5) days requesting the resumption of the appeal. If no notice of voluntary dismissal has been filed with the Court of Appeals within sixty (60) days after the filing of the joint stipulation, the appeal shall be returned to the active docket, and the time for preparing the transcript or statement of the evidence, the record on appeal, and the briefs shall begin to run anew.

(d) The parties may voluntarily resolve their disputes in any appeal filed in the Court of Appeals without requesting the suspension of the processing of the appeal be suspended. However, the provisions of this rule providing for the suspension of the processing of the appeal pending voluntary mediation shall not apply (1) appeals required to be expedited by statute, rule, or order of a court, (2) appeals in which the constitutionality of a statute, ordinance, or rule or the constitutionality of an application of a statute, ordinance, or rule is an issue, (3) appeals involving the imposition of criminal contempt sanctions, (4) appeals in cases in which mediation has already been unsuccessful, or (5) appeals granted by permission under Tenn. R. App. P. 9 or Tenn. R. App. P. 10.

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March 12, 2007

Mr. Mike Catalano
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Tennessee Supreme Court Rule 48

Dear Mr. Catalano:

I am submitting this letter to express my opinions regarding the proposed Tennessee Supreme Court Rule 48. I disagree that mediation at the appellate level should be required. This requirement would increase the cost of an appeal. In addition, it would delay the appellate process.

There are many opportunities to mediate a case prior to a trial. I do not believe that mediation would be effective post trial in the vast majority of cases. If parties desire to attempt a resolution of a case post trial, there is nothing that prohibits them from direct negotiations and/or submitting the case to mediation. I do not believe the mediation process should be mandatory.

Thank you for allowing me the opportunity to express my views on the proposed rule.

Yours very truly,

ROGERS & DUNCAN

Christina Henley Duncan

CHD/rgm

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*Rule 31 Listed General Civil Mediator

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OF COUNSEL
DAVID L. STEED

March 12, 2007

Mr. Mike Catalano
Appellate Court Clerk
Middle Division
Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Comment on Proposed Provisional Rule 48

Dear Mr. Catalano:

I am writing this letter to comment on the above-referenced proposed Rule for mandatory appellate mediation. As a Rule 31 Mediator and a lawyer representing clients in the trial and appellate courts, I have found the mediation process to be quite beneficial. However, it is my opinion that mediation is most successful when the parties engage in it voluntarily. By the time a case reaches the appellate level, mediation has usually already been explored without success and if it has not, then the likelihood of a successful mediation at the appellate stage is remote. I have engaged in the mandatory mediation process through the Federal Sixth Circuit Court of Appeals and have found it to be generally a waste of time and expense to the clients. The proposed Rule 48 is even more burdensome to the parties because they will have to pay the cost of the mediator. Finally, even though the stated purpose of the proposed Rule indicates that it is not the intent to extend the length of time for the resolution of civil cases, it appears that is what exactly will happen if the Rule is implemented. The length of time it takes a case to wind through the appellate system is long enough as it is and lengthening it could be detrimental to the parties. This is especially so for a party who is obligated to pay the statutorily mandated ten percent post-judgment interest rate.

As it now stands, Supreme Court Rule 31 allows courts to enter orders of reference requiring the parties to engage in alternative dispute resolution, which Rule also applies to the Appellate Courts. I would rather leave the decision to seek mediation to the parties, or in the event of a reference, to at least one of the parties, who would be in the best position to determine if a case should be mediated. Of course, as a Rule 31 mediator myself, I plan to apply to be included on the roster, which makes my comments in this letter against my personal interest. Obviously, should Rule 48 be passed, it will be a significant benefit to Rule 31 mediators, but in my view, the Rule will not be in the best interest of judicial economy or the parties in the litigation.

Sincerely,

C. Bennett Harrison, Jr.

CBHJr/tj

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March 13, 2007

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

RE: Proposed Tennessee Supreme Court Rule 48
Proposed 10 S. Ct. R. 48- Mandatory Appellate Mediation

Dear Mr. Catalano

I recently received a letter dealing with the proposed mandatory appellate mediation. I am very much against this. By the time most cases are at the appellate level they are way beyond the possibility of mediation. In the few cases where mediation may be of substantial value it certainly can be utilized without the necessity of a mandatory rule. I fail to see how such a rule could practically benefit the parties in most cases, or how it could possibly assist in improving the appellate decision-making process. Given the nature of this proposed rule I am extremely curious as to who is sponsoring it? And further, to serve what purpose?

I personally believe that it will be an expensive, and, most often, useless and time consuming endeavor if adopted. I believe that in most cases it will not represent a viable alternative.

I appreciate the opportunity to share my opinion, and sincerely hope that others are doing the same as well.

Very truly yours,

Russell. L. Leonard

RLL/jm

VINCENT E. WEHBY
ATTORNEY AT LAW
501 Union Street, Suite 500
Nashville, TN 37219
(615) 255-7534
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March 13, 2007

Mike Catalano, Esq.
Clerk, Tennessee Supreme Court
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Provisional Rule 48

Dear Mr.Catalano:

As a practicing lawyer since 1961 and a Rule 31 General Civil Mediator since 1997, I want to go on record as being unalterably opposed to the above proposed rule. There are a number of reasons why. I will only briefly comment.

My experience has been that any form of court ordered mediation is far less effective than mediation that is voluntary with perhaps a "recommendation" at the trial level. At the appellate level it would be a disaster and manifestly unfair to the parties, especially the plaintiff in contingent fee cases, who would be called upon for yet another expense where the appeal in most cases oftentimes makes the appeal a losing proposition, even when successful.

There are enough "cottage industries" in the practice of law. We do not need another one.

Sincerely,

VINCENT E.WEHBY

vew/kwr

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SUSAN D. BASS
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JENNIFER J. MORONEY

MORTON B. HOWELL
1919-2000

March 12, 2007

The Honorable Michael Catalano
Clerk of Appellate Courts
Supreme Court Building
401 7th Ave., No.
Nashville, TN 37219

Dear Mr. Catalano:

I am writing to add my voice to the growing opposition to the Supreme Court's mandatory appellate mediation rule.

As a lawyer, I have always considered rigorous analysis to be fundamental to our profession. Consequently, I am dismayed the Supreme Court would consider imposing mandatory appellate mediation. As far as I am aware, no "problem" has been identified that would justify such a rule. Nor am I aware of any reasoned analysis that mandatory mediation is necessary to fix whatever the problem is perceived to be. Without such analysis, I am left with the conclusion the proposed rule is the result of a special interest group, i.e., mediators, seeking additional work and/or that the Court does not believe lawyers are capable of representing their clients' interests.

Without an understanding of the perceived problem, I cannot legitimately suggest possible alternatives to the proposed rule. I am certain, however, that neither the proposed rule nor the process that produced the rule are consistent with the best interests of the legal profession or the people of the State of Tennessee.

Very truly yours,

Mary Martin Schaffner

MMS:ja

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J. Taylor Walker
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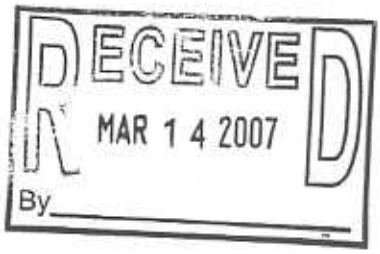
O'NEAL, WALKER & BOEHM

March 14, 2007



Mike Catalano, Clerk
TENNESSEE APPELLATE COURTS
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Tenn. Sup. Ct. Rule 48

Dear Mike:

I write to express dismay at this proposal. Mediation at the threshold level works because it forces litigants to see the chinks and defenses to what initially is a myopic view of their subjective case. By the time a case reaches appellate level, the litigants are battle tested and entrenched, and the chances of reaching a mediated settlement are remote.

I urge you not to mandate appellate mediation.

Cordially yours,

Jeffrey D. Boehm
O'Neal, Walker & Boehm

JDB:mmw
Enclosure(s)

mike catalano.letter.mmw

Tennessee Lawyers' Association for Women
P.O. Box 331214
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(615) 385-5300

March 14, 2007

Mr. Michael W. Catalano, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

VIA FACSIMILE (615-532-8757)

Re: Proposed Tennessee Supreme Court Rule 48 Comments

Dear Mr. Catalano:

Please accept the comments of the Tennessee Lawyers' Association for Women ("TLAW") relative to the proposed Tennessee Supreme Court Rule 48 regarding mediation of civil case appeals at the appellate court level.

TLAW has concerns with regard to the mandatory nature of the mediation which is proposed by Rule 48. By the time most cases reach the appellate stage, they are in a different posture than at the trial court level. In some cases, positions of the parties have hardened to the point that mediation would be pointless. Mandatory mediation will pose additional costs to litigants, and additional burden. The lawyers who have a responsibility to their clients are in a better position to decide if mediation would be helpful as opposed to an employee of the Administrative Office of the Courts. It is TLAW's position that while mediation in general has proven itself to be very beneficial to our justice system, it should be voluntary, not mandatory, in the appellate court system. The decision on whether to mediate at the appellate level should be left to the litigants and their counsel. An alternative to the rule currently proposed would be for an Administrative Office of the Courts' employee to inquire of the parties to an appeal as to whether or not mediation would be helpful as there is not currently a mechanism in place to propose mediation to the parties to an appeal. The proposed rule gives a mediation administrator the final decision making authority as to whether or not parties are required to mediate on appeal. This substitutes the judgment of someone with little familiarity with the case for that of lawyers and parties who are intimately familiar with the case.

Another concern is that the source of published and unpublished case law of Tennessee is largely from the appellate courts. If cases are mediated rather than considered and decided by an appellate court, there may be fewer opinions on the law to guide Tennesseans.

Thank you for your attention to this matter. Should you have any questions, please contact me at (865) 588-4091 or heather@howardhowardlaw.com.

Sincerely,

Heather G. Anderson

Heather G. Anderson
Recording Secretary, TLAW

cc: Jacqueline B. Dixon, Esq.
President, TLAW

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March 13, 2007

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
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RE: Proposed Tennessee Supreme Court Rule 48
Proposed 10 S. Ct. R. 48- Mandatory Appellate Mediation

Dear Mr. Catalano

I recently received a letter dealing with the proposed mandatory appellate mediation. I am very much against this. By the time most cases are at the appellate level they are way beyond the possibility of mediation. In the few cases where mediation may be of substantial value it certainly can be utilized without the necessity of a mandatory rule. I fail to see how such a rule could practically benefit the parties in most cases, or how it could possibly assist in improving the appellate decision-making process. Given the nature of this proposed rule I am extremely curious as to who is sponsoring it? And further, to serve what purpose?

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I appreciate the opportunity to share my opinion, and sincerely hope that others are doing the same as well.

Very truly yours,

Russell. L. Leonard

RLL/jm

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March 13, 2007

Mike Catalano, Esq.
Clerk, Tennessee Supreme Court
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Provisional Rule 48

Dear Mr.Catalano:

As a practicing lawyer since 1961 and a Rule 31 General Civil Mediator since 1997, I want to go on record as being unalterably opposed to the above proposed rule. There are a number of reasons why. I will only briefly comment.

My experience has been that any form of court ordered mediation is far less effective than mediation that is voluntary with perhaps a "recommendation" at the trial level. At the appellate level it would be a disaster and manifestly unfair to the parties, especially the plaintiff in contingent fee cases, who would be called upon for yet another expense where the appeal in most cases oftentimes makes the appeal a losing proposition, even when successful.

There are enough "cottage industries" in the practice of law. We do not need another one.

Sincerely,

VINCENT E.WEHBY

vew/kwr

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MORTON B. HOWELL
1919-2000

March 12, 2007

The Honorable Michael Catalano
Clerk of Appellate Courts
Supreme Court Building
401 7th Ave., No.
Nashville, TN 37219

Dear Mr. Catalano:

I am writing to add my voice to the growing opposition to the Supreme Court's mandatory appellate mediation rule.

As a lawyer, I have always considered rigorous analysis to be fundamental to our profession. Consequently, I am dismayed the Supreme Court would consider imposing mandatory appellate mediation. As far as I am aware, no "problem" has been identified that would justify such a rule. Nor am I aware of any reasoned analysis that mandatory mediation is necessary to fix whatever the problem is perceived to be. Without such analysis, I am left with the conclusion the proposed rule is the result of a special interest group, i.e., mediators, seeking additional work and/or that the Court does not believe lawyers are capable of representing their clients' interests.

Without an understanding of the perceived problem, I cannot legitimately suggest possible alternatives to the proposed rule. I am certain, however, that neither the proposed rule nor the process that produced the rule are consistent with the best interests of the legal profession or the people of the State of Tennessee.

Very truly yours,

Mary Martin Schaffner

MMS:ja

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O'NEAL, WALKER & BOEHM

March 14, 2007

Mike Catalano, Clerk
TENNESSEE APPELLATE COURTS
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Tenn. Sup. Ct. Rule 48

Dear Mike:

I write to express dismay at this proposal. Mediation at the threshold level works because it forces litigants to see the chinks and defenses to what initially is a myopic view of their subjective case. By the time a case reaches appellate level, the litigants are battle tested and entrenched, and the chances of reaching a mediated settlement are remote.

I urge you not to mandate appellate mediation.

Cordially yours,

Jeffrey D. Boehm
O'Neal, Walker & Boehm

JDB:mmw
Enclosure(s)

mike catalano.letter.mmw

Tennessee Lawyers' Association for Women
P.O. Box 331214
Nashville, TN 37203
(615) 385-5300

March 14, 2007

Mr. Michael W. Catalano, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

VIA FACSIMILE (615-532-8757)

Re: Proposed Tennessee Supreme Court Rule 48 Comments

Dear Mr. Catalano:

Please accept the comments of the Tennessee Lawyers' Association for Women ("TLAW") relative to the proposed Tennessee Supreme Court Rule 48 regarding mediation of civil case appeals at the appellate court level.

TLAW has concerns with regard to the mandatory nature of the mediation which is proposed by Rule 48. By the time most cases reach the appellate stage, they are in a different posture than at the trial court level. In some cases, positions of the parties have hardened to the point that mediation would be pointless. Mandatory mediation will pose additional costs to litigants, and additional burden. The lawyers who have a responsibility to their clients are in a better position to decide if mediation would be helpful as opposed to an employee of the Administrative Office of the Courts. It is TLAW's position that while mediation in general has proven itself to be very beneficial to our justice system, it should be voluntary, not mandatory, in the appellate court system. The decision on whether to mediate at the appellate level should be left to the litigants and their counsel. An alternative to the rule currently proposed would be for an Administrative Office of the Courts' employee to inquire of the parties to an appeal as to whether or not mediation would be helpful as there is not currently a mechanism in place to propose mediation to the parties to an appeal. The proposed rule gives a mediation administrator the final decision making authority as to whether or not parties are required to mediate on appeal. This substitutes the judgment of someone with little familiarity with the case for that of lawyers and parties who are intimately familiar with the case.

Another concern is that the source of published and unpublished case law of Tennessee is largely from the appellate courts. If cases are mediated rather than considered and decided by an appellate court, there may be fewer opinions on the law to guide Tennesseans.

Thank you for your attention to this matter. Should you have any questions, please contact me at (865) 588-4091 or heather@howardhowardlaw.com.

Sincerely,

Heather G. Anderson

Heather G. Anderson
Recording Secretary, TLAW

cc: Jacqueline B. Dixon, Esq.
President, TLAW

WALKER, TIPPS & MALONE

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March 15, 2007

VIA FACSIMILE NO. (615) 532-8758
AND FIRST CLASS MAIL

Mike Catalano, Clerk
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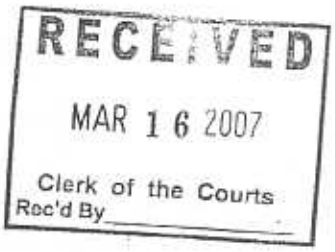

Re: Proposed Rule 48 (Appellate Mediation)

Dear Mr. Catalano:

Please convey these comments to the Court in opposition to the proposed Rule 48.

I oppose the adoption of court sponsored or mandated mediation at the appellate level. I believe mediation at the trial level has generally been a good thing. However, more of a good thing is not always good. One can die from too much aspirin. At the trial level, when the case is just beginning and initial discovery has been gathered, there is a prime incentive for successful mediation, with substantial cost savings for those cases that are settled early in the process or even immediately prior to complex trials. This does not obtain at the appellate level.

By the time a case has failed mediation at the trial level and gone through trial, there is not a great deal mediation can do to enlighten the litigants and attorneys on the risks/benefits of continued litigation on appeal. Facts will have been found, issues decided, and damage claims valued. By comparison to trial preparation and conduct, there isn't nearly so much cost remaining in the typical case at the appellate level. What *is* left is time to be consumed before closure. Herein lies my other reason for opposition -- more time delay and cost to litigants.

The proposed rule says initially that it is not the intent to extend the time for resolution; but then sets up an administrator, administrative office, time schedules, forms, screening, discretionary consideration, reconsideration, selection of mediators, objections, and a stay from the beginning of the appellate process. All this is time consuming and costly, and simply another billing opportunity for attorneys—adding cost. A task force person told me that the screening

process was designed to select only those cases that appear to benefit from mediation. However, the administrator will have to screen them all to find the mediation candidates. This is going to require staff and soon more staff and will plainly establish another process that interferes with the rights of litigants to have their cases decided by judges in a timely and just manner. I believe that we in the legal system run a serious risk of swamping the judicial system with administrative process at the expense of substantive justice.

We have appellate mediation in the 6th Circuit now. I do not know the statistics, but from personal experience in several cases, the mediation constitutes only a billing opportunity for each set of lawyers; and I cannot remember one that settled because of the mediation.

Finally, reviewing the administrative process in the proposed Rule 48, I would much prefer to spend the money on additional judicial staff, law clerks, or even additional panels of judges to accomplish the work load of appellate requirements.

Thank you for permitting these comments.

Yours very truly,

Robert J. Walker

RJW/em

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February 26, 2007

Appellate Court Clerk Mike Catalano
Tennessee Appellate Court
401 Seventh Avenue, North
Supreme Court Building
Nashville, TN 37219

Dear Clerk Catalano:

I have reviewed the proposed Rules for mandatory appellate mediation. As a practicing trial and appellate lawyer for more than 40 years I believe the proposed Rule is a mistake. This belief is fortified by my experience with the Sixth Circuit mediating process. Among other things, I believe:

1. That the worst time to enforce mediation is after a trial judgment has been entered in favor of one party or the other. This is particularly true when the parties have declined to voluntarily seek mediation. Lawyers who prevail in the trial court almost invariably believe that the judgment will be affirmed on appeal. At the very least, they would rather fight for what they have obtained than graciously give any substantial portion of it to the other party.

2. Under the proposed Rules the decision to mediate would be in the hands of an administrator who presumably knows far less about the case than the lawyers who tried it and is not a satisfactory substitute for a trained appellate judge. Lawyers who do not wish to mediate voluntarily will appropriately feel resentment that they are being forced to negotiate with each other by such a process. I have experienced great satisfaction from some pre-trial mediations I have engaged in. They are voluntary and are engaged in before the parties' rights have been solidified by a judicial ruling. I have had the reverse experience with federal appellate mediation. To the extent these have been compulsory mediations, the other lawyer and I have never gotten close to an agreement or even to a reasonable settlement discussion with one another. On the other hand, I have settled some trial judgments by voluntary negotiations which satisfied both parties.

It seems to me that compulsory post-trial mediation would, in almost every case, simply prolong an already lengthy appellate process. As you know much better than I do the volume of litigation has slowed final resolution of lawsuits to a crawl over the past few decades. In my view the proposed mediation procedure would simply add to the paperwork and detract from the speed of the appellate process as a whole.

The fact that Alabama has adopted such a process does not impress me very much. My appellate experience in Alabama indicates that it is rare to be granted an oral argument in the

Supreme Court of Alabama. Obviously, the volume of litigation per judge has compelled that Court to adopt procedures that make appeals less efficacious. I hope that the Tennessee appellate process has not arrived at a similar destination. If it has, I suggest that other, more useful, steps might be taken. Slowing the process down with an essentially useless bureaucratic roadblock is not, in my view, the answer.

Yours very truly,

Alfred H. Knight

AHK/jg

cc: Chief Justice William M. Barker
Justice Janice M. Holder
Justice Cornelia A. Clark
Justice Gary R. Wade

STATE OF TENNESSEE

Office of the Attorney General

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March 15, 2007

VIA FACSIMILE (615) 532-8757 and U.S. MAIL
Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Provisional Rule 48
Rules of Tennessee Supreme Court

Dear Mr. Catalano:

Thank you for the opportunity to comment on proposed provisional rule 48 to the Rules of the Tennessee Supreme Court. This office appreciates the time and effort expended by the task force on this issue and supports the concept of alternative dispute resolution. We are concerned, however, about the mandatory aspect of the proposed rule, given the volume and nature of civil appeals handled by this office.

This office handles a high volume of civil appeals. It has always taken a proactive approach to settling matters that are suitable for settlement, and therefore we do not anticipate that a mandatory mediation rule would result in a significant number of additional settlements. In addition, due to the unique nature of our client, a number of our cases – parental terminations, challenges to the constitutionality of a statute, writs of certiorari/UAPA appeals, and cases with unrepresented parties, among others –involve subject matters or issues that are not suitable to mediation.

Accordingly, we are concerned that a mandatory rule, particularly one that gives broad discretion to the administrator in the selection of cases for mediation, will result in significant delay in the resolution of our appeals. Such a delay could adversely impact the interests of the

state and place an additional burden on the lawyers in this office. This office would endorse an optional mediation program but is concerned about the impact on the state and its lawyers of a mandatory program.

Yours very truly,

Robert E. Cooper, Jr.
Attorney General and Reporter

REC/csb

TAPM
TENNESSEE ASSOCIATION
PROFESSIONAL MEDIATORS

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info@tennmediators.org
www.tennmediators.org

Comments from Tennessee Association Of Professional Mediators regarding Proposed Rule for Appellate Mediation

Support for Proposed Rule 48:

For the reasons set forth below, the Tennessee Association of Professional Mediators would like to voice its support for appellate mediation in Tennessee and, in particular, the proposed Tennessee Supreme Court Rule setting forth a process to require more mediation at the appellate level.

About Our Organization:

The Tennessee Association of Professional Mediators (TAPM) is an organization of approximately 140 members, which has just celebrated its first anniversary on March 6, 2007. Although its membership is currently concentrated in the Middle Tennessee area, it has members from across the state. The primary requirement for membership is that all members must be Rule 31 trained mediators. There is a healthy mix of civil and family mediators, and our members come from a wide range of professions.

Many of TAPM's members already serve on the Tennessee Bar Association ("TBA") ADR Committee, the Nashville Bar Association ("NBA") ADR Committee, NBA Appellate Practice Committee, the NBA Family Law Committee, and the NBA Circuit/Chancery Committee. The President of the TAPM is Marietta Shipley (who served on the Appellate Mediation Task Force). The President-Elect is Randal Mashburn who is an active business dispute mediator. The past President is Jack Waddey, a patent attorney and national mediator. Directors include Jan Walden, a long time mediation advocate; Mike Sadler, a former judge who mediates in both Tennessee and Mississippi; and John Williams, attorney and mediator (who settled the high-profile Predators' cheerleader's case).

Lisa W. Smith
TAPM Executive Director
615-383-TAPM (Voice Mail)

TAPM's Position:

Obviously TAPM is pro-mediation. Indeed, one of the primary purposes of our organization is to promote mediation. We would, however, like to provide a few comments on why we believe that mediation can be helpful even at the appellate stage of a dispute.

- Most of the normal benefits of mediation at the trial level are likewise applicable at the appellate level, including allowing the parties to reach a mutually satisfactory result, cost savings, efficiency, availability of more creative options, etc.

- In some cases, disputes that could not be settled at the trial level -- due to high emotions, lack of sufficient factual information or a serious discovery or evidentiary issue – can more easily be resolved at the appellate level. Yet the culture in the legal community has not been to think of mediation as an option on appeal. Some tangible support for the mediation process is therefore needed to encourage mediation at the appellate level.

- The appellate process can be expensive, and, in many cases, the result is a remand back to trial court where even greater expense is incurred. Therefore, the appellate process is not always the end of legal proceedings but often just the mid-way point.

- Circumstances often change during the litigation process such that settlement becomes viable at the appellate stage due to the mere passage of time, financial setbacks, business considerations or other factors. However, once the trial is over and the lawyers have fewer reasons to talk to each other, settlement becomes an afterthought and mediation is usually not considered. A formal appellate mediation process can put settlement options back on the front burner.

- One or both parties to an appeal may have some reluctance to have a reported decision – either due to greater publicity or concerns about precedent. Exploring mediation to resolve a matter before there is an appellate decision should be encouraged in such situations.

- Having a formal process that requires a conscious decision about the mediation option avoids having one

party appear "weak" for suggesting additional settlement discussions after the trial is over.

- Mediation can involve creative solutions beyond the power of the court system. Even more than at the trial level, the relief that can be granted by an appellate court can be quite limited, depending on exactly which issues are appealed and the procedural status of various matters. Mediation provides many more options.

- Mediation may preserve and heal relationships, particularly in the family area or where there are on-going relations such as in small businesses, construction, real-estate, community disputes, and governmental disputes. Of course, this is true at the trial level as well. However, by the time a case makes its way to the appellate level, enough time has sometimes passed that the importance of such relationships is clearer to the parties and they may be more receptive to a resolution – yet the current system does nothing to encourage it.

- The screening process built into the proposed rule allows for a skilled screener to eliminate 50% of the cases from mediation and the administrator can address issues brought up by the other 50% if someone is reluctant to mediate. Thus, while it would be "required" mediation in certain instances, there are sufficient safeguards to assure that it is not utilized where it would not be productive.

- While Tennessee judges in general have been supportive of mediation, it is clear from Tennessee's experience, as well as other states, that mediation does not come into widespread use until there is a greater push from the courts, beyond mere encouragement. Having a mandatory system, but with appropriate screening of cases, is a necessary step toward creating a legal atmosphere where attempted resolution by the parties is a critical step in each stage of the process – including at the appeal level.

- The mandatory nature of the order of referral (of the cases properly screened) is necessary as voluntary mediation has proven to be ineffective in other states as outlined in: 5 JAPPPR 409 5 J.App.Prac. & Process 409 Appellate Mediation in Pennsylvania: Looking Back at the History and Forward to the Future (2003);

and 42 SANDLR 177 42 San Diego L. Rev. 177
Appellate Mediation - "Settling" the Last Frontier of ADR
(2006)

In short, we believe that parties should have the right, and be encouraged, to mediate at every stage of the legal process, from pre-litigation to appellate mediation or post-appellate. While a purely voluntary system may be ideal in principle, it is difficult to take full advantage of the benefits of mediation without the backdrop of the legal system and with some degree of a mandatory process.

The appellate courts are vitally necessary for the court system to be a revered part of our system of law and justice. However, mediation can be equally important at the appellate level as it is earlier in the process. Indeed, the timing and status of the case may make it even more ripe for resolution – but, again, the court system needs to create a culture and a process that encourages and, in some cases, mandates mediation.

Therefore, TAPM supports the appellate mediation process in Rule 48.

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March 14, 2007

Michael W. Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

Re: Proposed Provisional Tenn. S. Ct. Rule 48

Dear Mr. Catalano:

I am writing in response to the request for comments on the proposed provisional rule for mandatory mediation in civil cases filed in the Tennessee Court of Appeals. My review of the proposed rule has led me to the considered conclusion that its adoption would not achieve the goal of making resolution of civil cases more efficient and less costly, but would have quite the opposite effect: the rule would make the resolution of civil cases far less efficient and far more costly and it would result in some other, undesirable consequences as well.

Mediation at any stage of litigation is salutary. It is the mandatory component of the proposed mediation rule that poses a problem, particularly at the appeals stage. By the time a notice of appeal has been filed, it is a foregone conclusion that settlement and ADR options have been explored – repeatedly. The parties to the appeal are fully aware of ADR opportunities and will voluntarily continue to explore those opportunities, if it makes economic sense to do so. Mediation is, of course, currently available to litigants at the appellate level, should they opt to revisit that pathway to resolution. But taking that path should be their choice, not a forced march.

Required mediation, in my experience in the Sixth Circuit, has never borne fruit. Late-stage intervention is substantially less productive than intervention at the trial level, because the appellant, having lost at trial, has nothing further to lose, and the appellee, having prevailed at trial, is rarely ready to compromise the victory. Thus, in the vast majority of appeals, required mediation only will only add to the time and expense of the appeals process, a process that is already protracted and costly. The mediation time-line and the additional paperwork and procedures called for in the proposed rule are considerably more onerous than the settlement procedures in the Sixth Circuit. The full-blown mediation contemplated by the rule very well

may – assuming the attorneys, the mediators, and the parties prepare properly – cost as much as the appeal itself.

The cost of mandatory mediation will be an additional cost, except in the few cases in which the mediation may result in settlement. Preparation and presentation of a case for mediation is not the same as the preparation and presentation of an appeal to the Court of Appeals. Thus, the bureaucratic layers added to the appeals process by the proposed rule will require considerable work that cannot effectively be recycled in preparing and presenting the appeal.

Because of the substantial, extra expense, appellate mandatory mediation threatens to produce a two-tiered justice system, in which only the wealthy can afford full access to the judicial system and a final adjudication based on law. Voluntary use of the mediation process can undoubtedly result in a win-win outcome. But coercion into mediation can result in coercion in mediation.

Of most concern, however, is the potential for mandatory mediation to undermine the public's confidence in the appellate judicial system in a number of ways. Litigants are already hard pressed to understand the time-gap between the filing of an appeal and the filing of the decision in the case. Mandatory mediation will only increase the gap and the frustration. Cases on appeal generally turn on a question of law, and the litigants are looking for finality based on the rule of law. Court-mandated mediation sends a message to the litigants that the courts are reluctant to adjudicate their cases and thwarts their expectations of having a law-based decision. The purpose of appellate adjudication is not simply to resolve conflicts, but to explain the bases on which particular conflicts are resolved, to set guiding precedent (and thereby to reduce the adjudication of similar conflicts in the future), and to give force to public values. Mediation is a private, not a public enterprise. When a dispute is mediated, the court is deprived of the opportunity to perform these functions, and the public is deprived of the precedent that the court would otherwise set.

Sincerely,

Andrée Blumstein

Andrée S. Blumstein

ASB/tsf

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DARRELL G. TOWNSEND
MARY MARTIN SCHAFFNER
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1919-2000

March 13, 2007

Mike Catalano
Clerk of the Appellate Courts

Dear Mr. Catalano:

Re: Proposed Tennessee Supreme Court Rule 48

I write to voice my concern about mandatory mediation as part of the appellate process.

Why not? More expense. More delay–the two things that make many of my clients anxious to avoid "going to court" if they can. This is particularly true of those who face recurring claims and lawsuits–insurers, fleet operators, most businesses with large self-insured retentions that manage their own lawsuits.

Avoiding court? Yes. Adjusters who manage vehicle accident cases say they pay claims they do not owe because "justice" is too expensive. What's the point in winning the battle and then losing the war by paying more for a trial and maybe an appeal than it would cost to settle the claim? Automobile cases once were a large part of our practice. Now they are scarce.

Where have the trials gone? Lawyers of my generation who used to be in court more days than in the office ask this question often, usually with a follow-up of "How are the young lawyers going to learn how to try a case when almost nobody wants a trial?"

Why so much expense? Too many document requests. Too many interrogatories. Too many motions. Too many exorbitant expert witness fees. Too many depositions. Too many *long* depositions. Too many lawyers at trial or at depositions. Too many *appeals* that run up too much expense. We lawyers are to blame for much of that.

The court system is broken is what many say. Costs too much. Takes too long. How can you tell? A lawyer in my firm recently went looking for a circuit judge to approve a workers compensation settlement. The circuit courtrooms were dark or vacant. Someone in the clerk's office told him there was nothing scheduled for any of the circuit judges that day. He found a

criminal court judge and convinced him that he had authority to approve the settlement.

Why was nothing scheduled that day? My guess is that people who once might have been in court were busy with *voluntary* mediation, *before* expense and delay mounted to the point of exasperation. A lawyer in my firm has acted as mediator in more than 1,400 cases in the last three-plus years. I know at least a half-dozen other mediators who also mediate cases that come to them because the parties want to avoid courts.

What else will people do to avoid courts? Several years ago I represented a liability insurance company with a regular stream of cases. The claim manager refused to use General Sessions Court. He would allow defaults in Sessions and appeal to Circuit. Didn't want to pay for two trials.

Remember the Medical Malpractice Review Board? Useless and annoying time and expense loaded on top of already-too-expensive preparation for medical malpractice trials. That was the view of many people who dealt with it.

If pre-trial mediation is so popular, why not *more* mediation? One reason many people opt for pre-trial mediation is that it is *voluntary,* as well as quick and relatively cheap. They *want* to mediate. But after someone has paid for a trial and has won, can you imagine the task of the winning lawyer in telling the client, "Yes, you won in court fair and square, and spent the time and money to do it, but now the law requires that you go back to square one and spend *more* time and money to discuss settlement?" What will the winner say about *that* court system?

Worn-out and disgusted. That's the way many people now feel after exposure to the court system, win or lose. Blame the lawyers, but also blame the already tortuous road to finality. Don't pile another layer of time and expense on people who, like it or not, must use the courts. Don't have them accusing us of make-work featherbedding for our mediator friends–or for devising still another way to run up our own fees.

Sincerely,

D. Fisher

Douglas Fisher

lb/dmf

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O'NEAL, WALKER
& BOEHM

March 14, 2007

Mike Catalano, Clerk
TENNESSEE APPELLATE COURTS
100 Supreme Court Building
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Nashville, TN 37219-1407

Re: Proposed Tenn. Sup. Ct. Rule 48

Dear Mike:

I write to express dismay at this proposal. Mediation at the threshold level works because it forces litigants to see the chinks and defenses to what initially is a myopic view of their subjective case. By the time a case reaches appellate level, the litigants are battle tested and entrenched, and the chances of reaching a mediated settlement are remote.

I urge you not to mandate appellate mediation.

Cordially yours,

Jeffrey D. Boehm
O'Neal, Walker & Boehm

JDB:mmw
Enclosure(s)

mike catalano.letter.mmw

CHARLES H. WARFIELD
3737 West End Avenue, Apt. 305
Nashville, Tennessee 37205

March 13, 2007

Mike Catalano, Clerk
TENNESSEE APPELLATE COURTS
100 Supreme Court Building
401 Seventh Avenue North
Nashville, Tennessee 37219-1407

Re: Proposed Tenn. S. Ct. R. 48

Dear Mike:

This letter is in regard to the proposed mandatory appellate mediation rule. I am opposed to the proposed rule.

I recognize that mediation is a helpful process at certain stages of litigation, especially at the trial court level. In fact, many cases may have already been through mediation by the time they reach the appellate courts. One of the valid criticisms of our judicial system is the slowness of the process. To add another step to the judicial process by mandating mediation would further slow the process.

Another valid criticism of our judicial system is its expensive nature. By mandating mediation, we make the system even more expensive.

For the reasons stated above, I oppose a mandatory mediation rule. While I think it is unnecessary, I would not oppose a voluntary mediation rule.

Sincerely,

Charles H. Warfield

kps

07000N:2:718729:1:NASHVILLE

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MORTON B. HOWELL
1919-2000

March 14, 2007

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Provisional Rule 48, Rules of the Tennessee Supreme Court

Dear Mr. Catalano:

These are my written comments concerning the proposed provisional Rule 48, Rules of the Tennessee Supreme Court, which accompanied the December 13, 2006 order of the Tennessee Supreme Court. I offer these comments solely as my individual opinions and in no representative capacity for my law firm or any other organization or entity.

I have been a Tennessee lawyer for 29 years. My practice has almost exclusively involved litigation of civil cases in Tennessee state and federal courts. A substantial number of cases in which I have been involved have included appeals within the Tennessee appellate system.

I believe that the proposed Provisional Rule 48 is unnecessary and that, if adopted, it would lead to waste of time and resources of litigants and attorneys and to delay in resolution of appeals.

Over the past ten years or so, mediation in the trial courts has, of course, become a virtual routine. It has, by and large, served its intended purposes well. It has facilitated the resolution of lawsuits and potential lawsuits, and it has done so in, according to my perception, a reasonably efficient and economical manner. My experience informs me, however, that mediation at the trial court level is almost uniformly unsuccessful when it is ordered against the wishes of one or more of the parties. In other words, mediation works best when all parties want it. It is not effective, and indeed can be counterproductive, when parties are ordered into the process against their will.

The thrust of proposed provisional Rule 48 is that parties can be ordered to mediation whenever the Appellate Mediation Administrator deems it appropriate.

Uniformly the criticisms which the public directs toward the justice system are:

(1) "It costs too much;" and
(2) "It takes too long."

Adoption of the proposed Provisional Rule 48 would only provide additional legitimate grounds for those criticisms.

The rule provides for the set up and operation of an additional layer of administrative bureaucracy within the appellate court clerk's office. Somebody has to pay for that. Presumably, it will be Tennessee taxpayers. There has been no showing that this "investment" would provide any "return."

The rule provides for an elaborate system of document preparation and filing by litigants. Lawyers would spend their time complying with the requirements of the rule. Clients would pay. Again, there has been no showing that this increased expense has any likelihood of leading to more economic results than does the present system.

The rule provides for private mediators. Clients would pay.

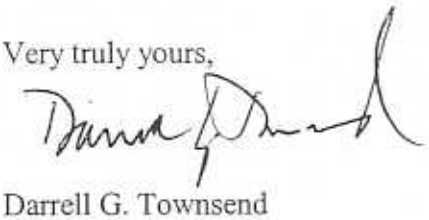
Inevitably, the additional layer of action preliminary to a resolution of a case on its merits in the Court of Appeals will lead to delay in resolution of the case.

My experience is that the majority of cases which end up in the appellate system have, at some point, gone through a mediation. Indeed, many trial courts in the state now make mediation mandatory before a case even can go to trial. If a case has been once mediated at the trial court level, what is the likelihood that it will be resolved by mediation at the appellate level? Is there any data to suggest that the likelihood of resolution at the appellate level increases after a failed mediation at the trial court level?

Finally, I suggest that proposed Provisional Rule 48 is unnecessary for a reason which is obvious based on a review of Tennessee Supreme Court Rules as they presently exist. Parties who wish to mediate their cases while on appeal are free to do so. All they have to do is arrange to have a mediator and go through the process. I have done this; it has worked.

There has been no showing that an administrative bureaucracy set up within the office of the appellate court clerk is necessary to facilitate this process which is available to all and, by this time, certainly well known to all Tennessee attorneys.

Very truly yours,



Darrell G. Townsend

DGT/lmh

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Julie M. Burnstein
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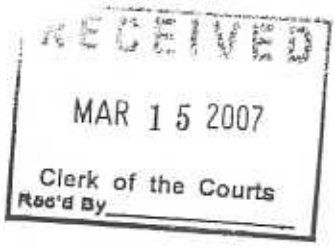
March 15, 2007



VIA HAND DELIVERY

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue, North
Nashville, TN 37219-1407

Dear Mr. Catalano:

We are writing pursuant to the Tennessee Supreme Court's December 13, 2006 Order soliciting comments concerning proposed provisional Rule 48 of the Rules of the Tennessee Supreme Court ("Rule 48"). As explained below, based on our collective experience, we believe that adoption and implementation of Rule 48 would not make resolution of civil case appeals more efficient or economical.

By way of background, this firm maintains a very active civil litigation practice, with thirty-five of our lawyers practicing in that area. Our civil litigation practice generates involvement in many civil appeals each year, including appeals in the Tennessee Court of Appeals, the Tennessee Supreme Court, courts of appeals in other states, the United States Court of Appeals for the Sixth Circuit and the other federal courts of appeals.

Based on our experience with mandatory appellate mediation in other courts, particularly in the Unites States Court of Appeals for the Sixth Circuit, we do not believe the appellate mediation contemplated by Rule 48 will facilitate more efficient or economical resolution of civil appeals. As a preliminary matter, Rule 48 does not address the criteria pursuant to which cases will be selected for participation in mediation. Accordingly, as proposed, Rule 48 is unclear as to what cases will be selected for mediation. Particularly without some explanation as to which cases will be selected for mediation under Rule 48, we believe the mediation process contemplated by the Rule will extend the time period for appeals and increase attorneys' fees and other costs associated with appeals without significantly facilitating resolution of cases.

There are several reasons why we believe appellate mediation as contemplated by Rule 48 will likely not accomplish the stated goals of the Rule. First, once a case reaches the Tennessee Court of Appeals, many civil cases already have been mediated, whether by order of the trial court pursuant to Tennessee Supreme Court Rule 31 or by the parties' agreement. Accordingly, the parties and their lawyers have had the opportunity to discuss the case in a confidential setting with a neutral third party. Second, once a case reaches the Tennessee Court of Appeals, the case has been decided by the trial court. The trial court's decision facilitates the lawyers' and the parties' assessment of the relative strengths and weaknesses of the case and is

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part of the consideration as to whether to pursue an appeal. As a result, a required mediation at the appellate level will likely duplicate the earlier mediation effort and do little to affect the lawyers' and parties' evaluation of the case. While many cases may settle once an appeal is filed, in our experience, mandatory mediation at the appellate level rarely facilitates this process. We believe that allowing a case to proceed through its regular briefing schedule will more efficiently and economically conclude civil cases on appeal than institution of a mandatory mediation process.

Rule 48 contemplates several procedures that could increase the attorneys' fees and other costs associated with the appeal with little corresponding benefit. If selected for participation in mediation, the parties must complete the Mediation Case Screening Form. The decision of the Appellate Mediation Administrator to refer a case to mediation may be reviewed by written request. The parties must consult concerning the appointment of a private mediator. The parties, with the consent of the mediator, may agree to extend the time for mediation, a likely result in light of the schedules of many lawyers and mediators. The mediation itself will, of course, generate additional legal fees, associated with preparation of the mediation statement and representation at the mediation. Likewise, the parties will bear the cost of the mediator. A private mediator, unlike the staff attorneys used for mediation in some appellate courts, may have a financial incentive to prolong the mediation process. Rule 48 also provides a mechanism for motion practice to compel compliance with the Rule which contemplates the assessment of costs and fees. Each of these steps inevitably will increase the attorneys' fees and costs associated with resolving the case on appeal with little additional benefit.

Thank you for the opportunity to comment on Rule 48. While we appreciate the efforts of the Task Force to Study Appellate Mediation in studying the issue and in proposing Rule 48, we do not believe adoption of Rule 48 will make the resolution of civil cases more efficient or economical.

Sincerely,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: Patricia Head Moskal
Patricia Head Moskal
Co-Chair, Litigation Section

Julie M. Burnstein
Julie M. Burnstein
Co-Chair, Litigation Section

JMB/rc

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CHARLES I. MALONE

March 15, 2007

VIA FACSIMILE NO. (615) 532-8758
AND FIRST CLASS MAIL

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Rule 48 (Appellate Mediation)

Dear Mr. Catalano:

Please convey these comments to the Court in opposition to the proposed Rule 48.

I oppose the adoption of court sponsored or mandated mediation at the appellate level. I believe mediation at the trial level has generally been a good thing. However, more of a good thing is not always good. One can die from too much aspirin. At the trial level, when the case is just beginning and initial discovery has been gathered, there is a prime incentive for successful mediation, with substantial cost savings for those cases that are settled early in the process or even immediately prior to complex trials. This does not obtain at the appellate level.

By the time a case has failed mediation at the trial level and gone through trial, there is not a great deal mediation can do to enlighten the litigants and attorneys on the risks/benefits of continued litigation on appeal. Facts will have been found, issues decided, and damage claims valued. By comparison to trial preparation and conduct, there isn't nearly so much cost remaining in the typical case at the appellate level. What *is* left is time to be consumed before closure. Herein lies my other reason for opposition -- more time delay and cost to litigants.

The proposed rule says initially that it is not the intent to extend the time for resolution; but then sets up an administrator, administrative office, time schedules, forms, screening, discretionary consideration, reconsideration, selection of mediators, objections, and a stay from the beginning of the appellate process. All this is time consuming and costly, and simply another billing opportunity for attorneys—adding cost. A task force person told me that the screening

process was designed to select only those cases that appear to benefit from mediation. However, the administrator will have to screen them all to find the mediation candidates. This is going to require staff and soon more staff and will plainly establish another process that interferes with the rights of litigants to have their cases decided by judges in a timely and just manner. I believe that we in the legal system run a serious risk of swamping the judicial system with administrative process at the expense of substantive justice.

We have appellate mediation in the 6th Circuit now. I do not know the statistics, but from personal experience in several cases, the mediation constitutes only a billing opportunity for each set of lawyers; and I cannot remember one that settled because of the mediation.

Finally, reviewing the administrative process in the proposed Rule 43, I would much prefer to spend the money on additional judicial staff, law clerks, or even additional panels of judges to accomplish the work load of appellate requirements.

Thank you for permitting these comments.

Yours very truly,

Robert J. Walker

RJW/em

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PROPOSED ADOPTION)
OF SUPREME COURT RULE 48)
APPELLATE MEDIATION) NO. _____

COMMENT OF THE NASHVILLE BAR ASSOCIATION

The Nashville Bar Association ("NBA"), by and through its President, Lela Hollabaugh and General Counsel, Waverly D. Crenshaw, Jr., Jr., files this comment recommending that proposed Tennessee Supreme Court Rule 48 be adopted as a mandatory program, with modifications recommended herein.

BACKGROUND

By Order entered February 2, 2006, this Court established the Task Force to Study Appellate Mediation. On July 27, 2006 the Task Force recommended a proposed rule. On December 13, 2006 the Court entered an order publishing for comment a proposed provisional rule and soliciting written comments concerning the proposed provisional rule with a deadline for comments of Thursday, March 15, 2007. The Task Force to Study Appellate Mediation charged with the task of reviewing comments regarding the proposed Supreme Court rule and reporting to the Court not later than April 15, 2007.

The NBA, through its Appellate Practice Committee ("Committee") reviewed the Proposed Provision Rule and made recommendations on the Proposal

Provisional Rule to the NBA Board of Directors. The NBA Board of Directors adopted the Committee's recommendation on March 6, 2007.

COMMENTS

1. NBA COMMENT ON SECTION 4 – CONFIDENTIALITY

The NBA submits that Tennessee Rule of Evidence 408 does not adequately protect the confidentiality of ADR proceedings. The confidentiality provisions of Supreme Court Rules 31 and 37 and proposed Rule 48 could be improved.

2. THE COURT SHOULD DELETE SECTION 5.(e) OF THE PROPOSED PROVISIONAL RULE.

In order to increase the potential success of an appellate mediation and to avoid potential unnecessary costs, preparation of the trial transcript should be stayed. The stay certainly should not be used by any party for the purpose of delay. It can be helpful in the mediation proceeding for the parties and the mediator to know the estimated cost of the trial transcript. To accomplish this the NBA recommends that the Court reword Section 5(e) as follows:

> (e) **Notice to Clerk to Stay Proceedings on Appeal.** If the Appellate Mediation Administrator sends the Mediation Case-Screening Form to the parties, the Appellate Mediation Office at the same time shall send to the Trial Court Clerk, the Appellate Court Clerk, and if appropriate to the Court Reporter, with service on all parties, a Notice to Clerk to Stay Proceedings on Appeal. The Notice shall state that all appellate schedules, including record and transcript preparation, are stayed pending further orders of the Court of Appeals. The court reporter shall notify the appellant of the estimated cost of the transcript within two weeks of the date of the Notice of Stay.

Additionally, Section 5 should be modified as follows to make clear that both preparation of the transcript and the briefing schedule are stayed during mediation: "The appellate process, including the preparation of the record, preparation of the transcript, and the briefing schedule, will be stayed until the Appellate Mediation Administrator determines the case is not appropriate for mediation or, if deemed appropriate for mediation, until the mediation is completed or terminated."

3. THE COURT SHOULD CLARIFY SECTION 6(a)(4)(ii) REGARDING THE COURT'S RECONSIDERATION OF REFERRALS TO MEDIATION AND SECTION 6(c)(iii)(2) REGARDING THE CONTENTS OF THE APPELLATE RECORD.

The NBA recommends that the Court make it clear that, unlike the Administrator's referral, there is no reconsideration of a court's referral to mediation by adding the following to Section 6(a)(4)(ii): "The Court will not consider Request for Reconsideration of its determination to refer a case for mediation."

The NBA further recommends that the Court clarify that the Motion to Disqualify Mediator and the Clerk's order not become part of the record by adding a sentence, so the last two sentences of Section 6(c)(iii)(2) would read as follows: "The Motion and the Clerk's order shall not become part of the appellate court record. In the event an Appellate Mediator is disqualified, the parties or the Appellate Mediation Administrator shall select a replacement in accordance with this section."

4. SECTION 6.(e) SHOULD PROVIDE A PROCEDURE FOR THE MEDIATOR'S FEES TO BE CHARGED AS COURT COSTS.

Section 6.(e) provides that the costs, fees, and expenses associated with the mediation shall be allocated pro rata among the parties, unless the parties agree otherwise. The issue of the mediator's fees can become a subject to negotiation, potentially impairing the effectiveness of the mediator. The NBA recommends that an alternative procedure be offered, similar to that provided in Supreme Court Rule 31, Section 8 and Rule 37(i), which provide that the mediator's fees may be charged as court costs in the action. Accordingly the NBA proposes that an additional sentence be added at the conclusion of Section 6.(e), as follows: "Alternatively, at the mediator's request, the costs of the services of the mediator may be charged as court costs at the conclusion of the case."

5. THE COURT SHOULD REVISE PROPOSED PROVISIONAL RULE 48, SECTION 7.(a)(1) TO REQUIRE ADDITIONAL TRAINING FOR THOSE LISTED AS "ROSTER APPELLATE MEDIATORS."

As currently drafted, Provisional Rule 48 Section 7(a)(1) allows any mediator listed as Supreme Court Rule 31 mediator to qualify as an appellate mediator. The NBA believes that appellate cases require a different skill set than is required to mediate other matters. The NBA believes that an additional six (6) hours in Appellate Mediation should be required to serve as an Appellate Mediator. The Provisional Rule should be modified accordingly.

6. THE COURT SHOULD CORRECT A TYPOGRAPHICAL ERROR IN SECTION 7.(f).

To correct a typographical error, the last line of Section 7.(f) should be changed from "Section (Compensation) to "Section 13 (Compensation)."

7. THE COURT SHOULD REVISE SECTION 8.(e)(1)(iii) REGARDING THE ATTENDANCE OF REPRESENTATIVES OF INSURANCE CARRIERS AT MEDIATIONS.

The NBA recommends that Section 8.(e)(iii) have the word "full" added, so it would read as follows: "(iii) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle."

8. SECTION 8.(f) SHOULD MORE FULLY EXPLAIN THAT THE ELEMENTS OF THE MEDIATION STATEMENT ARE DISCRETIONARY.

As currently drafted, Section 8.(f) provides a list of items that the mediator may request in a mediation statement, if the mediator desires such a statement. In order to avoid any confusion as to whether all, or some, of such items should be contained within a Mediation Statement, the NBA recommends that the Court revise Section 8.(f)(2) to read as follows: "(2) The mediator may request the parties to prepare and submit a Mediation Statement. If a Mediation Statement is requested by the mediator, the Mediation Statement may include one or more of the following:"

9. THE COURT SHOULD CLARIFY SECTION.(g)(1) REGARDING CONTENTS OF THE APPELLATE RECORD AND REVISE SECTIONS 8.(g)(2) and 8.(g)(5) REGARDING SANCTIONS.

The NBA recommends that the following clarifying sentence be added at the end of Section 8.(g)(1): "The Clerk's order shall not become part of the appellate court's record."

The NBA further recommends a revision of Section 8.(g)(2). Supreme Court Rules 31 and 37 have provisions regarding costs, but do not contain any provision for assessment of costs, fees, and expenses as a sanction. Delving into the conduct of a mediation in connection with alleged lack of "good faith" and other similar matters such as "unreasonable obstruction" would compromise the confidentiality of the mediation and create harmful incentives for parties to accuse each other of lack of good faith. Further, "unreasonable" obstruction is a somewhat vague concept that may be difficult to sanction. Refusal to schedule or attend a mediation, on the other hand, can be easily identified without compromising confidentiality and should be subject to appropriate sanctions. The NBA recommends that the words "schedule or" be added and the words "unreasonable obstruction of the conduct of the program" be deleted, so the sentence on recommendation of sanctions would read as follows: "In making the recommendation, the Appellate Court Clerk shall state reasons for a specific allocation of costs, fees and expenses and may consider a party's refusal to schedule or attend a mediation session or sessions."

For the reasons stated above, the NBA believes that "failure of the mediation" should not be a basis for assessing expenses against a party as a

sanction. Even if a mediation does not result in an immediate settlement, it should not be considered a sanctionable "failure." The NBA therefore recommends that the sentence regarding sanctions in Section 8.(g)(5) be reworded as follows: "Sanctions may include assessing reasonable expenses caused by a party's refusal to schedule or attend a mediation session or sessions or unreasonable delay in the scheduling of a mediation."

CONCLUSION

For the foregoing reasons the NBA believes that any appellate mediation program should be modified as recommended.

Respectfully submitted,

By: _____

Lela Hollabaugh
Waller Lansden Dortch & Davis, LLP
Nashville City Center
511 Union Street, Suite 2700
Nashville, TN 37219-8966

By: _____

Waverly D. Crenshaw, Jr.
Waller Lansden Dortch & Davis, LLP
Nashville City Center
511 Union Street, Suite 2700
Nashville, TN 37219-89661

TENNESSEE BAR ASSOCIATION

March 15, 2007

The Honorable Michael Catalano
Clerk, Tennessee Supreme Court
Supreme Court Building, Room100
401 Seventh Avenue North
Nashville, TN 37219

IN RE: PROPOSED PROVISIONAL RULE 48 –
RULES OF TENNESSEE SUPREME COURT

Dear Mike:

Attached please find an original and six copies of the Comment of the Tennessee Bar Association in reference to the above matter.

As always, thank you for your cooperation. I remain,

Very truly yours,

Allan F. Ramsaur
Executive Director

cc: Larry D. Wilks, President
Gail Vaughn Ashworth, General Counsel
Marnie Huff, Chair, TBA Dispute Resolution Section
Task Force to Study Appellate Mediation
Service List

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PROPOSED ADOPTION OF SUPREME COURT RULE 48- APPELLATE MEDIATION	)))))	No.

COMMENT OF THE TENNESSEE BAR ASSOCIATION

INTRODUCTION

The Tennessee Bar Association ("TBA"), by and through its President, Larry D. Wilks; General Counsel, Gail Vaughn Ashworth; and Executive Director, Allan F. Ramsaur, files this comment recommending that proposed Tennessee Supreme Court Rule 48 not be adopted as a mandatory program, and recommending that if a voluntary program is to be adopted, certain modifications as set forth in this comment should be made.

BACKGROUND

By order entered February 2, 2006, this Honorable Court established the Task Force to Study Appellate Mediation. That task force reported on July 27, 2006 offering a proposed rule. On December 13, 2006 this Honorable Court entered an order publishing for comment a proposed provisional rule and soliciting written comments concerning the proposed provisional rule with a deadline for comments of Thursday, March 15, 2007. Subsequent to the entry of the December 13 order, the Task Force to Study Appellate Mediation was reestablished and charged with the task of reviewing comments regarding the proposed Supreme Court rule and reporting to the Court not later than April 15, 2007.

The TBA Executive Committee has held two meetings with respect to the proposed rule and has solicited and received comment from other interested parties.

COMMENT

1. THE TBA RECOMMENDS THAT THE COURT NOT ADOPT PROVISIONAL SUPREME COURT RULE 48. THE TBA RECOMMENDS A SUPREME COURT RULE ON VOLUNTARY APPELLATE MEDIATION.

The appellate process is an essential component of our judicial system. As with any component of that system, appeals increase the time and expense necessary for final disposition of parties' legal claims. Adding another mandatory component to our judicial system at the appellate level- mandatory appellate mediation- will also increase the time and the expense necessary for final disposition of parties' legal claims. Mediation is already readily available to parties at the appellate court level without mandating the process. The Task Force to Study Appellate Mediation did a thorough, thoughtful review of the rules from several states, but there is no evidence in the July 27, 2006 Report To Tennessee Supreme Court From Task Force To Study Appellate Mediation Appointed To Study A Rule For Appellate Mediation ("Report of the Task Force") to support a conclusion that mandatory appellate mediation actually provides a more efficient and economical resolution

of civil case appeals. In addition, consideration should be given to the fact that an assumed benefit of mandating appellate mediation in civil cases balanced against the additional cost and delay imposed upon all civil appeals if such a Rule is enacted may be a misplaced or inaccurate assumption. The TBA recommends further study on the need for mandatory appellate mediation and on the cost benefit analysis for mandatory appellate mediation in Tennessee. The TBA further recommends a voluntary and parallel-track appellate mediation process and a Supreme Court Rule setting forth the applicable procedures for parties' electing to participate in appellate mediation. A Supreme Court Rule would increase parties' consideration of appellate mediation in suitable cases and would provide governance for the mediation process. However, if the Court proceeds to adopt Provisional Supreme Court Rule 48 for mandatory appellate mediation, or if the Court changes the Proposed Provisional Rule to a voluntary process, the TBA offers the following comments to the Proposed Provisional Rule:

2. TBA COMMENT ON SECTION 4- CONFIDENTIALITY

The TBA submits that Tennessee Rule of Evidence 408 does not adequately protect the confidentiality of ADR proceedings. The confidentiality provisions of Supreme Court Rules 31 and 37 and proposed Rule 48 could be improved. The

TBA is studying this issue for a comprehensive recommendation on these confidentiality provisions.

3. THE COURT SHOULD DELETE SECTION 5.(e) OF THE PROPOSED PROVISIONAL RULE.

The TBA recommends a parallel track for mediation and therefore strongly recommends against an automatic or presumptive stay of the appellate process.

4. A. THE COURT SHOULD ALTER SECTION 6.(a)(1)(i) AS FOLLOWS:

6.(a)(1)(i) If, in the discretion of the Administrator, a case is not deemed appropriate for mediation, the Administrator shall send to the parties, the Trial Court Clerk, and the Appellate Court Clerk a Notice stating that the case is not deemed appropriate for mediation.

4. B. THE COURT SHOULD ALTER SECTION 6.(a)(4) AS FOLLOWS:

6.(a)(4) If the Administrator has issued a Decision on Reconsideration Request withdrawing the Referral to Mediation, the Administrator promptly shall send to the parties, the Trial Court Clerk, and the Appellate Court Clerk a Notice stating that the Referral to Mediation has been withdrawn.

4. C. THE COURT SHOULD CLARIFY SECTION 6.(a)(4)(ii) REGARDING THE COURT'S RECONSIDERATION OF REFERRALS TO MEDIATION AND SECTION 6.(c)(iii)(2) REGARDING THE CONTENTS OF THE APPELLATE RECORD.

The TBA recommends that the Court make it clear that, unlike the Administrator's referral, there is no reconsideration of a court's referral to mediation by adding the following to Section 6.(a)(4)(ii): "The Court will not consider a Request for Reconsideration of its determination to refer a case for mediation."

The TBA further recommends that the Court clarify that the Motion to Disqualify Mediator and the Clerk's order do not become part of the record by adding a sentence, so the last two sentences of Section 6.(c)(iii)(2) would read as

follows: "The Motion and the Clerk's order shall not become part of the appellate court record. In the event an Appellate Mediator is disqualified, the parties or the Appellate Mediation Administrator shall select a replacement in accordance with this section."

5. SECTION 6.(e) SHOULD PROVIDE A PROCEDURE FOR THE MEDIATOR'S FEES TO BE CHARGED AS COURT COSTS.

Section 6.(e) provides that the costs, fees, and expenses associated with the mediation shall be allocated pro rata among the parties, unless the parties agree otherwise. The issue of the mediator's fees can become a subject of negotiation, potentially impairing the effectiveness of the mediator. The TBA recommends that an alternative procedure be offered, similar to that provided in Supreme Court Rule 31, Section 8, and Rule 37(i), which provide that the mediator's fees may be charged as court costs in the action. Accordingly, the TBA proposes that an additional sentence be added at the conclusion of Section 6.(e), as follows: "Alternatively, at the mediator's request, the costs of the services of the mediator may be charged as court costs at the conclusion of the case".

6. THE COURT SHOULD REVISE PROPOSED PROVISIONAL RULE 48, SECTION 7.(a)(1) TO REQUIRE ADDITIONAL TRAINING FOR THOSE LISTED AS "ROSTER APPELLATE MEDIATORS."

As currently drafted, Provisional Rule 48 Section 7.(a)(1) provides that in order to be listed as an appellate mediator, the mediator must be an active listed Supreme Court Rule 31 mediator and submit the appropriate request for listing to the Appellate Mediation Office. The TBA believes that appellate cases are often more difficult to mediate, the skills necessary to mediate a case at the appellate level require a different skill set than is required to mediate other matters, and additional training should be required to be listed. Such additional training may be necessary to more fully address concepts such as the appellate standard of review applicable to certain cases. The TBA further believes that additional training will thereby contribute to the efficacy of the Provisional Rule. Accordingly, the TBA recommends that Provisional Rule 48, Section 7.(a)(1) be supplemented by adding the following after subparagraph (ii): "(iii) Has completed at a minimum an

additional six (6) hours of training in appellate mediation, as approved by the Alternative Dispute Resolution Commission."

7. THE COURT SHOULD CORRECT A TYPOGRAPHICAL ERROR IN SECTION 7.(f).

To correct a typographical error, the last line of Section 7.(f) should be changed from "Section (Compensation)" to "Section 13 (Compensation)."

8. THE COURT SHOULD REVISE SECTION 8.(e)(1)(iii) REGARDING THE ATTENDANCE OF REPRESENTATIVES OF INSURANCE CARRIERS AT MEDIATIONS.

The TBA recommends that Section 8.(e)(1)(iii) have the word "full" added, so it would read as follows: "(iii) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle."

9. SECTION 8(f) SHOULD MORE FULLY EXPLAIN THAT THE ELEMENTS OF THE MEDIATION STATEMENT ARE DISCRETIONARY.

As currently drafted, Section 8.(f) provides a list of items which the mediator may request in a mediation statement, if the mediator desires such a statement. In order to avoid any confusion as to whether all, or only a portion, of such items should be contained within a Mediation Statement, the TBA recommends that the Court revise Section 8.(f)(2) to read as follows: "(2) The mediator may request the parties to prepare and submit a Mediation Statement. If a Mediation Statement is requested by the mediator, the Mediation Statement may include one or more of the following:"

10. THE COURT SHOULD CLARIFY SECTION 8.(g)(1) REGARDING CONTENTS OF THE APPELLATE RECORD AND REVISE SECTIONS 8.(g)(2) AND 8.(g)(5) REGARDING SANCTIONS.

The TBA recommends that the following clarifying sentence be added at the end of Section 8.(g)(1): "The Clerk's order shall not become part of the appellate court's record."

The TBA recommends a revision of Section 8.(g)(2). Supreme Court Rules 31 and 37 have provisions regarding costs, but do not contain any provision for assessment of costs, fees, and expenses as a sanction. Delving into the conduct of a mediation in connection with alleged lack of "good faith" and other similar matters such as "unreasonable obstruction" would compromise the confidentiality of the mediation and create harmful incentives for parties to accuse each other of lack of good faith. Further, "unreasonable" obstruction is a somewhat vague concept that may be difficult to sanction. Refusal to schedule or attend a mediation, on the other hand, can be easily identified without compromising confidentiality and should be subject to appropriate sanctions. The TBA recommends that the words "schedule or" be added and the words "unreasonable obstruction of the conduct of the program" be deleted, so the sentence on recommendation of sanctions would read as follows: "In making the recommendation, the Appellate Court Clerk shall state reasons for a specific allocation of costs, fees and expenses and may consider a party's refusal to

schedule or attend a mediation session or sessions."

For the reasons stated above, the TBA believes that "failure of the mediation" should not be a basis for assessing expenses against a party as a sanction. The fact that a mediation does not result in an immediate settlement should not be considered a sanctionable "failure." The TBA therefore recommends that the sentence regarding sanctions in Section 8.(g)(5) be reworded as follows: "Sanctions may include assessing reasonable expenses caused by a party's refusal to schedule or attend a mediation session or sessions or unreasonable delay in the scheduling of a mediation."

CONCLUSION

For the foregoing reasons the TBA believes that any appellate mediation program should be voluntary and that any voluntary rule should be modified as recommended.

Respectfully Submitted,

By: /s/ by permission

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "A" by regular U.S. Mail, postage prepaid on _____.

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March 15, 2007

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RE: Proposed Tenn. S. Ct. R. 48 - Mandatory Appellate Mediation

Dear Mr. Catalano:

I am opposed to mandatory appellate mediation because:

(1) Appellate lawyers and judges have not requested this rule. In fact, appellate mediation is currently available when the parties desire to pursue it.

(2) Mandatory appellate mediation will create unnecessary delay in the appellate process. Mediation has already been attempted in many of the cases that reach the Court of Appeals. There is no basis to assume that mediation will be any more successful following a judgment in the trial court than it was before.

(3) Mandatory appellate mediation will add significantly to the costs of appeals. In addition to the costs of the mediation itself, the clients will be required to bear the costs of assembling the information and preparing the documents required by the rule.

(4) Mandatory appellate mediation will take appeals away from the lawyers and place them in the hands of an employee of the Administrative Office of the Courts. This employee, whose job security will depend on requiring as many appellate mediations as possible, will have no judicial oversight and will impose mediation based on only sketchy information about the case.

Very sincerely yours,

Randall L. Kinnard

Randall L. Kinnard

RLK/mdg

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March 26, 2007

Michael Catalano
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RE: Proposed Tenn. S. Ct. R. 48 - Mandatory Appellate Mediation

Dear Mr. Catalano:

Please accept this letter as a public comment on the proposal for mandatory appellate court mediation. Who is in favor of this proposal? Not I.

As an attorney practicing actively in the trial and appellate courts for over 20 years, I am opposed strongly to any more efforts by the judicial system to increase the cost of litigation and avoid deciding cases. Mediation is all too often ordered in cases that need to be tried. The never-ending increase in the cost of litigation and the seemingly never-ending delays, frequently resulting from mandatory procedural steps that serve little useful purpose, often dictate settlement. Further, mediators often paint a picture for litigants that suggest trials and appeals are nothing but a crap shoot, where the outcome is dictated by the remorseless Fates instead of judges and juries who are trying hard to get it right. I have often participated in mandatory mediation at the Sixth Circuit and find the process to be unnecessary and costly for clients. Recently I sat on hold for over an hour while the mediator tried to get opposing counsel to be reasonable (or what the mediator thought was reasonable). I finally had to tell the mediator "my side is the appellee. We aren't inclined to pay extortion money at this point."

We are raising a generation of lawyers who do not know how to try a lawsuit. Many do not ever get to appear before an appellate court. We are not getting jury verdicts to tell us how to value a case or precedent setting decisions for guidance. We have created a system where anyone can file a lawsuit and demand money under pain of the cost of defense, and there is virtually no risk to the plaintiff. Much of this has come about through well intended efforts to avoid conflict at trial, thinking avoiding trials and appellate litigation is a good in and of itself. This is not always a good thing. The law of unintended consequences then came into play, and the efforts had the result of increasing

the cost and delay associated with litigation to levels where we no longer use the legal system to actually get decisions. Adding yet another process to try to force settlement is a very bad idea.

Very truly yours,

William A. Blue

WAB/gnd