

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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

Filed: December 13, 2006

ORDER

On February 2, 2006, the Court filed an order establishing the Tennessee Supreme Court's Task Force to Study Appellate Mediation ("Task Force"). The Court directed the Task Force to review Tennessee Supreme Court Rule 37 and its impact upon the cases subject to its provisions and upon the appellate docket in general as an aid to determining the feasibility, effectiveness, inherent fairness, and method of implementation of a rule applying to all appellate civil cases; to report on the feasibility of a mediation program applicable to appealed civil cases generally; to recommend what action(s) should be taken regarding the implementation of mediation of appealed civil cases; and to report its findings and recommendations to the Court by July 31, 2006.

On July 27, 2006, the Task Force submitted its report to the Court, along with a proposed provisional Rule 48, Rules of the Tennessee Supreme Court, which would set out the process and procedure for appellate mediation. The proposed provisional Rule 48 is attached as Appendix A to this order.

The Court hereby solicits written comments concerning the proposed provisional rule from judges, lawyers, bar associations, members of the public, and any other interested parties. The deadline for submitting written comments is Thursday, March 15, 2007. Written comments should be addressed to:

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

The Clerk shall provide a copy of this order, including Appendix A, to LexisNexis and to Thomson-West. In addition, this order, including Appendix A, shall be posted on the Tennessee Supreme Court's website.

IT IS SO ORDERED.

FOR THE COURT:

WILLIAM M. BARKER, CHIEF JUSTICE

APPENDIX A

PROPOSED PROVISIONAL SUPREME COURT RULE 48

SECTION 1. PURPOSE AND GOALS

(a) This Rule envisions the use of mediation to make resolution of civil case appeals more efficient and economical. It is not the intent of this Rule to extend the length of time required for final resolution of civil cases.

(b) This Rule will provide the parties with a confidential forum and process by which they can:

(1) Realistically consider the possibility of settlement of all or part of the issues in the case while on appeal;

(2) Discuss limiting and simplifying the issues on appeal;

(3) Take actions that may reduce costs; and

(4) Aid the speedy and just resolution of any case.

(c) This Rule does not apply to interlocutory appeals pursuant to Tennessee Rule of Appellate Procedure 9, or to extraordinary appeals pursuant to Tennessee Rule of Appellate Procedure 10.

SECTION 2. DEFINITIONS

As used in this Rule, unless context otherwise requires:

(a) “Appellate Court Clerk” is the clerk of appellate courts of Tennessee.

(b) “Appellate Court Mediation” is any mediation conducted pursuant to this Rule.

(c) “Appellate Mediation Administrator “ or “Administrator” is a duly licensed Tennessee attorney in good standing with the Board of Professional Responsibility, chosen by the Tennessee Supreme Court to serve at will to administer the Appellate Court Mediation program pursuant to this Rule.

(d) “Appellate Mediation Office” is the office managed by the Appellate Mediation Administrator and is to be administered separately from the Appellate Court Clerk’s office.

(e) “Appellate Mediator” is any mediator who is an active listed Tennessee Supreme Court Rule 31 general civil mediator for civil cases or family mediator for domestic relations cases who has met the requirements for approval as an appellate mediator pursuant to Section 7(a) of this Rule.

(f) “Trial Court Clerk” is a circuit court clerk, clerk and master, or clerk of a civil court of record within the Tennessee state court system.

SECTION 3. SUBMISSION OF DOCUMENTS AND COMPUTATION OF TIME

(a) Documents required or permitted to be submitted to the Administrator shall be submitted to the Appellate Mediation Office. Submission shall not be timely unless the documents are received by the Appellate Mediation Office within the time fixed for submission.

(b) In computing any time period prescribed or permitted by this rule, the date of the act, event or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, a legal holiday, or, when the act to be done is the submission of a paper in the Appellate Mediation Office, a day on which weather or other conditions have made the Appellate Mediation Office inaccessible, in which event the period runs until the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

SECTION 4. CONFIDENTIALITY AND INADMISSIBILITY

In order to protect the confidentiality of all Appellate Court Mediations, the Appellate Mediation Office shall maintain in strict confidentiality all information received from parties participating in an Appellate Court Mediation, including all information disclosed in the course of screening for mediation, referral to mediation, and mediation, including oral, documentary, or electronic information. No such confidential information shall be divulged by the Appellate Mediation Office except as permitted under this Rule.

Mediations shall be conducted in accordance with Section 10(d) of Tennessee Supreme Court Rule 31, and Section 7 of the Standards of Professional Conduct for Rule 31 Neutrals, Appendix A of Rule 31, with regard to the confidentiality of the mediation.

Evidence of conduct or statements made in the course of Appellate Court Mediation ADR Proceedings shall be inadmissible to the same extent as conduct or statements are inadmissible under Tennessee Rule of Evidence 408.

SECTION 5. SCREENING FOR MEDIATION AND STAY OF APPEAL PROCESS

(a) **Eligible Cases.** All civil matters within the jurisdiction of the Tennessee Court of Appeals shall be eligible for referral to the Appellate Court Mediation Program.

(b) **Notice to Administrator of Pendency of Appeal.**

(1) On receipt of the Notice of Appeal, the Appellate Court Clerk shall promptly forward the Docketing Statement Form to the Appellant.

(2) The Appellant shall return the completed Docketing Statement Form to the Appellate Court Clerk within ten (10) days of its mailing date from the Appellate Court Clerk to the Appellant.

(3) On receipt from the Appellant, the Appellate Court Clerk promptly shall forward the completed Docketing Statement Form to the Appellate Mediation Office. When the Appellate Court Clerk's Office has implemented electronic filing pursuant to Tennessee Supreme Court Rule 46, the Docketing Statement Form shall be transmitted to the Appellate Mediation Office via electronic means.

(c) **Pre-screening of Cases.** Upon receipt of the Docketing Statement from the Appellate Court Clerk and review of the information contained in it, the Appellate Mediation Administrator shall determine whether the case should be further considered for appellate mediation. If chosen

for further consideration, the Administrator promptly shall furnish a Mediation Case-Screening Form to the parties.

(1) *Mediation Case-Screening Form.* On or before the due date as shown on the Mediation Case-Screening Form, each party to the appeal shall submit to the Appellate Mediation Office, with service on all other parties to the appeal, a completed Mediation Case-Screening Form, containing information to supplement the Docketing Statement. The Appellant shall attach to the Mediation Case-Screening Form the following:

- (i) a copy of the Docketing Statement;
- (ii) a copy of the complaint and any amendments to the complaint;
- (iii) a copy of the order, judgment and/or memorandum opinion to be reviewed by the appellate court;
- (iv) a copy of the order on any post-judgment motion, if applicable; and
- (v) a copy of the post-judgment motion if it will assist the Administrator in determining the nature of the dispute. Any party to the appeal may also submit with the Mediation Case-Screening Form a statement of any compelling reasons why the case is or is not appropriate for referral to mediation.

(2) *Confidential Statement.* Each party to the appeal may submit a separate confidential statement to the Appellate Mediation Office at the time the Mediation Case-Screening Form is submitted. The confidential statement may contain information the party believes has bearing on the decision of the Administrator to refer the appeal to mediation. The confidential statement shall not be served on opposing counsel and therefore may contain information relating to the parties' positions regarding settlement. If submitted, the confidential statement should be on 8 ½ by 11 inch paper, double spaced and no more than three (3) pages in length.

(d) Content of Forms.

(1) No forms or notices relating to the screening process submitted to or issued by the Appellate Mediation Office shall contain information relating to the parties' positions regarding settlement or any substantive matter that is the subject of the mediation. The exclusive purposes of forms and notices in the Appellate Mediation Program are to maintain status records and statistics, to ensure orderly compliance with this Rule, and to provide a mechanism for returning the case to the ordinary appeal process where mediation has not resolved the appeal. All forms used in implementing this Rule shall be developed by the Appellate Mediation Administrator with approval by the Tennessee Supreme Court, and will be available on the Administrative Office of the Courts ("AOC") website and from the AOC.

(2) The optional confidential statement shall not be on a prescribed form and is not to be used for any purpose other than to provide information to assist the Administrator in the mediation referral screening process.

(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 and Appellate Court Clerk, with service on all parties, a Notice to Clerk to Stay Proceedings on Appeal. The Notice shall state that all appellate schedules, including record preparation, are stayed pending further orders of the Court of Appeals.

The appellate process, including the preparation of the record, 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.

SECTION 6. REFERRAL TO MEDIATION

(a) Referral to Mediation.

By the Appellate Mediation Administrator:

(1) The Appellate Mediation Administrator promptly shall review the completed Mediation Case-Screening Forms and, if submitted, any confidential statements received from the parties to the appeal.

(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 Lifting the Stay of Proceedings on Appeal, and the case will resume the normal appeal track under the Tennessee Rules of Appellate Procedure.

(ii) If, in the discretion of the Administrator, a case is deemed appropriate for mediation, the Administrator shall issue the Referral to Mediation Notice to the parties.

(2) There shall be no review or appeal of the decision of the Administrator that a case is not deemed appropriate for mediation.

(3) Within ten (10) days of the date of service of the Referral to Mediation Notice, any party may submit in writing, with service on all parties, a request that the Administrator reconsider the referral to mediation. No reply or opposition papers from any other party shall be permitted in response to a request to the Administrator to reconsider the referral. The Administrator promptly shall reconsider the referral to mediation based on the request and other submissions in the file and shall serve the parties with the Decision on Reconsideration Request stating whether the Referral to Mediation Notice remains effective or is withdrawn. The Administrator shall not state any reasons supporting the Decision on Reconsideration Request.

(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 Lifting Stay of Proceedings on Appeal, and the case will resume the normal appeal track under the Tennessee Rules of Appellate Procedure.

(i) At the Request of All Parties:

All parties to the appeal may request Appellate Court Mediation at the time they submit the Mediation Case Screening Forms, and the Administrator shall issue the Referral to Mediation Notice.

(ii) By the Court:

If in the opinion of the Court of Appeals a case is appropriate for mediation, the court may refer any case to mediation at any time during the appellate process.

(b) List of Mediators. The Appellate Mediation Administrator shall maintain a list of approved Appellate Mediators. The list shall be posted on the Tennessee Supreme Court's

website at www.tncourts.gov. Upon request, the Appellate Mediation Administrator shall provide the list to the parties via electronic mail, telefax, or U.S. Mail

(c) **Selection of an Appellate Mediator.** Within fifteen (15) days of the issuance of the Referral to Mediation or, if a request for reconsideration has been made or a Motion to Appeal has been submitted, within fifteen (15) days after a final decision sustaining the Referral to Mediation, the parties shall submit to the Appellate Mediation Office their Report on Status of Selection of Mediator, stating either:

(i) *By Agreement:*

That they have agreed upon a mutually acceptable Mediator, setting out the date, time, and location of the mediation and the agreement of the parties regarding the fees and expenses of the mediation, or

(ii) *By Appointment:*

That, after best efforts, they cannot agree upon a Mediator. The Administrator shall then assign at random from the list of approved appellate mediators an Appellate Mediator who is located within reasonably close proximity to the parties, shall issue a Notice of Assignment of Mediator to the parties and the Mediator, and shall forward to the Mediator a copy of the Docketing Statement.

(iii) *Appeal of Appointment of Mediator:*

(1) Within ten (10) days of receipt of the Notice of Assignment of Mediator, the parties and/or the Mediator shall notify the Appellate Mediator Administrator of any ground for disqualification of the Mediator selected. The Administrator shall have the discretion either to assign a different Mediator to the case and issue a new Notice of Assignment of Mediator, or to deny the disqualification. An Appellate Mediator shall be subject to the Standards of Professional Conduct for Tennessee Supreme Court Rule 31 Mediators as set forth in the Appendix to Tennessee Supreme Court Rule 31 regarding disqualification for partiality or conflict of interest. The Administrator promptly shall serve notice to the parties of the Decision on Disqualification Request.

(2) Within ten (10) days of service of the Decision on Disqualification Request, any party may submit a Motion to Disqualify Mediator in the Appellate Mediation Office with service on all parties. Any party may submit a supporting or opposing reply within five (5) days of service of the Motion to Disqualify Mediator. The Motion to Disqualify Mediator and any supporting or opposing replies shall be on 8 ½ by 11 inch paper, double spaced and no more than three (3) pages in length. If a Motion to Disqualify Mediator is received in the Appellate Mediation Office and after the time has expired within which supporting or opposing replies may be submitted, the Administrator promptly shall forward all such papers to the Appellate Court Clerk. The Appellate Court Clerk promptly shall decide the Motion and shall forward the decision to the Appellate Mediation Office, which, in turn, promptly shall serve the decision on the parties. In the event an Appellate Mediator is disqualified, the parties or the Appellate Mediation Administrator shall select a replacement in accordance with this section.

(d) **Initial Contact with the Appellate Mediator.** The parties shall contact the Appellate Mediator directly to arrange for the time and place of the mediation session or sessions and to arrange for payment of fees and expenses of the mediation.

(e) **Costs, Fees, and Expenses.** Unless otherwise agreed by the parties, the costs, fees and expenses associated with the mediation shall be allocated pro rata among separately represented parties and shall be payable at the conclusion of the mediation.

(f) **Mediation Time Frame.** Unless otherwise agreed by the parties with the approval of the Mediator, and ordered by the Appellate Court Clerk, a mediation session shall be conducted within sixty (60) days of the issuance of the Referral to Mediation. If reconsideration of the referral to appellate mediation is requested by any party, a mediation session shall be conducted within forty-five (45) days of the date of the Decision on Reconsideration. The Mediator is

authorized to set the date and time of all mediation sessions, upon giving reasonable notice to the parties.

SECTION 7. APPELLATE MEDIATOR

(a) Qualifications of Mediator.

(1) *Roster Mediator.* An approved Appellate Mediator is someone who is an attorney in good standing with the Board of Professional Responsibility or is a professional in good standing with any professional licensing agency or organization and:

(i) Is an active listed Tennessee Supreme Court Rule 31 mediator, and

(ii) Has submitted a request to the Appellate Mediation Office to be listed as an appellate mediator and has certified in writing familiarity with this Rule.

(2) *Nonroster Mediator.* Nothing in these Rules prevents the parties from choosing their own mediator as long as the proposed mediator is an active listed Tennessee Supreme Court Rule 31 mediator and in good standing with the licensing board for the profession in which the person practices or, if the profession of the person is not subject to licensing, has three (3) written recommendations and agrees to be bound by this Rule. The appellant shall attach documentation showing these qualifications to the Report on Status of Selection of Mediator Form within fourteen (14) days from the date of the issuance of the Referral to Mediation.

(b) **Duty of Mediator Before Accepting Appointment.** All Appellate Mediators shall comply with Sections 9 and 10 of Tennessee Supreme Court Rule 31.

(c) **Inability of Mediator to Serve.** If, once a mediator has accepted an appellate case for mediation, the mediator becomes unwilling or unable to serve, the mediator shall immediately notify the Appellate Mediation Office and the parties to the appeal. Within seven (7) days of such notice, the parties shall notify the Appellate Mediation Office of the selection of an alternate, who has the requisite qualifications. If, within that seven-day period, the parties cannot agree on an alternate mediator, the Appellate Mediation Administrator shall appoint a mediator.

(d) **Request for Waiver of Mediator Fees.** Any party may apply to the Appellate Mediation Administrator for a waiver of mediator fees before a mediator is appointed. The Administrator may approve a waiver of mediator fees only on a showing of sufficient reason by the applying party, such as undue financial hardship. After considering the application for waiver of mediator fees, the Appellate Mediation Administrator may appoint a pro bono mediator selected at random from the approved mediator list.

(e) **Disqualification of an Appellate Mediator.** An Appellate Mediator may be disqualified from mediating appellate cases for:

(1) Violating Tennessee Supreme Court Rule 31; or

(2) Failure to remain in good standing with the licensing board for the profession in which the person practices; or

(3) At the discretion of the Supreme Court.

(f) **Discipline, Immunity and Compensation.** Appellate mediators acting pursuant to this Rule shall be subject to and covered by the provisions of Tennessee Supreme Court Rule 31, Section 11 (Proceedings for Discipline), Section 12 (Immunity) and Section (Compensation).

SECTION 8. MEDIATION PROCEDURES

(a) **Scheduling.** The Mediator is authorized to set the date and time of all mediation sessions subject to the provisions of Section 6(f) after consultation with the parties, upon giving reasonable notice to the parties. Any requests to reschedule the mediation within the sixty (60) day time frame are to be made directly to the mediator, not to the Appellate Mediation Office, and shall comply with the provisions of Section 6(f).

(b) **Additional Mediation Sessions.** If the mediation is not completed within sixty (60) days of the issuance of the Referral to Mediation, mediation shall be deemed to be at an impasse, unless an extension has been granted pursuant to Section 8(d).

(c) **No Record.** There shall be no record made of the mediation proceeding.

(d) **Extensions.** A mediator may request an extension of time from the Appellate Mediation Administrator beyond the sixty (60) day period allowed by Section 6(f) if the mediator is of the opinion that the additional time for mediation would be productive. The request for an extension must be made in writing or telephonically to the Appellate Mediation Administrator within the time allowed for mediation. The mediator must send a confirmation letter to the Appellate Mediation Office, copied to all counsel. That letter should read as follows:

"Re: [Appeal number and style]. This confirms that to facilitate settlement the Appellate Mediation Administrator has granted my request to extend the time to mediate this appeal from the current due date of [date] to the new due date of [date]."

(e) **Attendance at Mediation Session.** A party is deemed to appear at a mediation session if:

(1) The following persons are physically present or, if the mediator so authorizes, are reasonably available to authorize settlement during the mediation session:

(i) The party or its representative having authority to settle without further consultation.

(ii) The party's counsel of record, if any.

(iii) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has authority to settle.

(2) As to a governmental or other entity for which settlement decisions must be made collectively, the availability or presence requirement may be satisfied by a representative authorized to negotiate on behalf of that entity and to make recommendations to it concerning settlement.

(3) The failure of a party and/or the party's counsel to attend the mediation session may be grounds for recovery of costs against the party, the party's counsel, or both, to be imposed by the appellate court in which the case is pending. (See subsection (g) of this section.)

(f) **Conduct of Mediation.**

(1) Evidence of conduct or statements made in the course of the mediation shall be inadmissible to the same extent as conduct or statements are inadmissible under Tennessee Rule of Evidence 408.

(2) The mediator may request the parties to prepare and submit a Mediation Statement. If a Mediation Statement is requested, the Mediation Statement may include:

(i) a brief recitation of the facts established to the satisfaction of the fact-finder;

(ii) the history of any efforts to settle the case, including any offers or demands and previous mediations;

(iii) a statement of the issue or issues on appeal and the manner in which each issue was preserved;

(iv) a statement of the standard of review applicable to each issue;

(v) a summary of the parties' legal positions and a candid assessment of the respective strengths and weaknesses of those positions;

(vi) the present posture of the appeal, including any matters pending in the trial court or in any related litigation;

(vii) any recent developments that may impact the resolution of the appeal;

(viii) identification of the individual or individuals and counsel the parties believe should be directly involved in the settlement discussions;

(ix) a description of any sensitive issues that may not be apparent from the court records, but that may or will influence the settlement negotiations;

(x) the nature and extent of the relationship between the parties or their counsel;

(xi) the parties' priority of interests;

(xii) any suggested approach for the mediator to take in an attempt to settle the appeal (e.g., "problem" to be settled, sequence of issues);

(xiii) any suggested creative solutions;

(xiv) necessary terms in any settlement;

(xv) any particular concerns about confidentiality;

(xvi) any limitations in counsel's authority to make commitments on behalf of the client; and/or

(xvii) any additional information that the counsel's client or the other party needs to settle the case and whether it should be provided before the mediation.

(3) Mediation Statements are confidential. Copies of the Mediation Statements submitted by the parties should go directly to the mediator and should not be served upon opposing counsel.

Documents prepared for mediation sessions are not to be submitted to the Appellate Mediation Office or to the Appellate Court Clerk's office and are not to be part of the record on appeal.

(4) The Appellate Mediator shall comply with Section 10 of Tennessee Supreme Court Rule 31 (Obligations of Rule 31 Neutral), as applicable.

(g) Motions

(1) Pursuant to Tennessee Rule of Appellate Procedure 22(b), the Appellate Court Clerk is delegated the authority to rule on issues, as set forth in these Rules, raised by the parties or the Appellate Mediation Administrator and to order appropriate relief. The Decision on Disqualification Request (Section 6(c)(iii)(b)), of the Administrator shall be presumed by the Appellate Court Clerk to be correct and shall not be modified unless the relevant factors preponderate against the decision. Any decision by the Appellate Court Clerk shall be final and cannot be appealed.

(2) Neither the Appellate Mediation Office nor the Appellate Mediation Administrator has the authority either to impose sanctions or to allocate costs, fees and expenses. Only the Court of Appeals shall have the authority to assess costs, fees and expenses and/or to impose sanctions relating to the mediation process.

(3) The Administrator shall have the authority in appropriate cases to seek an order from the Appellate Court Clerk to compel compliance with any provision of this Rule.

(4) Any party may seek to recover costs, fees and expenses as part of a motion to the Appellate Court Clerk. In addition to issuing a decision on any given motion, the Appellate Court Clerk may recommend to the Court of Appeals that costs, fees and expenses relating to said motion should be assessed to one or more of the parties. The Recommendation of the Appellate Court Clerk shall be filed with the Appellate Mediation Administrator and served on all parties, to be held pending filing of a motion pursuant to Subsection (5) of this Section. In making the recommendation, the Appellate Court Clerk shall state reasons for a specific allocation of costs, fees and expenses and may consider, among other things, a party's refusal to attend a mediation session or sessions, unreasonable delay in the scheduling of mediation, or otherwise unreasonable obstruction of the conduct of the program. The Recommendation of the Appellate Court Clerk shall be confidential and shall not be disclosed to the Court of Appeals by the Appellate Court Clerk, the Appellate Mediation Administrator or the parties until a motion is filed pursuant to Subsection (5) of this Section.

(5) A party to the appeal may file a Motion with the Court of Appeals to assess costs, fees and expenses or to impose sanctions relating to the mediation process. Such Motion may be filed only (a) within the ten (10) day period after the Court of Appeals has issued its opinion in the underlying appeal and the time for filing a motion to rehear under Tennessee Rule of Appellate Procedure 39 has expired or (b) within ten (10) days after the ruling on a motion to rehear under Rule 39. No party may file a Motion to assess costs, fees and expenses and/or to impose sanctions relating to the mediation process unless the issue was ruled on by the Appellate Court Clerk and the Appellate Court Clerk issued a recommendation as part of a decision. The party seeking the assessment shall file the Appellate Court Clerk's recommendation with the Motion to assess costs, fees and expenses and/or to impose sanctions. Sanctions may include, but are not limited to, assessing reasonable expenses caused by the failure of the mediation, including an award of mediator and/or attorney fees; assessing all or a portion of the appellate costs; or taking such other appropriate action as the circumstances may warrant. Any Motion filed pursuant to this Section shall comply with Tennessee Rule of Appellate Procedure 22.

SECTION 9. COMPLETION OF MEDIATION PROCESS

(a) **Mediator's Report.** Upon completion or termination of the mediation, the Appellate Mediator shall file a final report with the Appellate Mediation Office. The mediator shall make a final report on a form prescribed by the Appellate Mediation Office. The report shall state: (i) whether all parties appeared and participated in the appellate mediation or otherwise complied with the requirements of Section 8(e) above; and (ii) whether the case was completely settled or partially settled. The final report shall not contain any detail of the nature or substance of the mediation or any agreement reached. The final report shall be filed within fifteen (15) days after the conclusion of the mediation.

(b) **Settlement Agreement.** If the mediation is concluded by a total or partial settlement of the issues on appeal, a written Settlement Agreement shall be executed by the parties to the mediation containing the essential terms of the settlement. The Appellate Mediator shall oversee the preparation and execution of the Settlement Agreement which shall be executed before the parties leave the mediation session. In the case of a partial settlement of issues on appeal, the parties shall, at the same time, also prepare a Stipulation as to Matters No Longer in Controversy. The Settlement Agreement may be in memorandum or outline form, contemplating a more formal document to be prepared at a later time.

(c) **Post-Mediation Filing By the Parties; Duties of the Appellate Mediation Office.**

(1) *Agreement on all issues.* If mediation results in an agreement on all of the issues on appeal, dismissal of the appeal will be governed by Tennessee Rule of Appellate Procedure 15. The Rule 15 stipulation of dismissal shall be filed within five (5) days of the conclusion of the mediation.

(2) *Agreement on some but not all issues.* If mediation results in an agreement on some, but not all, of the issues on appeal, counsel shall file with the Appellate Mediation Office the Stipulation as to Matters No Longer in Controversy within five (5) days of the conclusion of the mediation.

In those cases where an agreement is reached on some but not all issues, the Appellate Mediation Office shall send the Stipulation as to Matters No Longer in Controversy to the Court of Appeals, with copies to the parties. At the same time, the Appellate Mediation Office promptly shall send to the Trial Court Clerk, the Appellate Court Clerk and the parties a Notice Lifting Stay of Proceedings on Appeal and the case will resume the normal appeal track under the Tennessee Rules of Appellate Procedure.

(3) *Agreement on none of the issues.* If mediation results in agreement on none of the issues on appeal, counsel shall submit with the Appellate Mediation Office, a non-specific Notice of Termination of Mediation Without Settlement. The notice shall not disclose the nature or substance of the mediation. The Notice of Termination of Mediation Without Settlement shall be submitted within five (5) days of the conclusion of the mediation.

In those cases where no agreement is reached, the Appellate Mediation Office promptly shall send to the Trial Court Clerk, the Appellate Court Clerk, and the parties a Notice Lifting Stay of Proceedings on Appeal, and the case will resume the normal appeal track under the Tennessee Rules of Appellate Procedure.

SECTION 10. DISMISSAL PROCEDURES

(a) **Joint Stipulation for Dismissal of Case After Mediation.** If the parties reach an

agreement as a result of the mediation, they may file a joint (or agreed) motion to dismiss the case pursuant to Tennessee Rule of Appellate Procedure 15 with the Appellate Court Clerk's office in which the case is pending. The parties shall serve a copy of the stipulation of dismissal on the mediator. The motion to dismiss should address the following:

(1) Whether the dismissal pertains to all parties and claims on appeal;

(2) Whether the case should be remanded to the trial court for further proceedings in conformance with the parties' settlement agreement; and

(3) Whether the parties are to bear their own costs or whether, pursuant to the parties' agreement, the costs are to be otherwise apportioned.

(b) **Termination of Mediation and Notice to Reinstate Appeal.** The mediator may terminate the mediation process at any time, if, in the opinion of the mediator, further attempts at mediation will serve no useful purpose.

(1) Once mediation has been terminated without the parties reaching an agreement, the appeal will be reinstated on the appellate docket and the stay of proceedings lifted to reinstate the appeal. The clerk of the appellate court shall send the Notice to Reinstate Appeal to the parties.

(2) All Appellate Time Requirements shall resume. The appellant shall make satisfactory arrangements with trial court clerk and court reporter for preparation of the record on appeal within seven (7) days of the date of the Notice to Reinstate Appeal.

SECTION 11. PILOT PROJECT IMPLEMENTATION AND EVALUATIONS.

(a) **Pilot Project Implementation.** The implementation of this Rule shall be tested in a fifteen (15) month pilot project that will be phased in as follows:

(1) From the effective date forward, this rule shall apply only to those appeals docketed in the Middle Section.

(2) Beginning with the seventh month after the effective date, the rule shall further and additionally apply to those appeals docketed in the Eastern Section.

(3) Beginning with the tenth month after the effective date, the rule shall further and additionally apply to those appeals docketed in the Western Section.

(b) **Pilot Project Evaluations.**

(1) Each party shall submit a completed evaluation form supplied by the Appellate Mediation Office to the Appellate Mediation Office within ten (10) days of the completion of mediation. The evaluation form shall be maintained as confidential and shall not be entered into the case file.

(2) The completed evaluation form shall be placed in an evaluation form envelope supplied with the evaluation form, and the evaluation envelope shall be sealed. The sealed evaluation envelope shall then be placed in a cover envelope and mailed by each party to the Appellate Mediation Office. The case name and number shall be noted on the cover envelope ONLY.

(3) The Appellate Mediation Administrator shall receive the evaluation envelopes, remove the evaluations, review and compile the results of the evaluations and shall provide information

to the Tennessee Supreme Court or the designee of the Court on the results of the evaluations on a periodic basis set by the Court.

The results in the cases affected by this Rule and the efficacy of the procedures outlined herein shall be subject to evaluation by the Tennessee Supreme Court with the assistance of any designee the Court selects.

SECTION 12. PERMANENT PROGRAM EVALUATIONS.

In the event the Appellate Court Mediation Program is implemented as a permanent Rule, then evaluations shall be conducted and reported according to procedures adopted by the Alternative Dispute Resolution Commission.

SECTION 13. ELECTRONIC SUBMISSION OF DOCUMENTS

So as to ensure the prompt and timely consideration and disposition of appeals for mediation under this Rule, all documents submitted to the Appellate Mediation Office shall be submitted via electronic means through a method to be determined by the Appellate Mediation Administrator.

Effective Dates.

In order to provide sufficient time to hire the Appellate Mediation Administrator and to establish the Appellate Mediation Office, this Provisional Rule 48 shall take effect on July 1, 2007.

For all other purposes, this Rule shall apply to cases in which a notice of appeal is filed on or after July 1, 2007, through September 30, 2008.