CIVIL JUSTICE EXPENSE

AND DELAY REDUCTION PLAN

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ALABAMA

December 1, 1993

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This Plan, with Appendices B and C, constitutes the Civil Justice Expense and Delay Reduction Plan for the United States District Court for the Northern District of Alabama under the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471 *et seq.*

SECTION I. GENERAL DESCRIPTION OF PLAN

A. Purpose

The purpose of this Plan is to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolution of civil disputes in the district.

B. Development

This Plan has been developed after consideration of the recommendations of an Advisory Group appointed in accordance with 28 U.S.C. § 478. The district was neither named as a pilot court nor designated to participate in any special demonstration programs under the CJRA, and, at the suggestion of the Advisory Group, the court elected not to be an early implementation district.

The Report of the Advisory Group has been submitted to the court and made available to the public in accordance with 28 U.S.C. § 472(b). It includes a thorough assessment of the state of the court's civil and criminal dockets as provided in 28 U.S.C. § 472(c)(1); the basis for the Group's recommendation as to whether the court should select a model plan or develop its own plan; the various measures, rules, and programs recommended by the Group for inclusion in the plan; and an explanation of how the plan recommended by the Group complies with 28 U.S.C. § 473.

As recommended by the Advisory Group, the court elected to develop its own Expense and Delay Reduction Plan rather than adopt one of the model plans. In formulating the provisions of this Plan, the court, in consultation with the Advisory Group through careful review of the Group's Report, has considered the six "principles and guidelines" specified in 28 U.S.C. § 473(a) and the six "techniques" specified in 28 U.S.C. § 473(b) for litigation management and cost and delay reduction. Each of the causes for expense and delay identified in the Report has been considered. This Plan adopts each recommendation made by the

Advisory Group and calls for contributions from the court, attorneys, and litigants in reducing the time and expense of civil litigation.

C. Adoption; Conflicts

This Plan has been adopted by a general order of the court, effective December 1, 1993. A copy of this order is attached as Appendix A.

Most components of this Plan are not self-executing on the effective date of the order, and either require other court action or can be accomplished only in phases. For example, amendment of the local rules, as described in Section II.A.2 of this Plan, involves separate requirements under 28 U.S.C. § 2071 and FED. R. CIV. P. 83, and cases cannot be referred to Mediation or Med/Arb tracks, as described in the ADR plan adopted as part of this Plan, until formation of the Panel of Neutrals. Section II indicates the steps taken, or to be taken, to implement each element of this Plan.

In the event of conflict or inconsistency, the local rules adopted by the court and the orders of a judge in a particular case prevail over the provisions of this Plan.

SECTION II. EXPENSE AND DELAY REDUCTION PLAN

A. Provisions of Plan; Implementation

1. **Alternative Dispute Resolution.** The court adopts the Alternative Dispute Resolution (ADR) plan attached as Appendix C to this Plan. The ADR plan, as adopted, is identical to that recommended by the Advisory Group in its Report to the court. For more convenient use and reference, copies of the ADR plan will be included in booklets prepared by the Clerk that contain local rules of the court; the ADR plan may also be distributed as a separate document.

(a) The effective date of the ADR plan is December 1, 1993. After that date, ADR procedures may, if and to the extent authorized under the ADR plan, be used in cases then pending, as well as in cases later filed or removed, except that the "Mediation" and "Med/Arb" tracks may be used only after formation of the Federal Court Panel of Neutrals.

(b) The court will begin in December 1993 to take steps leading to the formation of the Federal Court Panel of Neutrals. As called for under ADR plan, the Chief Judge designates, with his consent, District Judge Edwin L. Nelson to receive applications from persons interested in being included on the Panel and to assist the court in compiling a list of persons qualified to serve on the Panel. After a sufficient number of persons have been found so qualified, cases may then be selected for ADR under the "Mediation" and "Med/Arb" tracks. The court will, from time to time, receive applications from additional persons to serve on the Panel.

(c) As recommended by the Advisory Group and after consultation with its Advisory Committee on Local Rules, the court has adopted a local rule (LR16.1(c)) to highlight the potential use of ADR as a topic for consideration in Rule 16 conferences. A copy of this new local rule, which before adoption was made available for public comment as required by 28 U.S.C. § 2071 and FED. R. CIV. P. 83, is contained in Appendix B to this Plan. The local rule takes effect December 1, 1993, the same date that this Plan becomes effective.

(d) This Plan contemplates that judges will not ordinarily order ADR over the objection of a party.

(e) The Advisory Group recommended that, when funds become available, a new position of "ADR Administrator" should be added in the Office of the Clerk. When such funds become available, the court will review the demands placed on the Clerk's office by additional functions related to ADR and, after evaluating other staffing needs in the Clerk's office at that time, determine whether to request the position of "ADR Administrator."

2. Rules to Address Discovery Problems. As recommended by the Advisory Group and after consultation with its Advisory Committee on Local Rules, the court has amended its local rules to address, in conjunction with amendments in the FED. R. CIV. P. that become effective on December 1, 1993, the most frequently recurring problems with discovery. A copy of new local rule LR26.1, which before adoption was made available for public comment as required by 28 U.S.C. § 2071 and FED. R. CIV. P. 83, is contained in Appendix B to this Plan.

(a) Local Rule LR26.1 takes effect December 1, 1993, the same date that this Plan becomes effective. As indicated in Section I.C of this Plan, the provisions of the local rules take precedence over provisions in this Plan in the event of any conflict or inconsistency.

(b) In its Report to the court, the Advisory Group identified three problems as most frequently recurring with discovery: over-utilization, withholding of relevant information, and disputes concerning the scope of discoverable materials. The new national rules contain provisions that, with LR26.1, will enable the court to address those problems more effectively and efficiently. This Plan adopts the position of the Advisory Group that more drastic measures to contain and control discovery are not warranted at the present time in this district.

(1) Over-utilization. FED. R. CIV. P. 16(b) contemplates that the court in scheduling orders will not only set a deadline for completing discovery but also impose a restriction on the extent of permitted discovery which is tailored to the circumstances of the case. These limitations are to be guided by the suggestions of the parties contained in the report required under new Rule 26(f). These rules, in conjunction with the amendments to Rules 30, 31, and 34 that establish

presumptive limits on the number of depositions and interrogatories,[1] should, as stated in Rule 26(b)(2), be used by the court to limit discovery if it would be "unreasonably cumulative or duplicative" or "obtainable from some other source that is more convenient, less burdensome, or less expensive" or if "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." The judges of the court will utilize the authority contained in these rules to prevent over-utilization of discovery.

(2) Withholding of information. Amendments to Rules 33 and 34 make clear that, where an interrogatory or document request is only partly objectionable, the responding party must provide the requested discovery to the extent not objectionable, rather than delaying until the objection is ruled on. Amendments to Rule 30 should reduce the disruptions in depositions caused by speaking objections and inappropriate directions not to answer. The amendment to Rule 37(a)(4) should discourage litigants from waiting to file responses to discovery responses until after a motion to compel has been filed. In conjunction with amended Rule 26(b)(5), requiring an identification of materials being withheld under a claim of privilege or work-product protection, these provisions should, when enforced by the court, result in reduction of the problems caused by unwarranted withholding of requested discovery. The judges of the court will utilize the authority contained in these rules to ensure that relevant information is not improperly withheld.

(3) Disputes requiring judicial resolution. The time and expense incurred when discovery disputes must be presented to the court for resolution should be reduced through the interaction of several of the amendments to the Rules. Amendments to Rules 26-37 will require litigants to certify, before filing discovery motions with the court, that they have in good faith conferred, or attempted to confer, with adverse parties in an effort to resolve the dispute without need for judicial action. By amendments in Rules 29, 33, 34, and 36, parties will not have to seek judicial approval for routine agreements to extend time to respond to discovery requests. Discussion by litigants of the issues in the case as required by amended Rule 26(f), particularly if followed by a conference with the court under Rule 16, should reduce the number of disputes regarding the scope of discovery. The judges of the court will utilize the authority contained in these rules to eliminate unnecessary encroachments on judicial time to resolve discovery disputes.

(c) Local Rule LR26.1(a)(1) provides for a modified form of "initial disclosures" whether or not the requirement contained in FED. R. CIV. P. 26(a)(1) as

1. Consistent with the Advisory Group's Report, no special local rule limiting the length of depositions is being proposed. The proposed local rules will adopt the presumptive limits on number of interrogatories and depositions contained in the new national rules, although the Advisory Group had questioned whether this was needed.

adopted by the Supreme Court is allowed by Congress to take effect on December 1, 1993.

(1) As recommended by the Advisory Group, the new local rule contains these special provisions: (i) initial disclosure applies only in cases filed on or after December 1, 1993; (ii) initial disclosure does not apply in cases such as Social Security appeals, bankruptcy appeals, and veterans and student loan cases; (iii) litigants may agree not to make the disclosures, or to alter the timing, scope, or sequence of disclosures, unless the judge specifically orders otherwise; and (iv) the disclosures are not filed with the Clerk unless a need for court review arises.

(2) The language requiring disclosure of potential witnesses, as contained in LR26.1(a)(1)(A), has been drafted in a manner to lessen problems with compliance, while still serving the intended salutary purpose of eliminating the need for interrogatories to obtain this core information.

(3) The language requiring disclosure of potential documentary evidence, as contained in LR26.1(a)(1)(B), has been drafted in a manner that, by limiting the obligation to evidence that the party may use to support its contentions, should substantially lessen any problems with compliance or attorney-client conflicts. With this change regarding the scope of the disclosure, however, two other changes were also appropriate: first, the obligation respecting such supporting evidence will be to make the items available for inspection and copying as if a Rule 34 request had been made; and second, Rule 34 requests for other documentary information can be made earlier in the litigation, namely, after appearance of the parties involved in the Rule 34 request.

(d) In unusually complex cases, the judges to whom such cases are assigned will continue to adopt special procedures tailored to deal with discovery problems in those cases. As recommended by the Advisory Group, no special local rules are being proposed to deal with discovery in those cases.

3. Judicial Involvement in Case Management; Prompt Resolution of Discovery Disputes. Recognizing the need for early, individualized, and on-going judicial involvement in management of civil litigation, the judges will, as recommended by the Advisory Group in its Report, continue to use scheduling conferences and orders, and other pretrial conferences, to set appropriate deadlines for completion of discovery and to schedule cases for trial within a reasonable time after those deadlines have expired.

(a) The judges will continue their practice of permitting, when appropriate, litigants and counsel to participate by telephone at conferences and in hearings on motions.

(b) Judges of the court will continue to use practices enabling prompt resolution of discovery disputes. Any judge not currently holding monthly motion dockets will, if the need arises, consider instituting that practice as a means for monitoring pending motions. District judges of the court will, from time to time, refer

discovery disputes to a magistrate judge where that reference may facilitate an early and full consideration of the merits of the dispute.

(c) As the continuation of ongoing practices, this component of the Plan will be immediately implemented by the court and does not require adoption of any new procedures.

4. Questionnaire for Jurors. As recommended by the Advisory Group, the court will immediately proceed to develop and implement a system in which prospective jurors are requested to complete a written questionnaire for use during voir dire and jury selection. The form, as well as the procedures for completing and distributing the questionnaire, will be developed jointly by the court and the bar.

(a) District Judge U. W. Clemon has, with his consent, been designated to coordinate, on behalf of the court, implementation of this new procedure.

(b) Juror questionnaires will be available for use in jury trials commenced after January 31, 1994.

(c) When the Guidelines for Trial of Case in the Northern District of Alabama are next published, the section regarding selection of juries will be modified to reflect the procedures for using jury questionnaires, as well as other changes that have been made in jury selection procedures used in the district.

5. Education. As recommended by the Advisory Group, the court will immediately take steps to educate members of the bar regarding the new practices.

(a) Commencing December 1, 1993, a brief explanation of the new procedures respecting commencement of formal discovery, the presumptive limits on discovery, and the required meeting-and-report of the litigants will be provided by the Clerk of the Court to counsel for the plaintiff (or for the removing defendant) when a case subject to those procedures is filed in (or removed to) this court, with extra copies for distribution to other parties along with the summons (or notice of removal).

(b) Copies of the amended local rules and the ADR plan will be immediately reproduced by the Clerk of the Court for general distribution to members of the bar of the court.

(c) Copies of the Advisory Group's Report and of this Plan will be immediately reproduced by the Clerk of the Court and made available, on request, to attorneys and members of the public.

(d) A series of seminars sponsored by the court will be presented during January through March 1994 to members of the bar at several different locations within the district.

(1) District Judge William M. Acker, Jr., has, with his consent, been designated to plan and coordinate these seminars on behalf of the court.

(2) The primary emphasis will be to educate attorneys about their new responsibilities, especially with respect to the meeting-and-report required under new FED. R. CIV. P. 26(f), the disclosure obligations and limitations on timing and extent of discovery in the new national rules and local rules, the obligation under FED. R. CIV. P. 33 and 34 to provide unobjectionable discovery even when some parts of discovery requests are objectionable, and the obligation to attempt to resolve discovery disputes without need for court involvement. Attorneys will also be provided information regarding the ADR plan and their opportunity to participate as members of the Panel of Neutrals.

6. Judicial Resources. As recommended by the Advisory Group, the court has taken, or will take, the following steps to ensure that the district has sufficient judicial resources to manage its caseload efficiently and effectively:

(a) The court has already requested, through the appropriate Judicial Conference committee, that the temporary district judgeship be converted, through Congressional action, to a permanent position prior to the time the temporary authorization expires. The court will continue to support this request as it is reviewed within the judiciary. Informal communications with members of Congress indicate that this request should receive favorable consideration when a new judgeship bill is brought before Congress. Members of the bar will be asked by the court to indicate their support when it is appropriate to do so.

(b) The court will immediately request the appropriate Judicial Conference Committee to undertake a study to determine whether an additional magistrate judge position is warranted. Magistrate Judge Elizabeth Todd Campbell is designated to work with the Chief Judge of the court in preparing this request and in providing supporting documentation.

B. Contributions by Court, Attorneys, and Litigants

This Plan will require that substantial contributions be made by the court, by attorneys, and by the litigants themselves in reducing the cost and delay of civil litigation. While significant, however, these burdens should be more than offset by the benefits to be derived.

1. Court. Case-management responsibilities of the judges of the court will increase, particularly as a result of heightened responsibilities respecting the monitoring and control of discovery and establishing fair and realistic scheduling orders tailored to the specific circumstances of particular cases. Judges will have to become familiar with, and learn to apply, the new pretrial practices called for under the amended national and local rules. The court will have to implement the ADR plan, and the judges will have to learn when and how to employ the various ADR options. The court will have to develop workable procedures for using juror questionnaires and to plan and conduct seminars to educate the bar on the new practices.

2. Attorneys. Attorneys will have many new responsibilities under the amended national rules and local rules, particularly with respect to the meeting and report required under

FED. R. CIV. P. 26(f), the obligations for initial disclosure and disclosure of expert opinions, and the restrictions on commencement and extent of formal discovery. Attorneys will also have to become familiar with the opportunities for ADR, and many will be called upon to serve as members of the Panel of Neutrals.

Members of the bar will also have a key role to play — primarily in presenting concerns to Congress — in dealing with some of the causes for delay and expense identified in the Advisory Group's Report that cannot be addressed in this Plan, such as problems with the federalization and criminalization of matters traditionally handled in state courts, and underfunding of the judicial budget. As noted in the Advisory Group's Report, the United States Attorney for this district can make a special contribution through efforts to restrict federal criminal prosecutions to matters than cannot or should not be handled in state courts.

3. Litigants. Litigants will be called upon to participate in ADR programs in appropriate cases. They will also have new obligations in assisting their counsel to comply with "initial disclosure" requirements early in the litigation.

C. Compliance with 28 U.S.C. § 473(a) — the "Six Principles"

In formulating the provisions of this Plan, the court has, in consultation with the Advisory Group through review of its Report, considered each of the "six principles" for litigation management and cost and delay reduction listed in 28 U.S.C. § 473(a).

1. Differential Case Management. The court will, through new local rules electing options available under the amended FED. R. CIV. P., employ a limited form of differential case management in civil litigation; namely, by specifying certain types of cases in which formal discovery may not be undertaken without court approval (LR26.1(b)(1)), in which there is no requirement for a meeting of litigants (LR26.1(d)(1)), in which early discovery will be permitted (LR26.1(c)(1)), and in which a scheduling order will not be required (LR16.1(b)).

(a) A more extensive form of differential case management — such as fixing the extent of discovery, length of the discovery period, and trial dates based on the category of the case — is not warranted so long as the judges of the court have sufficient time to make these determinations on a case-specific basis through entry of individualized scheduling orders. The reports to be submitted by litigants under Rule 26(f) should assist the judges in formulating fair and realistic scheduling orders, particularly aiding those judges who do not regularly hold conferences with the litigants before entering these orders.

(b) During its existence under the CJRA, the Advisory Group will monitor the effectiveness of more elaborate differential case-tracking systems in other courts to assess whether such a system might be of benefit in this district.

2. Early, Continuing Judicial Control of the Pretrial Process. Implementation of Sections II.A.2 and II.A.3 of this Plan should ensure that early and ongoing active judicial involvement in the case management of civil litigation continues and is enhanced. This includes case planning, monitoring discovery, and controlling motion practice. Without the need for any

rules changes, the judges of the court expect to continue their practice of establishing at an early stage of litigation the date when a case is to be ready for trial, and then actually being in a position to conduct that trial within a short time after the date, if not on the actual day, when the case is set for trial. Rarely have trials not been held within 18 months after the case was filed, and the court expects to be able to continue to set most cases for trial within 12 months after filing.

The early setting of a firm trial date is a useful technique to control discovery, to encourage adequate preparation for trial, and even to promote settlement. The court believes, however, that attempts to do this in all cases can be counterproductive. It cannot always be predicted in the first few months that a case is pending how long a trial of the case will take or whether, because of settlement or summary disposition, a trial will even be needed. Setting firm trial dates for all cases at this early stage can result in too few or too many cases remaining for trial during a particular trial period, resulting in a waste of scarce judicial resources or in expensive and disappointing continuances. Accordingly, judges of the court will continue their current practice of making an early determination regarding trial, which, however, may take the form of a firm trial date, of a specified period during which the trial will be scheduled, or of a date after which the parties are to be ready for trial upon issuance of a trial docket or other appropriate notice.

3. Special Monitoring of Complex Cases. This principle, with its various components listed in 28 U.S.C. § 473(a)(3), is already effectively observed in the district and, accordingly, as recommended by the Advisory Group, no specific changes are needed. Illustrative of the special techniques and attention given to complex litigation are the procedures that have been adopted in the "Breast Implant" cases.

4. Encouragement of Cost-effective Discovery. This principle is already effectively observed in the district, primarily through scheduling orders and conferences and rulings on discovery motions. Amendments to the FED. R. CIV. P., as described in Section II.A.2 of this Plan, will, in conjunction with new local rule LR26.1, provide additional impetus and support for cost-effective discovery, including exchange of core information without resort to formal discovery requests.

5. Non-judicial Attempts to Resolve Discovery Disputes. Amendments to FED. R. CIV. P. 26-37, as described in Section II.A.2 of this Plan, should effectively implement this principle without any need for special rules or procedures at the district level.

6. Use of Alternative Dispute Resolution Programs. Section II.A.1 of this Plan incorporates this principle.

D. Compliance with 28 U.S.C. § 473(b) — the "Six Techniques"

In formulating the provisions of this Plan, the court has, in consultation with the Advisory Group through review of its Report, considered each of the "six techniques" for litigation management and cost and delay reduction listed in 28 U.S.C. § 473(b).

1. **Litigant Development of Case Management Plans.** This technique is incorporated in amended FED. R. CIV. P. 26(f), as described in Section II.A.2 of this Plan, which requires litigants to confer and develop for presentation to the court a proposed plan for discovery and case management. Through new local rule LR26.1(d)(1), the court is exempting from this requirement some types of cases, such as cases unlikely to need any discovery and cases brought *pro se* by persons in custody. To save expenses, the parties are permitted under LR26.1(d)(3) to agree to conduct their meeting by telephone if the offices of their principal counsel are not within 100 miles of one another, and, to prevent delays in development of the plan and commencement of discovery, the parties are required under LR26.1(d)(2) to conduct their meeting within 45 days after the first appearance of a defendant.

2. **Requirement of Attorney Authority at Pretrial Conferences.** This technique is incorporated in amended FED. R. CIV. P. 16(c), which requires that "at least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed." As recommended by the Advisory Group, this Plan does not impose any additional requirements through changes in the court's local rules and practices.

3. **Signature of Client on Requests for Extension.** As recommended by the Advisory Group, this Plan does not require that requests for extension of time or continuances be signed by both attorney and client. Under amended FED. R. CIV. P. 29, litigants will be permitted, without need for court approval, to agree to extensions of time to answer discovery requests if the extensions will not affect the time for completion of discovery or the dates for trials and other hearings; this is a cost-saving measure and will relieve the court of unnecessary encroachments on judicial time. Requests for continuances of trials and hearings, or for extension of discovery deadlines that might affect such dates, will require court approval, and, consistent with current practice, the judges of the court will not grant these requests except when truly merited. The court believes that a requirement for client-signature would frustrate legitimate requests premised upon circumstances arising too late to permit contact with clients and could well lead to additional cost and delay, particularly in cases where the client is located outside the district. When justified by the circumstances, the court can require counsel to notify clients that extensions or continuances were granted at their request.

4. **Neutral Evaluation Program.** Although considered, "neutral evaluation" is not, for several reasons, included as a specified ADR option under the ADR plan. First, the "Mediation" track, which is one of the specified options, has many of the same features as neutral evaluation. Second, "neutral evaluation" can be afforded under the "Open" track. Third, it is preferable that, at the time the ADR program is first implemented in the district, it not be encumbered with any unnecessary complexities. Accordingly, as recommended by the Advisory Group, this Plan does not call for using the technique of "neutral evaluation" at the present time.

5. **Client Participation in Settlement Conferences.** Under amended FED. R. CIV. P. 16(c), judges conducting settlement conferences may in their discretion require that the attorneys be able to reach a representative of the client who has settlement authority or

responsibilities. Clients and their representatives may also be required to participate in ADR proceedings directed under the ADR plan. As recommended by the Advisory Group, no additional provisions are needed in this Plan to provide adequate opportunities for client participation in settlement discussions.

6. Other Features. The Plan includes additional features not specifically mentioned in the CJRA, such as those contained in Sections II.A.4, II.A.5, and II.A.6.

E. Effect on Litigation Costs

Implementation of this Plan should result in a net reduction in the cost of litigation. It should be recognized that three of the new procedures — the obligations of litigants to meet-and-report, to provide written reports from retained experts, and to participate, when directed, in ADR — are likely to cause some direct increase in litigation expenses. These three procedures should, however, indirectly result in savings later in the litigation; and, in any event, their cost should be more than offset by various other changes that are designed to reduce the time spent on discovery, motion practice, and trial itself, which in turn will reduce time-based attorney's fees, as well as related expenses such as travel and court-reporting fees.

Among the new pretrial procedures that should have this salutary effect are the following: imposing appropriate limits on the number of interrogatories and depositions (and, indeed, eliminating the need for some interrogatories through the "initial disclosure" procedure); precluding disruptive objections and directions during depositions; improving the procedures for responding to interrogatories and production requests; facilitating early formulation of the issues on which discovery is needed (as well as fostering collegiality and cooperation) through the meeting of the litigants; and reducing the frequency of discovery disputes presented to the court by requiring good faith efforts to resolve these disputes without court intervention.

The following procedures should reduce trial time: facilitating the introduction of documentary evidence under FED. R. CIV. P. 26(a)(3); using juror questionnaires during voir dire and selection; and better managing the presentation of expert testimony, both through using the court's powers under Rule 16 to limit the number of experts and in requiring detailed pretrial written reports from retained experts. Use of ADR should produce earlier, more cost-effective settlement of some cases, and the settlement of some other cases that, without such special efforts, would require trial — and, even if unsuccessful in fully settling a case, may help to narrow the triable issues and in turn reduce the time needed for trial.

III. TRANSMITTAL; REVIEW; MONITORING.

A. Transmittal and Review.

This Plan will be transmitted as provided in 28 U.S.C. § 472(d) and be reviewed as provided in 28 U.S.C. § 474.

B. Monitoring.

As provided in 28 U.S.C. § 475, the court will, in consultation with the Advisory Group, annually assess the condition of its civil and criminal dockets with a view to determining any appropriate additional actions that may be taken to reduce cost and delay in civil litigation and to improve the litigation management practices of the court.

Appendix A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

GENERAL ORDER

Pursuant to 28 U.S.C. § 471, the court hereby adopts, and will implement, the Civil Justice Expense and Delay Reduction Plan for the district, effective December 1, 1993. A copy of this Order will be attached as Appendix A to the Plan to document its adoption.

This the 17th day of November, 1993.

Chief Judge

District Judge

District Judge

District Judge

District Judge

District Judge

District Judge

New Local Rules
(effective December 1, 1993)

LR16.1 Scheduling Orders; Alternative Dispute Resolution.

(a) Magistrate Judges may enter and modify scheduling orders under FED. R. CIV. P. 16(b) in cases assigned to them by consent under 28 U.S.C. § 636(c) and in cases referred to them by a District Judge, except that a Magistrate Judge shall not change a scheduling order entered by a District Judge without the express permission of a district judge of the court.

(b) Except as otherwise ordered by a judge of the court in a particular case, a scheduling order need not be entered in the categories of cases exempted under LR26.1(d)(1) from the requirement of a meeting of the parties.

(c) A judge of the court may, in a scheduling order or by separate order, direct that the litigants engage in one or more procedures for alternative dispute resolution as authorized and provided in the ADR plan adopted by the court.

LR26.1 Disclosures; Discovery Limitations and Commencement; Meeting of Parties.

(a) **Required Disclosures.**

(1) **Initial Disclosures.** Except to the extent otherwise ordered, a party shall, without awaiting a discovery request:

(A) provide to other parties the name and, if known, the address and telephone number of each individual believed by it to have discoverable non-privileged personal knowledge concerning any significant factual issue specifically raised in the pleadings or identified by the parties in their report to the court under FED. R. CIV. P. 26(f), appropriately indicating the subjects about which the person has such knowledge;

(B) make available to other parties for inspection and copying, as under FED. R. CIV. P. 34, all documents, data compilations, and tangible things in its possession, custody, or control that may be used by it (other than solely for impeachment purposes) to support its contentions with respect to any significant factual issue in the case;

(C) provide to other parties a computation of any category of damages claimed by it, making available for inspection and copying, as under FED. R. CIV. P. 34, the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) disclose to other parties the existence and extent of coverage of any insurance agreement under which any insurer may be liable to satisfy part or all of a judgment which may be entered against it in the action or to indemnify or reimburse it for payments made to satisfy the judgment.

Unless otherwise ordered or stipulated, these disclosures shall be made at or within 20 days after the meeting of the parties under paragraph (d) of this rule. A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures. These disclosures are subject to a duty of supplementation, as provided in FED. R. CIV. P. 26(e)(1), at least 30 days before the end of period allowed for discovery.

Unless otherwise ordered by the court in a particular case, the requirements of this paragraph (a)(1) do not apply in the categories of cases exempted under paragraph (d)(1) of this rule from the requirement of a meeting of litigants or in cases brought as class actions under FED. R. CIV. P. 23, and the parties may, by written stipulation, agree not to make the initial or supplemental disclosures or to modify the scope or timing of the disclosures.

(2) **Expert Testimony.** Unless otherwise ordered by the court in a particular case, the requirements of FED. R. CIV. P. 26(a)(2), relating to disclosure of expert testimony, do not apply in cases initially filed in, removed to, or transferred to this court before December 1, 1993, and by written stipulation the parties may agree to other times for providing information about expert testimony, to exempt one or more experts from the requirement of a written report, or to modify the information to be contained in the written reports. Unless otherwise ordered by the court in a particular case, the plaintiff shall make its disclosures under Rule 26(a)(2) at least 90 days before the date the case is set for trial or to be ready for trial and the defendant shall make its disclosures under Rule 26(a)(2) within 30 days after the plaintiff's disclosures.

(3) **Pretrial Disclosures.** Unless otherwise ordered by the court in a particular case, the requirements of FED. R. CIV. P. 26(a)(3), relating to final pretrial disclosure, do not apply in cases set for trial before February 1, 1994.

(4) **Filing.** Except as otherwise ordered by the court in a particular case, disclosures under paragraph (a)(3) of this rule shall be filed with the court promptly after being served, but disclosures under paragraphs (a)(1) and (a)(2) of this rule shall be filed only when, and to the extent, ordered by the court or needed by a party in connection with a motion (or response thereto) or for use at trial.

(b) **Limits on Formal Discovery.**

(1) Formal discovery under FED. R. CIV. P. 30-36 is permissible in the following types of cases — if initially filed in, removed to, or transferred to this court after December 1, 1993 — only with prior approval of a judge of the court or upon the written stipulation of the parties:

- Bankruptcy Appeals and Withdrawals (NOS: 422-23)
- Condemnation Actions (NOS: 210)
- Deportation Actions (NOS: 460)

- Equal Access to Justice — Fee Award Appeals (NOS: 900)
- Forfeiture and statutory penalty actions (NOS: 610-690)
- Freedom of Information actions (NOS: 895)
- Government collection actions (NOS: 151-153)
- Judgments — actions to enforce or register (NOS: 150)
- Prisoner actions to vacate sentence, for habeas corpus, or for mandamus (NOS: 510-40)
- Selective Service actions (NOS: 810)
- Social Security reviews (NOS: 861-65)
- Summons/subpoenas — proceedings to enforce/contest government summons and private party depositions
- Third-party IRS tax actions (NOS: 871)

(2) Unless a different number is fixed by court order or by the parties' stipulation, the maximum number of interrogatories (including all discrete subparts) that one party may serve on another party is 25, and the maximum number of depositions (whether on oral examination or written questions) that may be taken by the plaintiff(s), by the defendant(s), or by the third-party defendant(s) is 10. Absent a court order, however, there is no limitation on the number of interrogatories or depositions in:

(A) cases brought as class actions under FED. R. CIV. P. 23;

(B) cases filed in, removed to, or transferred to this court before December 1, 1993; or

(C) cases transferred to this court under 28 U.S.C. § 1407, or joined with cases so transferred.

(c) **Commencement of Discovery.** Except as otherwise stipulated in writing by the parties or ordered by the court in a particular case:

(1) formal discovery under FED. R. CIV. P. 30, 31, 33, and 36 may not be commenced before the meeting of the parties under FED. R. CIV. P. 26(f) except in the following cases:

(A) cases exempted under paragraph (d)(1) from the requirement of a meeting of the parties;

(B) cases in which a temporary restraining order or preliminary injunction is sought; and

(C) cases in which discovery is needed to resolve a preliminary motion such as an objection to personal jurisdiction or venue; and

(2) a request for production under FED. R. CIV. P. 34 may not be commenced before the requesting party and the party to whom the request is directed have appeared in the case.

(d) **Meeting of Parties.** Unless otherwise ordered by the court in a particular case, the provisions of FED. R. CIV. P. 26(f), requiring a meeting of and report from the parties, apply to all civil actions in this court, subject to the following modifications:

(1) Unless otherwise ordered by the court in a particular case, the requirement of a meeting and report does not apply in:

(A) cases filed in, removed to, or transferred to this court before December 1, 1993;

(B) cases in which, under paragraph (b)(1) of this rule, discovery is permitted only with prior approval of a judge of the court;

(C) cases instituted pro se by prisoners;

(D) cases consolidated with a case in which the parties have met as provided in this paragraph (d) or in which a scheduling order under FED. R. CIV. P. 16(b) has been entered; and

(E) cases transferred to this court under 28 U.S.C. § 1407 or consolidated with cases so transferred, and cases subject to potential transfer to another court under 28 U.S.C. § 1407 pursuant to a motion pending before the Judicial Panel on Multidistrict Litigation or a conditional transfer order entered by that Panel.

(2) Unless otherwise ordered by the court in a particular case, the meeting must be held within 45 days from the first appearance of a defendant and at least 14 days before any scheduling conference set by the court under FED. R. CIV. P. 16(b).

(3) Unless otherwise ordered by the court in a particular case, the parties may, if the offices of their principal counsel are not within 100 miles of one another, agree to conduct the meeting by telephone.

(4) The report by the parties to the court shall substantially conform to the format indicated in Form 35 contained in the Appendix to the FED. R. CIV. P., also including, however, a statement as to when the information specified in paragraph (a)(1) of this rule was or will be provided.

Appendix C

ALTERNATIVE DISPUTE RESOLUTION PLAN

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ALABAMA

ADR PLAN--NORTHERN DISTRICT OF ALABAMA

ALTERNATIVE DISPUTE RESOLUTION PLAN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

I. INTRODUCTION

The disposition rate for cases in the Northern District of Alabama is presently, and consistently has been, very favorable, ranking the district among the most efficient courts in the nation. Nevertheless, implementation of an alternative dispute resolution (ADR) plan in the district offers several potential advantages for the court system, attorneys, and litigants. The variety of mechanisms available through ADR present opportunities for resolving some disputes more quickly than traditional litigation would allow. Further, ADR can greatly reduce the expense to the parties of resolving a dispute. ADR processes frequently are used in the early stages of case development, providing substantial savings in discovery and expert witness costs.

Development of this Plan was guided by three principles: early intervention and evaluation by the Court; flexibility; and a preference for non-binding over binding processes. The fact that the Plan explicitly describes only a limited number of ADR processes should not be interpreted as discouraging the use of ADR. To the contrary, the Plan aims to encourage the use of ADR in part by granting the parties discretion to decide to employ any number of ADR processes available through private means.

II. PANEL OF NEUTRALS

The court will establish a Federal Court Panel of Neutrals (Panel) from which the neutrals for cases referred by the court to Mediation or Med/Arb will be selected. The Panel will be comprised of persons who, based on their training or experience, are deemed by the judges of the court to possess the qualities necessary for performance as neutrals. The Chief Judge of the court will designate a judge, magistrate, or other individual to receive applications from persons interested in being included on the Panel, and this designee will compile the list of names of persons deemed by the judges to be qualified to serve on the Panel. Any person placed on the Panel may be removed for cause at the discretion of the Chief Judge. There is no maximum limit to the number of people who may be included on the Panel.

It is anticipated that there will be cases for which Mediation or Med/Arb would be appropriate but in which the parties are unable to afford the additional cost of ADR. Each person serving on the Panel therefore will be encouraged, though not required, to volunteer to serve as a neutral, without remuneration, at least five hours annually. Each person applying for inclusion on the Panel will indicate on the application form the number of hours he or she is willing to serve annually on an uncompensated basis.

III. REFERRAL OF CASES TO ADR

A. Exclusion of Categories of Cases

Each judge may decide to exclude certain classes of cases from consideration for referral to ADR. All cases in classes not excluded are subject to an ADR evaluation conference.

B. Evaluation of Cases for Potential Use of ADR

Each judge will conduct an ADR evaluation conference during the early stages of case development to determine whether a case might be appropriate for ADR. This conference may be held in conjunction with a pretrial conference under Rule 16 or a scheduling conference under Rule 16(b), but may be conducted as a separate conference. The conference must be attended by attorneys representing each party to the dispute or, in the case of unrepresented parties, by the parties themselves. The purpose of the conference will be to determine if the issues of the case, the needs and relationships of the parties, and any other factors the court may deem relevant make ADR appropriate for the potential resolution of the dispute.

The judge, after consulting with the parties, will decide as a result of the conference whether ADR should be employed in the dispute. If ADR is to be employed in the dispute, the court may order use of either the Mediation Track or the Med/Arb Track; or the parties may choose one of the tracks by agreement. The parties also may elect to utilize other ADR procedures under the Open ADR Track.

IV. ADR TRACKS

A. Open ADR Track

On this track, parties may employ any form of ADR upon which they mutually agree. Parties are free to utilize a single ADR process or a combination of ADR processes. Such alternate forms of ADR would include, but not be limited to, private arbitration and mini-trials. Upon suggestion of all parties, the court also may approve the use of summary jury trials in appropriate cases and upon such conditions as the court deems necessary.

If all parties advise the court that they would prefer to use a form of ADR other than either the Mediation or Med/Arb Tracks set out below, the court may permit them to do so, subject to the following:

1. the parties must execute and submit to the court an agreement providing for the conduct of the ADR process;

2. within ten (10) days of the completion of the ADR process, a written report must be filed with the court, stating whether any agreements were reached through the use of ADR, and signed by the neutral or by the parties if no neutral was used; and

3. the ADR process must be conducted at the expense of the parties.

B. Mediation Track

On this track, litigants meet with a neutral mediator for in-depth settlement discussions. The mediator may be appointed by the court or selected by the litigants; he or she may be expert in the subject area of the dispute, but this is not a requirement. The mediator facilitates discussions among litigants to assist them in identifying the underlying issues and in developing a creative and responsive settlement package. The mediator does not, however, make findings of fact, make recommendations to the court of how to decide issues in the case, or render a decision on the merits of the case.

The purposes of mediation are to increase the chances of settlement, help the litigants devise better settlements, and improve relationships among the litigants.

1. **Eligible Cases.** Any civil case not specifically excluded by category by the judge to which the case is assigned may be referred to mediation.

2. **Selection of Cases.**

   a. When Selected. A case may be selected for mediation:

      i. when the status of discovery is such that the parties are generally aware of the strengths and weaknesses of the case; or

      ii. at any earlier time by agreement of the parties and with the approval of the court.

   b. How Selected. A case may be selected for mediation:

      i. by the court on its own motion;

      ii. by the court, on motion of one of the parties; or

      iii. by stipulation of all parties.

   c. Objection to Mediation. A party may object to the referral to mediation by the court by filing a written request for reconsideration, for good cause shown, within ten (10) days of the date of the court's order. Mediation processes will be stayed pending decision on the request for reconsideration, unless otherwise ordered by the court.

3. **Administrative Procedure.**

   a. Notice to Parties; Selection of Mediator by Parties. The court will promptly notify the parties in writing when a case is referred to mediation. The parties will first be given the opportunity to select the mediator of their choice. The parties must, within ten (10) days of the date of the court's notice of referral to mediation, notify the court of the name of the person selected by the parties to serve as mediator.

b. Selection of Mediator by Court; Notice to Parties; Setting of Mediation Conference.

i. If the parties fail to agree on a mediator within the ten-day time period, or fail to notify the court within the ten day time period, the court will send to the parties a list of the names of three (3) proposed mediators taken from the Federal Court Panel. Each party will then rank mediators in order of preference and, within seven (7) days of the date of the written notice, return the ranked list to the court. The court will then:

(A) choose one party's list at random and "strike" the least preferred name on that list from consideration;

(B) go to the other party's list and "strike" the least preferred name remaining in consideration on that list; and

(C) select the remaining name as the mediator.

ii. In the event of multiple parties not united in interest, the court will add the name of one proposed mediator for each such additional party, and will then process the returned lists in the manner provided in section i. above.

iii. After ascertaining from the selected mediator the existence of any potential conflicts of interest, the court will give or send written notice to the parties, with a copy to the mediator, advising them of the identity of the mediator selected. The mediator will then contact all of the parties and arrange a mediation conference at a time no more than thirty (30) days from the date of the court's notice naming the mediator.

4. **Stay of Proceedings.** Upon the entry of an order directing mediation, proceedings in the dispute in mediation will be stayed as to the parties in mediation for such time period as may be set by the court. Upon motion by any concerned party, the court may, for good cause shown, extend the time period of the stay for such length of time as the court deems appropriate.

5. **Neutrality of Mediator.** If at any time during the process of mediation the mediator becomes aware of, or a party raises, an issue concerning the mediator's neutrality based on either an interest in the case or a relationship or affiliation with one of the parties, the mediator will disclose the facts relevant to the issue to all of the parties. If a party believes in good faith that, based on the facts disclosed by the mediator, the mediator will not be or remain impartial, the party may request that the mediator withdraw. Upon receiving such a request the mediator must withdraw and request that the Court appoint another mediator. The Court will then appoint another mediator from the Panel of Neutrals, according to the procedure outlined in IV.B.3.

6. **Written Submissions to Mediator.**

a. Materials to be Submitted; When Due. At least ten (10) days before the mediation conference, the parties must submit to the mediator:

i. copies of relevant pleadings and motions;

ii. a short memorandum stating the legal and factual positions of each party respecting the issues in dispute; and

iii. such other materials as the party believes would be beneficial to the mediator.

b. Preliminary Materials. Upon reviewing those items, the mediator may, at his or her own discretion or on the request of a party, schedule a preliminary meeting with counsel.

7. Attendance at Mediation Conference.

The attorney primarily responsible for each party's case must personally attend the mediation conference and must be prepared and authorized to discuss all relevant issues, including settlement. The parties also must be present, except that when a party is other than an individual or when a party's interests are being represented by an insurance company, an authorized representative of such party or insurance company, with full authority to settle, must attend. Wilful failure of a party to attend the mediation conference will be reported by the mediator to the Court, which may impose appropriate sanctions.

Mediation sessions will be private. Persons other than the parties and their representatives may attend only with the permission of all parties and with the consent of the mediator.

8. Time and Place of Mediation. The mediator will fix the time of each mediation session. The mediation sessions will be held at any location agreeable to the mediator and the parties or as otherwise directed by the court.

9. Procedure at Mediation Conference.

a. Informal Procedure. The mediation conference, and such additional conferences as the mediator deems appropriate, will be informal. The mediator will conduct the process in order to assist the parties in arriving at a settlement of all or some of the issues involved in the case.

b. Private Caucuses; Confidentiality. The mediator may hold separate, private caucuses with any party or counsel. The mediator must not disclose to any other party to the mediation any information disclosed by a party during a caucus which that party indicates to the mediator should be treated as confidential. It will be the responsibility of each party to clearly indicate to the mediator which information is and is not deemed confidential by that party.

c. Witnesses. Upon consent of the mediator, the parties may produce witnesses to provide the mediator and the parties with additional information about the issues in dispute. The mediator will determine the manner in which witnesses may present information and the rights of other parties to question or cross-examine witnesses.

d. Expert Advice. When necessary, the mediator may obtain expert advice concerning technical aspects of the dispute, provided the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice will be made by the mediator or by the parties, as the mediator may determine.

e. Settlement Proposal by Mediator. If, after reasonable efforts, the parties fail to develop settlement terms, or upon the parties' request, the mediator may submit to the parties a final settlement proposal that the mediator believes to be fair. The parties will carefully consider such proposal and, at the request of the mediator, will discuss the proposal with him or her. The mediator may comment on questions of law at any appropriate time.

f. Conclusion of the Mediation Process. The mediator will conclude the process when:

   i. a settlement is reached; or

   ii. The mediator concludes, and informs the parties, that further efforts would not be useful.

g. Report to the Court. The mediator will report the results of the mediation to the court, according to the following rules:

   i. if a settlement agreement is reached, the mediator, or, at the mediator's request, one of the parties, will prepare a written entry reflecting the settlement agreement, for signing by the parties and filing with the court for court approval; or

   ii. if a settlement agreement is not reached, the mediator will report in writing the following: "Mediation was held, but no agreements were reached," and nothing more.

10. Confidentiality.

The entire mediation process is confidential and by entering into mediation the parties mutually covenant with one another to preserve confidentiality on the basis established in this Plan. The parties and the mediator may not disclose information regarding the process, except the terms of settlement, to the court or to third persons unless all parties agree. Parties, counsel, and mediators may, however, respond to confidential inquiries or surveys by persons authorized by the court to evaluate the mediation program. Information provided in such inquiries or surveys must remain confidential and not be identified with particular cases.

The mediation process must be treated as a compromise negotiation for purposes of the Federal Rules of Evidence and State rules of evidence. The mediator is disqualified as a witness, consultant, attorney, or expert in any pending or future action relating to the dispute, including actions between persons not parties to the mediation process.

11. No Record. No record will be made of the mediation proceedings.

12. Expenses, Mediator's Fee, and Deposits.

a. Expenses. The expenses of a witness for a party will be paid by the party producing the witness. All other expenses of mediation, including necessary travel and other expenses of the mediator, the expenses of any witnesses called by the mediator, and the cost of any evidence or expert advice produced at the direct request of the mediator, will be borne equally by the parties unless otherwise agreed by the parties or directed by the court.

b. Mediator's Fee. A mediator will be compensated at a reasonable rate, agreed to by the parties, or as set by the court. The mediator's fee will be borne equally by the parties unless otherwise agreed by the parties or directed by the court.

c. Deposits. Before the mediation process begins, each party to the process will deposit with the clerk of the court such an amount of the anticipated expenses and fees as the court directs. When the mediation process has been terminated, the mediator will file with the clerk of the court a verified statement of fees and expenses. Upon approval by the court, the clerk will disburse to the mediator from the sums deposited by the parties an amount to satisfy the fees and expenses approved by the court. Any unexpended balance will be returned to the parties. If the sums deposited are insufficient to pay the full amount of the approved fees and expenses, the court will order the parties to pay any remaining fees and expenses.

C. Med/Arb Track

This track combines mediation and some features of arbitration. On this track, a dispute is first submitted to mediation. If, after mediation, the parties are unable to reach an agreement, the neutral renders a decision on the merits of the case, applying the pertinent law to the facts developed during mediation.

The primary purpose of the Med/Arb Track is to provide the parties with an informed and realistic appraisal of the outcome of the case if presented to binding arbitration or to trial.

1. Eligible Cases. Any civil case not specifically excluded by category by the judge to which the case is assigned may be referred to Med/Arb.

2. Selection of Cases.

a. When Selected. A case may be selected for Med/Arb:

i. when the status of discovery is such that the parties are generally aware of the strengths and weaknesses of the case; or

ii. at any earlier time by agreement of the parties and with the approval of the court.

b. How Selected. A case may be selected for the Med/Arb track only with the consent of all parties. In cases involving multiple parties, any number of parties with adverse claims may elect to submit to the Med/Arb process to settle the

claims between those parties, regardless of whether other parties with additional claims choose to participate in Med/Arb.

3. **Administrative Procedure.**

a. Notice to Parties; Selection of Neutral by Parties. When a case is referred to Med/Arb, the court will promptly notify the parties in writing. The parties will first be given the opportunity to select the neutral of their choice. The parties must, within ten (10) days of the date of the court's notice of referral to Med/Arb, notify the court of the name of the person selected by the parties to serve as neutral.

b. Selection of Neutral by Court; Notice to Parties; Setting of Conference.

i. If the parties fail to agree on a neutral within the ten day time period, or fail to notify the court within the ten day time period, the court will send to the parties a list of the names of three (3) proposed neutrals taken from the Federal Court Panel. Each party must then rank the neutrals in order of preference and, within seven (7) days of the date of the written notice, return the ranked list to the court. The court will then:

(A) choose one party's list at random and "strike" the least preferred name on that list from consideration;

(B) go to the other party's list and "strike" the least preferred name remaining in consideration on that list; and

(C) select the remaining name as the neutral.

ii. In the event of multiple parties not united in interest, the court will add the name of one proposed neutral for each such additional party, and then process the returned lists in the manner provided in section i. above.

iii. After ascertaining from the selected neutral the existence of any potential conflicts of interest, the court will give or send written notice to the parties, with a copy to the neutral, advising them of the identity of the neutral selected. The neutral will then contact all of the parties and arrange a Med/Arb conference at a time no more than thirty (30) days from the date of the court's notice naming the neutral.

4. **Stay of Proceedings.** Upon the entry of an order for Med/Arb, proceedings in the dispute in Med/Arb will be stayed as to the parties in Med/Arb for such time period as may be set by the court. Upon motion by any concerned party, the court may, for good cause shown, extend the time period of the stay for such length of time as the court deems appropriate.

5. **Neutrality of Neutral.** If at any time during the Med/Arb process the neutral becomes aware of, or a party raises, an issue concerning the neutral's neutrality based on either an interest in the case or a relationship or affiliation with one of the parties, the neutral will disclose the facts relevant to the issue to all of the parties. If a party believes in good faith that, based on the facts disclosed by the neutral, the neutral will not be or

remain impartial, the party may request that the neutral withdraw. Upon receiving such a request, the neutral must withdraw and request that the Court appoint another neutral. The Court will then appoint another neutral from the Panel of Neutrals, following the procedure outlined in IV.C.3.

6. Written Submissions to Neutral.

a. Materials Submitted; When Due. At least ten (10) days before the Med/Arb conference, parties must submit to the neutral:

i. copies of relevant pleadings and motions;

ii. a short memorandum stating the legal and factual positions of each party respecting the issues in dispute; and

iii. such other materials as the party believes would be beneficial to the neutral.

b. Preliminary Meeting. Upon reviewing those items, the neutral may, at his or her own discretion or on the request of a party, schedule a preliminary meeting with counsel.

7. Attendance at Med/Arb Conference.

The attorney primarily responsible for each party's case must personally attend the Med/Arb conference and be prepared and authorized to discuss all relevant issues, including settlement. The parties also must be present, except that when a party is other than an individual or when a party's interests are being represented by an insurance company, an authorized representative of such party or insurance company, with full authority to settle, must attend. Wilful failure of a party to attend the Med/Arb conference will be reported by the neutral to the Court, which may impose appropriate sanctions.

Med/Arb sessions will be private. Persons other than the parties and their representatives may attend only with the permission of all parties and with the consent of the neutral.

8. Time and Place of Med/Arb. The neutral will fix the time of each Med/Arb session. The Med/Arb sessions may be held at any location agreeable to the neutral and the parties or as otherwise directed by the court.

9. Procedure at Med/Arb Conference: Mediation Phase.

a. Informal Procedure. The Med/Arb conference, and such additional conferences as the neutral deems appropriate, will be informal. The neutral will conduct the process in order to assist the parties in arriving at a settlement of all or some of the issues involved in the case.

b. Private Caucuses; Confidentiality. During the mediation phase of the Med/Arb process, the neutral may hold separate, private caucuses with any party or counsel. The neutral must not disclose to any other party to the Med/Arb any information disclosed by a party during a caucus which that party indicates to the

neutral should be treated as confidential. It will be the responsibility of each party to clearly indicate to the neutral which information is and is not deemed confidential by that party. During the arbitration phase, all sessions will be jointly held unless otherwise agreed to by all parties.

c. Witnesses. Upon consent of the neutral, the parties may produce witnesses to provide the neutral and the parties with additional information about the issues in dispute. The neutral will determine the manner in which witnesses may present information and the rights of other parties to question or cross-examine witnesses.

d. Expert Advice. When necessary, the neutral may obtain expert advice concerning technical aspects of the dispute, provided the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice will be made by the neutral or by the parties, as the neutral may determine.

e. Conclusion of Mediation Phase. The neutral will conclude the mediation phase when:

i. a settlement is reached; or

ii. the neutral concludes, and informs the parties, that further efforts would not be useful.

f. Settlement During Mediation Phase; Written Entry. If a settlement agreement is reached during the mediation phase of Med/Arb, the neutral, or, at the neutral's request, one of the parties will prepare a written entry reflecting the settlement agreement, for signing by the parties and filing with the court for court approval.

10. Procedure at Med/Arb Conference: Arbitration Phase.

a. Witnesses; Documents; Arguments. If a settlement agreement is not reached during the mediation phase of Med/Arb, the neutral will proceed to take such additional testimony from witnesses as the parties choose to present, review documents or other exhibits, and permit the parties to make oral or written presentations summarizing the facts and applicable law.

b. Decision of Neutral; Notice to Parties; Filing with Court. At the conclusion of the arbitration phase of Med/Arb, the neutral will render a decision, either immediately or within a reasonable time. Upon reaching a decision, the neutral will deliver by first class mail a written copy of his or her decision to each party that participated in the Med/Arb. A copy of the decision will also be filed with the clerk of the court in accordance with the procedures outlined in IV.C.15.

11. Confidentiality.

The entire Med/Arb process is confidential, and by entering into Med/Arb the parties mutually covenant with one another to preserve confidentiality on the basis established in this Plan. The parties and the neutral may not disclose information regarding the process, except the terms of settlement, to the court or to third persons unless all parties agree. Parties, counsel, and neutrals may, however, respond to confidential inquiries or surveys by persons authorized by the court to evaluate the

Med/Arb program. Information provided in such inquiries or surveys must remain confidential and not be identified with particular cases.

The Med/Arb process must be treated as a compromise negotiation for purposes of the Federal Rules of Evidence and State rules of evidence. The neutral is disqualified as a witness, consultant, attorney, or expert in any pending or future action relating to the dispute, including actions between persons not parties to the Med/Arb process.

12. **Record of Proceedings.** No record will be made during the mediation phase of Med/Arb. In the event the parties elect to present witnesses to the neutral during the arbitration phase, the neutral may, with the consent of the parties, make such stenographic, audio, video or other recording deemed by the neutral as necessary or advisable to assist the neutral in rendering a fair decision.

13. **Expenses, Neutral's Fee, and Deposits.**

a. Expenses. The expenses of a witness for a party will be paid by the party producing the witness. All other expenses of Med/Arb, including necessary travel and other expenses of the neutral, the expenses of any witnesses called by the neutral, and the cost of any evidence or expert advice produced at the direct request of the neutral, will be borne equally by the parties unless otherwise agreed by the parties or directed by the court.

b. Neutral's Fee. A neutral will be compensated at a reasonable rate, agreed to by the parties, or as set by the court. The neutral's fee will be borne equally by the parties unless otherwise agreed by the parties or directed by the court.

c. Deposits. Before the Med/Arb process begins, each party to the process must deposit with the clerk of the court such an amount of the anticipated expenses and fees as the court directs. When the Med/Arb process has been terminated, the neutral will file with the clerk of the court a verified statement of fees and expenses. Upon approval by the court, the clerk will disburse to the neutral from the sums deposited by the parties an amount to satisfy the fees and expenses approved by the court. Any unexpended balance will be returned to the parties. If the sums deposited are insufficient to pay the full amount of the approved fees and expenses the court will order the parties to pay any remaining fees and expenses.

14. **Effect of Decisions.** The decision of the neutral generally will be non-binding. The parties may elect, however, either of the following alternatives by filing with the neutral a written election signed by the parties or their attorneys :

a. Binding Arbitration. The parties may agree, at the time the dispute moves into the arbitration phase, that the decision of the arbitrator will be final and binding;

b. Conditionally-Binding Arbitration.

i. The parties may agree at any time to elect to make the neutral's decision conditionally binding. If this option is selected, the neutral's decision will be binding unless, within thirty (30) days of the date of the neutral's

decision, a party files with the neutral a written notice rejecting the decision of the neutral.

ii. If the decision of the neutral is rejected, the neutral will inform the court of the lack of agreement as provided in IV.C.15.

iii. If, under the conditionally-binding arbitration option, a party chooses to reject the neutral's decision and proceed to trial, and that party does not obtain a more favorable result at trial than the party would have received by the neutral's decision, that party must pay to the other party or parties all costs incurred by the other party or parties from the date the neutral received the written notice of rejection until the completion of trial. The term "all costs" includes attorneys fees and any costs actually incurred for discovery and expert witness fees and expenses. The amount to be awarded for attorneys fees will be established at the court's discretion based upon the following factors: (1) the number of hours expended since the date of election; and (2) a reasonable hourly fee for an attorney of similar skill and competence to the attorney whose fee is at issue. This amount will then be awarded as an additional judgment against the party who elected to proceed to trial.

15. **Procedure at the Conclusion of the Arbitration Phase: Report to Court.** At the conclusion of the arbitration phase of Med/Arb, the neutral will report to the court one of the following three results:

a. No Settlement Reached. If the parties are still unable to settle the dispute at the conclusion of the arbitration phase of a non-binding Med/Arb, this fact will be reported by the neutral to the judge to which the case is assigned within three (3) working days after the conclusion of the Med/Arb process. The neutral will state the following: "Med/Arb was held in this case and no agreements were reached."

b. Binding Arbitration. If the parties elected binding arbitration, the neutral will report to the court the decision rendered by the neutral.

c. Conditionally-Binding Arbitration. If the parties elected conditionally-binding arbitration, the neutral will make no report to the court until the expiration of thirty (30) days from the date of the neutral's decision. If no party elects to reject the decision within such thirty day period, the decision will be binding and be reported as in 15.b. If any party rejects the neutral's decision, the neutral will report to the court the following: "A conditionally-binding arbitration was held and a party has rejected the decision rendered by the neutral."

When the parties elect a conditionally-binding arbitration under Med/Arb and one or more of the parties rejects the decision of the neutral, the neutral will, after receiving notice of rejection of the decision by a party, file with the clerk of the court in a sealed envelope a copy of the neutral's written decision. The neutral will include in the sealed envelope a copy of the notice of rejection by the party in order to inform the court of the party making the rejection and the date the rejection was made. After a decision is

reached at trial, the court will open the sealed envelope and make such orders regarding costs as are appropriate under IV.C.14.b.