The Case for Mediated Case Management[1]

Lawrence M. Watson, Jr.

"Mediated Case Management" is a process specifically designed to cost effectively and rationally deal with the complex, multi-party, multi-issue, or high-end litigation that seems to evolve from many construction disputes. Lawsuits that consist of a series of often interrelated technical fact issues involving the conflicting interests of owners, designers, engineers, prime contractors, trade contractors and vendors. While the concepts presented here are thus particularly suited for construction cases, Mediated Case Management programs could also prove useful in cases with similar characteristics involving other areas.[2]

The underlying premise for a Mediated Case Management Program is simple**.** It is an unfortunate (but almost inevitable) aspect of resolving a dispute through litigation that time and money will be spent in what might be called "process debates". 'Process debates" are procedural arguments

[1] The substance of this article was presented in a panel program sponsored by the Construction Litigation Committee during the Litigation Section's Annual Meeting in Dallas, Texas April 16, 1999. The program featured The Honorable David Horowitz, a trial court judge with the Los Angles County Superior Court who also serves as the Section's Liaison to the ABA Judicial Division, and Celeste M. Butera, of Rivkin, Radler & Kremer in Uniondale New York who serves as Co-Chair of the Section's Litigation Management and Economics Committee. The author is grateful for their important contributions.

[2] In the course of the Committee program Judge Horowitz suggested that lower value cases ($100,000 range) are also in desperate need of a cost effective management processes as well, and that the real challenge would be to adopt Stipulated Case Management techniques to those lawsuits. Lawsuits with

that seem to erupt and flourish in complex cases. They can involve a wide range of peripheral issues. They are always focused on the *litigation process* (the way we are going to argue) rather than the *subject of the lawsuit* (what we are arguing about).

These "process debates" may involve subtle and academic arguments over such things as; venue, jurisdiction, sufficiency of pleadings, applicable law, discovery protocols, qualification of witnesses, conflicts of interest, scheduling, and cost sharing. In particularly adverse cases, disputes over the time of day, and who picks up the lunch tab will get into the mix as well.

There is no denying many process disputes can be very important – often affecting, to one degree or another, the ultimate outcome of the lawsuit. Ostensibly, the purpose of the rules controlling how we argue in court (which are usually at the heart of process debates) is to protect the integrity and validity of the end product of the argument - the courtroom judgement or verdict rendered. Theoretically, if all the rules are followed, positional arguments advanced at trial will be presented on a level playing field, with fully discovered and valid evidence, in an orderly and controlled manner. A fair and just measurement of the parties' conduct against appropriate legal standards is thus assured or so the theory goes. In any

---

issues valued in the lower ranges can benefit from Stipulated Case Management Programs that use one or two components of the procedures described herein.

event, trial lawyers would be more than remiss in not bringing most of these process issues to the clients' attention and vigorously engaging in process debates when its appropriate to do so.

Unfortunately, process debates tend to take on a life of their own and consume dispute resolution resources at a shocking rate. Rarely, however, does the outcome of process debates alter the controlling facts of the case. Rarely do process issues have anything to do with whether or not a design works, a roof leaks, a pipeline meets pressurization tests, or a product meets warranted performance standards. Time and money spent arguing over how we are going to argue, doesn't always get the ultimate argument resolved. In the final analysis, however, *that's what most construction litigation clients want - to get the ultimate argument resolved.*

There is no need to remind any experienced trial attorney that the cost of litigation can, and will often exceed the value of the matter in dispute. In many construction disputes, we end up spending more money arguing that fixing the problem. A simple economic reality that has our constituency running from the courthouse in a mass abandonment of the litigation process or, worse, running to the statehouse to secure overly reactive legislative reforms.

The Mediated Case Management program affords parties to a litigated dispute to accelerate their own consideration and possible reconciliation of the ultimate issues to be resolved without sacrificing the right to argue those process issues or losing the overall integrity of the trial court process should it be needed. Mediated Case Management blends the benefits of facilitated reconciliation processes with the benefits of adjudicatory processes. The program features a facilitated, cooperative implementation of dual tracks toward resolution of the case - a reconciliation track that parallels, intersects, or merges with a concurrent adjudicatory track. In simple terms, Mediated Case Management involves mediating the conduct of the litigation to expand and include reconciliation processes.

The program begins with an agreement. Counsel and clients involved in a multi-party, multi-issue complex or relatively high-end law suit meet with a mediator immediately after the filing of the complaint and negotiate accords on how they will conduct the litigation of the case. A *Charter* for the lawsuit is established.

The Stipulation for a Mediated Case Management Program

While the nature and extent of the initial agreement between counsel and the parties may vary from case to case, there are basic elements to the

program that should be addressed. A Stipulation for a Mediated Case Management Program should, therefore, include;

1. An Agreed Mutual Intent

The initial agreement should record a stated intent and desire to conduct the litigation and prepare for ultimate trial in a cost effective, timely and efficient manner without resorting to unnecessary or unproductive disputes over procedures and processes. As part of the litigation process, the parties would also agree to develop and implement alternative dispute resolution options that seek to reach settlement as quickly as possible. To carry out that intent, the parties and counsel agree to enter the Mediated Case Management program in which the conduct of the litigation would be mediated through a series of case management sessions convened for that purpose. All procedures and processes of the litigation would be subject to facilitation by a third party neutral working with the parties and the Court. Issues dealing with how we are going to argue and what we will be arguing about will be resolved through negotiated agreements. At the same time, an overriding focus is maintained on creating options to settle whatever substantive disputes in the case can be settled as well.

2. A Commitment To the Program

Counsel and each party entering into the Mediated Case Management Program would agree to attend and participate in all case management meetings called, to meet and comply with scheduled activities and agreements established at those meetings, and to use best efforts to minimize the expenditure of time and money in the conduct of the litigation. Each party would agree, in principal, to refrain from initiating or continuing frivolous or unproductive disputes concerning the process.

3. Lead and Alternative Counsel Designated

Each party would designate Lead and Alternative counsel who, collectively or independently, are responsible for attending and participating in all scheduled case management meetings. All counsel attending a case management meeting will come with full and complete authority to commit to the terms of any case management agreements reached. Party representatives are welcomed, encouraged, and on occasion expected, to attend case management meetings.

4. The Parties' Role in the Process

Each party shall designate a lead and alternative representative who *may* attend all case management meetings, and who *shall* attend those case

management meetings in which the mediator appointed deems it appropriate and necessary for the parties to be in attendance. It is anticipated that client representatives will be expected to attend far more meetings than not.

5. Appointment of the Case Mediator

A mutually agreeable mediator is appointed to facilitate the course of the case management program. An Alternative or Co-mediator may also be appointed to provide back-up relief or to handle discrete sub-parts of the case. Fees and costs of the neutral would be borne equally by all parties unless otherwise agreed (i.e., in cases where services are rendered to resolve sub-issues involving only a sub-set of parties).

6. Duties of Case Mediator

The mediator is responsible for organizing and conducting case management meetings, facilitating periodic agreements concerning the procedural conduct of the litigation, and helping structure concurrent alternative resolution processes to handle some or all of the issues in the case. The Mediator shall have no authority to adjudicate or decide any issue.[3]

[3] During the course of the Committee program, Ms Butera voiced the opinion of many trial lawyers that the mediator should have some decision making authority with respect to process issues, if not more substantive matters. While it might be convenient to have a mediator vested with some adjudicatory power in limited instances, giving the mediator any decision-making authority must be done very carefully. By definition, any final decision a mediator makes is going to disappoint someone and, more importantly, impact his or her neutrality. As a general rule, mediators should mediate, judges should judge.

The mediator shall, with prior notification and authority of the parties, serve as a spokesperson to inform the Court of the progress of the program and convey suggestions and requests to judicially support agreed case management procedures.

7. Confidentiality and inadmissibility of proceedings

All concessions, admissions, representations, communications, and discussions arising out of the Mediated Case Management Program shall be deemed "under the umbrella of mediation" – confidential and inadmissible. The sole exceptions to the rule are:

- Commitments regarding the case management proceedings that are reduced to writing and submitted to the Court as stipulations of record; and
- Discovery taken under oath.

8. Case Management Agreements to become Supplemental Case Management Orders

Following each case management meeting, any agreements reached on discovery or joint investigative processes, on Special Master hearings, or on other resolution procedures shall, where appropriate, be recorded by the mediator and submitted to the Court as Stipulated Case Management Orders.

Thereafter, any deviations from stipulated orders shall be upon the agreement of all parties or at the discretion of the Court.

9. Termination of Participation in the Process

Any party may terminate participation in the process upon ten days written notice to all other parties. All stipulations reduced to case management orders and all sworn discovery shall remain in full force and effect.

Operating the Program

Once a Charter is established, a series of periodic meetings – usually on a monthly basis – are scheduled. Regular meetings of counsel and the parties are essential to the case management process. While specific or more refined agendas can be developed as the case management process unfolds, regularly held case management meetings must immediately become part of the culture of the case. In addition to maintaining planned progress on both resolution tracks, regularly scheduled case management meetings serve as a relief valve for any process debates that might otherwise freeze progress in the case. Simply knowing a date has been set and process established for resolving such conflicts is in place often serves to stop problems before they arise.

The first meeting or series of meetings should be dedicated to defining, isolating, and focusing on the ultimate issues of the case. This can be done in a classic mediation format with the mediator facilitating the process. The parties would thus use first meeting(s) to make initial presentations of their side of the argument based on what is known at the time. These initial presentations should not be made as formalized legalese or generalized legal complaints, but down to earth positional assertions in plain English (much like the opening presentations in conventional mediations). Wherever possible, clients should become part of these presentations – not only to provide an opportunity for them to "buy into" the process, but to get past the typical venting that serves to unblock subjective obstructions to productive negotiations.

From these presentations and using the mediator's skills, the parties then agree on what they are really arguing about immediately, A stipulated, "working statement of issues" is thus developed to isolate and define key preliminary issues of law or procedure, and key ultimate issues of ultimate fact. Any collateral issues or non-determinative process issues are set side and preserved.

Based upon the agreed list of key issues of fact, the parties then define and schedule a mutually agreeable discovery or joint investigative program aimed at answering one simple question; *What do we <u>really</u> need to know – to look at, test, explore or develop - in order to resolve the fundamental issues of this case?*

Based upon agreed key issues of law or procedure, the parties then define and agree upon a mutually agreeable means of resolving those preliminary matters. Again, the program developed is focused on one preliminary question; *What determinative preliminary legal issues need to be resolved before the substantive issues of the case can be settled?*

A range of options is available to develop and resolve these issue-oriented programs. If key facts are unconfirmed, joint discovery or investigative programs may be defined and implemented to develop that information. Using the mediator as spokesperson with the Court, a prompt hearing might be set to get a final and binding judicial determination on any the key preliminary issues. A Special Master might be utilized as alternative to waiting for judicial attention if that becomes a problem. Another tact might be to simply get evaluative input in a non-binding adjudicatory process, by staging an abbreviated hearing before a mutually respected authority in order to receive an advisory opinion on the issue.

Whatever course of action is chosen after the key issues are delineated, the plan reached should be focused on two principal goals. First, whatever is done should be ultimately calculated to achieve both trial preparation objectives as well as settlement objectives. In this respect, the Case Management Program should be a "win-win" effort. Secondly, strong efforts should be made in every case to bypass non-determinative "process disputes" and focus on the ultimate factual disputes as quickly as possible.

As litigation oriented processes are developed to either gather data or generate adjudicatory input on the determinative issues of the case, plans to conduct separate mediations on discrete issues can also be instituted. On a construction case, therefore, we might see a period of negotiated discovery or testing followed by a "Windows, Balconies & Doors" Day, or a "Subsurface Conditions" Settlement Day scheduled to attempt to reach a reconciliation – or a mutually agreeable holding point – on one sub-set of issues in the case.

With the overall direction of the Mediated Case Management Program thus established, let's now take a moment to flesh out certain components of the program a bit further. Once the overall stipulation is adopted, the exact procedures utilized in a given case can be custom shaped to fit the specific

issues, personalities and characteristics of the specific dispute at hand, but some general thoughts about the processes available may prove useful.

Cooperative Discovery and Joint Investigation Programs

Regardless of what issues evolve, getting information necessary to intelligently deal with those issues as quickly as possible is a primary concern of everyone involved. Moving toward this goal in a mutually cooperative, concurrent discovery program that is facilitated and, to a limited extent, supervised by the mediator can be far superior to customary adversarial approaches.

Based on the agreed issues, therefore, a Stipulated Case Management discovery program might typically call for:

a) A voluntary exchange of documents.

b) A defined “rifle shot’ deposition program using “Rule 30(b)(6)” format depositions in which the parties identify and present for examination their corporate representatives having the most knowledge about the subject at hand. The idea here is to quickly and cost effectively share information – not to randomly search for information, practice cross-examination, impeach or test interrogation skills.

c) A joint interview session, site visit, or product inspection.

Any mutually agreed discovery program should be backed up with appropriate discovery pleadings and responses. The purpose here is not to create the basis for an argument, but to give all parties the comfort of knowing complete disclosure has certified on the record. An alternative might be to simply have counsel certify in an open letter to the mediator that full compliance with the agreed request has been met.

Since one major goal of the Program is to obtain a “win-win” position with respect to both trial preparation and settlement efforts, any discovery materials generated through cooperative agreements should be considered admissible. The “rifle shot” Rule 30(b)(6) depositions should proceed with the understanding that, while limited in scope to the subject at hand, a second round with the deponent on other matters bypassed will be allowed if the case doesn’t settle.

Based on the agreed issues, a joint investigation or testing program might be negotiated using one mutually agreeable neutral expert. In many construction disputes, the parties are quite capable of simply straightening out the numbers in contract balances, pending change order requests, or establishing the value of work and materials installed – or at least isolating limited areas where issues exist. In instances where this process presents a

problem, however, an audit of each party's books and records by a mutually agreed neutral financial expert can be helpful.

Where simple "yes-no" factual issues exist concerning work in place or physical conditions on the site (Was the rebar installed or not? Were the fill cells poured? Where exactly is the muck? Was the waterproofing placed according to the plans?) A joint investigative plan conducted by a mutually agreed neutral expert can help get those facts established quickly and efficiently.

Using joint experts in an agreed investigative program, will require to both a mutually acceptable testing protocol and an advance understanding of the use of the final report. While the parties could agree to keep the expert's investigative report confidential, perhaps a better idea would be to agree that no one would be bound by the outcome, but the report would become admissible at trial without objection as to form. If any party is dissatisfied with the outcome, other tests or investigations could still be introduced to present differing outcomes.

Specific Issue Mediations - Case Presentations

As previously noted, follow-up mediations can then be developed based on what has been discovered or developed on the stipulated issues. In

construction cases, these “mini-mediations” usually boil down to a sub-set of trade issues involving lower tier subcontractors or vendors.

The format for these sessions follow any other mediation – opening presentations setting forth “best case” trial scenarios are made followed by private caucuses utilizing the mediator to negotiate resolutions. In such cases, there is no real need for the full compliment of parties involved in the case to attend or participate. While everyone is welcome to attend these sessions, only the parties directly involved in the sub-issue under consideration need attend.

In cases where an overall settlement is dependent on the total outcome of all sub-parts of the dispute, a “subject to” agreement might be reached in a mini-mediation which puts a proposed settlement on hold until the overall deal takes on a better definition.

The order in which the sub-parts to a major construction dispute are approached will vary in each case and should the subject of careful thought and planning early in the Mediated Case Management Program. In most cases, preliminary discovery or investigative programs can generally proceed concurrently with other similar programs. The sequencing in holding the mini-mediations to reach complete or “subject to” settlements, however, requires more thought. Although there is no steadfast rule, factors

to consider would include the dollar size of the claim (large dollar first, and "the rest will follow", or small dollar first to generate momentum and "clear the table"), the relative difficulty in settlement (showing progress and developing momentum is important) and the sequence of construction events ("We can't settle the foundation pour problems until we get the soil condition issues resolved").

Damage and Fix Assessments

In construction disputes, mini-mediation sessions could also be held to work with experts on both sides to define and price a "fix" without regard to liability. The goal here would be to "freeze a number" on an appropriate fix for a particular problem. At the same time, the parties might also be able to agree on what the contract plans and specifications required and what might constitute and enhancement or betterment to the project. These decisions are then put on a conditional "hold" until liability issues are negotiated and resolved in other parts of the case. (Often simply knowing, how much the problem will cost makes decisions on accepting partial or complete liability easier to make).

Non-binding adjudicatory presentations.

It is surprising how effective a non-binding adjudicatory proceeding can be in settling cases. Qualified evaluative input on specific issues is a

powerful settlement tool. A great number of construction industry clients involved in litigation just want two things: “someone to listen to my problem” and, “someone to tell me if I’m right or wrong”. For one reason or another, the parties directly involved in some disputes simply don’t want to be the one to make a final decision – they want someone else to decide upon a final resolution. Negotiating to get determinative input in an expeditious, cost effective and qualified manner can serve these clients far more successfully than ongoing process debates.

The procedure is simple. The parties select a neutral third person whose opinion they trust and present their case on an agreed issue. The neutral may be formally appointed as a Special Master by the court if it would be helpful for him or her to have powers to mandate procedural matters – but an agreement by the parties to vest that power in the neutral would work just as well. The parties present their respective positions on select issues and the neutral then provides non-binding advisory input to parallel a probable outcome at court. In essence, the parties get a “free look” at what the judicial process might bring as well as a dress rehearsal of the arguments. With that information in hand, negotiations continue.j

The non-binding adjudicatory procedure can be conducted in almost any manner the parties wish. As a general rule, and in order to maintain cost

effectiveness and expediency, the procedure is conducted in a relatively informal atmosphere. Strict rules of evidence are suspended, but the foundational quality of the data presented may go to its credibility. Most of the facts and arguments are provided in narrative form by counsel who act as officers of the court or, if mutually agreed, are placed under oath themselves. Exhibits and witnesses are narrowly limited to only those that are truly critical. The intent here is to give each party a sense of having the substantive essence of their “day in court” and getting a quality evaluative input however it falls. The objective is not to satisfy every nuance of a perfect procedural trial.

Using the mediator’s services, the “rules of engagement” for an agreed process for adjudicatory input should be negotiated and committed to writing in advance.

While it may be preferred to have the outcome of these proceedings serve as binding determinations, keeping the process non-binding in nature tends to promote acceptance and avoids hang-ups in procedural issues. In the final analysis, if the process is fairly structured the parties get what they want and react accordingly.

Conclusion - General observations

Simple in concept, Mediated Case Management will be only as difficult in execution as the parties and their counsel chose to make it. Creativity is the rule. The concepts described above are not meant to represent final and binding standards on Mediated Case Management Programs. Indeed, one of the major benefits of the program is its flexibility – the fact there are no rules. Counsel, the parties, and the mediator can work together to customize a plan particularly suited to the specific case at hand.

While some of the individual concepts embodied in a Mediated Case Management Program have been used in various jurisdictions for many years, the concept of putting them all together in a focused plan to allow the parties to cooperatively move a case to trial or settlement is new. Like any new idea, it may have unrecognized problems in execution, a learning curve is involved, and actual experience will ultimately shape its form. Clearly, the program calls for a level of cooperation from counsel that is seldom seen in hard fought adversarial proceedings. It is also clear that this program will challenge the skills of the mediator involved and will require an adjustment in classic case management approaches from the courts. In cases where the program has been implemented, however, the benefits achieved have greatly outweighed these concerns.

First and foremost, the clients love the process. From their perspective, it's proactive, productive, and directly includes them in the progress of their case. Their lawsuit becomes a shared experience with their trial counsel rather than a mysterious proceeding represented by a monthly invoice.

It's a "win-win" effort. Properly conducted, a Stipulated Case Management Program doesn't cost anything that would otherwise be spent. If the case settles, fine. If not, the parties have done nothing they wouldn't otherwise need to do to prepare for trial. In some respects, the parties are better prepared for trial.

Legal fees are reduced and better spent. Eliminating wasted energy on peripheral process disputes will reduce overall legal fees somewhat. More importantly, however, they make the legal fees paid more cost effective. We learn more, accomplish more and progress more with the dollars spent. The clients understand the bills, often have a role in creating them, and a relatively happier about paying them.

After going through a mediated case management program, the importance of the process debates tends to wane. By the time a case management program has settled what could be settled, focused the parties

on the ultimate issues, and led a cost effective focused discovery program, the parties are generally ready to try a shorter, cleaner trial.

Finally, Stipulated Case Management programs are particularly effective in construction disputes. This fact can be attributed to several possible reasons;

- The mindset of the construction litigation bar, and the construction community is, comparatively speaking, more inclined to deal than not.
- Because of the relatively certain economics in construction disputes (rarely do we see significant intangible damages) there is a dollar cap on what we can be achieved from a claim. Process costs drain the economic benefits of even successful litigation.
- The matters in dispute are often filled with technical and interrelated fact issues, nomenclature is specialized, and arguments presented are often ill suited for lay juries.
- Future relationships play a bigger role in the construction industry – the construction community is relatively small. Our clients run into each other on the next project all the time. It doesn't pay to sue customers or co-workers.

The growth of reconciliation as an institutionalized dispute resolution process has changed the landscape of conflict management in this country. In the process, the role of the trial lawyer is being redefined to meet the demands created by this growth. New skills must be learned, new ways of servicing our clients must be conceived and implemented if we are to continue in our role are major players in the future of civil dispute resolution. There is good reason to believe Mediated Case Management Programs will be a part of that future.

Sample Case Management Order:

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA.

CASE NO. XXXXX

ABC Owner Company.
Plaintiff,
vs.

XYZ Construction Co.; Designer Company,
Defendants, Third Party Plaintiffs.
vs.

Subcontractor Inc.; Vendor Company Inc.
etc. et al Third Party Defendants
_____/

CASE MANAGEMENT ORDER

THIS CAUSE was heard on the Stipulation for Case Management Order filed herein by the parties and the Court's own motion. The parties, through their respective counsel, have advised the Court as to their desire for an orderly and cost effective process to resolve or adjudicate the matters in controversy presented by this action. Based upon those premises, and the Stipulation of the parties, IT IS HEREBY ORDERED, that the following CASE MANAGEMENT ORDER be entered in this proceeding and, until further notice of this Court, be followed by all parties to this action:

1) **Intent of This Order and Facilitated Case Management Program** It is the intent and the desire of the Court and all parties to this Order to prepare for the trial of this cause and conduct this litigation in a cost effective, timely, and efficient manner without resort to unnecessary or unproductive disputes over procedures and processes. It is the further desire and intent of the Court and the parties to develop this case in a manner that will maximize all opportunities, and focus attention upon, reaching a facilitated settlement of both procedural and substantive matters that may come into dispute as they unfold. To carry out that intent, the parties hereto are directed to submit to, and abide by, a Mediated Case Management Program calling for a series of facilitated agreements by the parties developed through periodic case management meetings convened for that purpose as described herein.

2) **Participation In Mediated Case Management Program.** Unless otherwise ordered by this Court, each party to this action is hereby ordered to a) attend and participate, through designated counsel or representatives, all Case Management Meetings called hereunder, and b) to meet and comply with all stipulated activities and established and scheduled at such meetings, and c) to use their best efforts to minimize the expenditures of time and money in the conduct of this litigation and refrain from initiating or continuing frivolous or unproductive disputes concerning the process of this litigation.

2.1 Each party shall designate "lead" and "alternate" counsel who, collectively or independently, shall be responsible for attending and participating in all case management meetings convened hereunder. Any counsel attending a case management meeting shall come with the full and complete authority of their respective clients to commit to the terms of any case management agreement reached.

2.2 Each party shall also designate "lead" and "alternate" party representatives (other than counsel) who, collectively or independently, shall be responsible for attending and participating in those case management meetings in which the mediators appointed hereunder deems it appropriate and necessary for

direct representatives of the parties to attend. Such party representatives shall also be grant full authority to commit their respective parties to any case management agreement reached.

2.3 Each party shall file and serve a Notice of Party Representative and Certification of Authority in this proceeding on or before 10 days following the date of this Order. Such Notice shall identify the name and contact information for each person to be designated as a Party Representative in this proceeding and affirmatively certify that such designated party shall have full and complete authority to bind the party to in all stipulations and agreements made on its behalf without further consultation.

3) **Appointment of Mediator** The Court hereby appoints Michael M. Mediator to mediate and facilitate the course of this case management program. Unless otherwise agreed to by the parties in writing, or directed by the mediator, all fees and costs incurred for general mediation services hereunder shall be borne equally by all parties to this action. Whenever, in the sole discretion of the mediator, a specific matter involving specific parties requires special mediation services unique to those parties, the fees and costs incurred for those services shall be borne only by those parties directly involved. Upon agreement of the parties, Mr. Mediator shall be further authorized to retain a co-mediator to assist in the facilitation of this case management program, or an administrative assistant to handle scheduling, record keeping, and follow up administrative services to the program.

4) **Duties of Mediator.** The mediator shall be responsible for promoting and facilitating settlement of all or any part of the both substantive and procedural issues involved in this action. In addition, the mediator shall be responsible for organizing case management meetings and facilitating periodic agreements between the parties concerning the timing and coordination of all procedural and discovery processes initiated by any party to this action. Unless specifically authorized by the parties, the mediators shall have no authority to adjudicate any disputes between the parties. The mediator shall, with prior notification and authority of the parties, serve as spokesperson to inform the Court of the progress of the parties in managing the procedural development of the case, and to convey suggestions and requests to the Court to support case management procedures agreed to under this Order. The mediator shall comply with all ethical and legal requirements controlling the performance of mediation services as established by applicable rules of procedure and law, and shall be granted the full protections and immunities thereby conferred.

5) **Scope of Case Management Program** The case management program to be facilitated by the mediator and his designees, and implemented by the parties pursuant to this Order shall include, a) scheduling and conducting at least monthly meetings of counsel or representatives of the parties (as the mediators deem necessary and appropriate) to monitor the progress of the case, resolve procedural and process issues, establish amended case management agreements and resolve such other matters as are necessary and appropriate to fulfill the intent of this agreement b) defining and scheduling a mutually agreeable discovery program c) defining and scheduling a mutually agreeable pre-trial motion procedure d) defining and implementing, where necessary, a mutually agreeable dispute resolution process utilizing a special magistrate to resolve procedural or discovery disputes which cannot be resolved by agreement and, e) defining, scheduling and executing a mutually agreeable pre-trial alternative dispute resolution process to resolve the entire case if possible.

6) **Case Management Agreements to Become Case Management Orders** The parties understand and agree periodic agreements reached in the course of completing this case management program shall be entered in the record of this proceeding as stipulations of the parties to the entry of Case Management Orders containing the terms of their agreement. Any modifications, changes, or continuances desired by any party after the entry of a case management order shall be made by appropriate application to the court, and shall be in the court's sole discretion.

7) **Confidentiality and Inadmissibility of Proceedings.** Any concessions, admissions, representations, other communications, or settlement discussions initiated or exchanged during the course of this case management program (excepting only written and signed settlement agreements and stipulations of record) shall, unless otherwise agreed to by the parties, be deemed confidential and

inadmissible in any subsequent evidentiary hearing convened in this case. This case management program shall be conducted pursuant to applicable laws and procedures controlling circuit civil trial mediations.

8) **Additional Parties** In the event additional parties are joined or seek to intervene in this action, they shall also be subject to this Case Management Order unless otherwise ordered by this Court.

9) **Motion to Terminate Participation in Case Management Program** - Any party may, upon thirty (30) day's written notice to all other parties and upon motion filed with this Court, petition to discontinue participation in this case management program. Upon good cause shown, such motion to terminate may be granted. In that event, however, all stipulations filed or reduced to case management orders, and written settlement agreements between the parties shall remain in full force and effect.

DONE AND ORDERED, this ____ day of January 2007.

_____
Hon. Joe Judge
Circuit Judge

Copies furnished to: