and provide it to the court fairly regularly. In this connection, it is suggested that a formal report every six months would be sufficient. However, if you have any other suggestions relative to the regularity of reporting, please advise.

ARBITRATOR TRAINING:

A training program for arbitrators in compliance with NAR 7(C) has been effectuated in conjunction with the National Judicial College, the E. L. Cord Center for Dispute Resolution, and the State Bar of Nevada. The first training sessions were conducted in Reno and Las Vegas on June 4 and 5, 1992. The programs lasted approximately six hours each and resulted in the certification of approximately 140 persons in Reno and 100 in Las Vegas. Each program included a brief history of arbitration in Nevada, a comprehensive discussion of the operation and scope of the program, and practice tips for arbitrators in terms of processing cases. There were also comprehensive presentations on mediation, settlement techniques, reduction and modification of discovery procedures, fair relaxation of evidentiary rules, and techniques for minimizing resort by the parties to further proceedings in district court via trials de novo. Finally, hypothetical situations were demonstrated through "role playing" by a very experienced retired trial judge who has arbitrated hundreds of cases.

We have scheduled additional training programs in Las Vegas and Reno in December to certify more arbitrators for appointment to the arbitration panels.

FORMATION OF ARBITRATOR PANELS:

The Judicial College has provided us with a complete list of persons who were certified as having attended the June arbitration programs. These lists were supplied to the Supreme Court clerk, whereafter, on July 24, 1992, the Supreme Court Order formally appointing the panel members was filed. Also, pending successful completion of either December arbitrator training program, several members of the former Clark County "automobile" arbitration panel were given temporary appointments. The list of names has been provided to the Washoe and Clark County discovery commissioners and those Judicial Districts are currently in the process of swearing in the new arbitrators.

Discovery Commissioner Biggar has divided the Clark County panel into two groups, one to handle casualty/accident cases and another to handle commercial disputes. This effort was facilitated through maintenance by the State Bar of a complete set of resumes. It has been suggested by members of the Washoe county bar that a divided set of panels would be most helpful in that district.

The State Bar will maintain the arbitrator list and the resumes as a resource to the bar membership and the courts.

EDUCATION AND ORIENTATION OF THE GENERAL BAR MEMBERSHIP:

The Nevada State Bar has held comprehensive education programs at the State Bar Convention and through separate seminars in Reno and Las Vegas. The second round of live lectures took place on July 16, in Las Vegas, and July 23, in Reno. There were over 100 attendees at the Sedona presentation, and over 150 attendees at each of the separate Reno and Las Vegas presentations. The Reno and Las Vegas lectures included comprehensive discussions of the rules by Hal Albright and the undersigned, by the local discovery commissioners regarding local program management, and by experienced arbitrators (James Armstrong, Esq. and Les Berkson, Esq.) regarding techniques for processing and presenting these matters at the arbitration hearings. The Reno and Las Vegas presentations were videotaped for repeat showings on August 7, 11, 20 and 27. In excess of 50 people have attended each taped presentation. Mr. Albright and myself have also had numerous occasions to present arbitration orientation programs to private groups such as the Nevada Trial Lawyers Association and the Defense Trial Lawyers of Nevada.

Additionally, the undersigned and Les Berkson have been asked to prepare a chapter on alternate dispute resolution for the new edition of the Nevada Civil Practice Manual. We have both submitted our rough drafts to District Judge Brent Adams, who has been in charge of the editing project. We expect publication sometime after January 1, 1993.

In light of the above, we are quite confident that a substantial portion of the bar membership will have had an opportunity to attend these presentations prior to referral of a significant number of matters into the program.

IMPLEMENTATION BY THE LOCAL DISCOVERY COMMISSIONERS:

In addition to forming the panels of arbitrators, both Discovery Commissioners have been in the process of developing a set of local forms for arbitration practice. Also, local computer systems are being adapted to immediately advise the discovery commissioners of failures by litigants to seek exemption or stipulate to private arbitration within 20 days following the filing of any answer in arbitrable cases. (Immediate notice is necessary so that the arbitrator selection process may begin as soon as it is determined that no attempts have been made to exempt

a matter from the program.) The computer systems are also being adapted to process petitions for exemption. Finally, a system is being initiated to screen case filings so that formal petitions for exemptions will not have to be lodged in cases designated as exempt under NAR 3(A).

INITIAL COMMENTS REGARDING POTENTIAL PROBLEMS UNDER THE RULES:

We have been impressed with the caliber of questions and comments generated by the lecture programs. Attached to this report is a copy of Harold Albright's letter to me of June 10, 1992, in which he articulates some of the more commonly voiced concerns. Also enclosed are copies of correspondence from Thomas A. Collins, Esq., and John Hawley, Esq.

The most serious problem thus far identified stems from the wording of NAR 16(B), whereunder the arbitrator has authority to award any amount deemed appropriate up to the limit of $25,000.00, "exclusive of attorney's fees and costs." A literal reading of this provision would seem to restrict awards of pre-judgment interest where such would cause an award to exceed $25,000.00. It was clearly our intent that all of the pre-judgment interest, cost and attorney's fee remedies (subject to the $3,000.00 limitation on fees) be left in place. If the $25,000.00 ceiling would limit an award of pre-judgment interest, smaller damage cases in arbitration would receive full pre-judgment interest awards while awards at or near $25,000.00 would have the pre-judgment interest component either eliminated or substantially reduced by the limitation. Thus, it is the recommendation of Mr. Albright and the undersigned that the last sentence of NAR 16(B) be amended to read as follows:

> "The maximum award that can be rendered by the arbitrator is $25,000.00, exclusive of attorney's fees, costs and interest."

Another problem of immediate impact stems from the lack of a specific procedural mechanism for awarding attorney's fees, costs and/or pre-judgment interest until after the substantive award is formulated (under NAR 17, the arbitrator is only empowered to amend an award to correct obvious [clerical] errors). Although there is nothing in the rules preventing the arbitrator from making such awards as part of the initial decision, the "prevailing party" for the purpose of making awards under NRCP 68, NRS 17.115, or 18.010 usually cannot be determined until after the formal substantive damage finding is made. This is because NRCP 68 and NRS 17.115 offers of judgment served on adverse parties may not be made known to the arbitrator, absent an agreement in writing, prior to the filing of the award (See NAR 10), and because the arbitrator is correspondingly unaware if no formal offers have been made until

after the substantive award is handed down. Thus, it is our recommendation that the court act quickly to amend NAR 17(B) and (C) to specifically allow arbitrators to entertain motions to amend awards to include such additional relief. In this connection, we also recommend the following: that motions to amend toll the time period within which a request for a trial de novo may be filed or within which the discovery commissioner must instruct the clerk to enter judgment under NAR 19; and that parties be given a maximum of ten days to submit motions to amend awards to include additional relief under NRCP 68 or NRS Chapters 17 and 18.

Another area of concern stems from the prohibition in NAR 4(E) against filing non-dispositive motions in District Court during the pendency of arbitration proceedings. Because the rules contemplate the possibility of adding new parties after a matter has been referred to arbitration, a technical reading of these rules would require such motions to be lodged with the arbitrator. NAR 9. It is the general consensus that Rule 4(E) should be amended to allow the District Court to hear motions to add parties after a matter has been submitted to arbitration.

It has also been observed by Clark County Discovery Commissioner Biggar that NAR 5 should be amended to include a time frame or limitation within which opposition to petitions for exemption from the program may be filed. There is no such time limit in the rules as presently drawn and the limitation would clearly facilitate a more orderly processing of these cases.

Commissioner Biggar also suggests that the second sentence of NRS 16 (D) should be placed in a separate subsection to clearly provide that any award of attorney's fees by the arbitrator, whether under the offer of judgment rules or otherwise, may not exceed $3,000.00. (There has been some confusion voiced as to whether the $3,000.00 limit applies only to discretionary attorney's fee awards pursuant to NRCP 68 or NRS 17.115.)

It was also the consensus of every lawyer who attended the arbitrator training and general continuing legal education seminars that the compensation for the arbitrators was deficient. It is also the consensus of the Board of Governors Committee on ADR that the compensation for arbitrators be raised to $100 per hour and to a limit of $1,000 per case. It is concern of everyone that the arbitrator compensation provisions may have the greatest potential for jeopardizing the success of this program.

CONCLUSION

As the court has observed, this program was met with a great deal of initial concern by the bar membership. However, the general response to these rules now appears to be one of academic

curiosity and enthusiasm. From the committee's viewpoint, everything that can be done will be done to assure that this program succeeds.

If you or any of the other members of the court wish to discuss this report or have any suggestions for the functioning of the committee, please do not hesitate to write or call.

Very truly yours,

A. WILLIAM MAUPIN

AWM:crn
Enclosures
cc: Proposed Sub-Committee Members
cc: Justices of the Nevada Supreme Court
cc: Rosie Small, SBN Executive Director
cc: Members of SBN Board of Governors

JOHN L. THORNDAL
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September 29, 1992

FILED

OCT 05 1992

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ADKT-126

Chief Justice John Mowbray
Supreme Court of Nevada
Capitol Complex
Carson City, Nevada 89710

Re: Court Annexed Alternate Dispute Resolution
(Implementation Committee Report)

Dear Justice Mowbray:

The following is the first formal report of the ADR Implementation Committee. This report will discuss progress made thus far in training arbitrators; the formation of arbitrator panels in Clark and Washoe counties; formal orientation and education of the bar with reference to the program; and local plans for implementation by the discovery commissioners in Clark and Washoe Counties. We will also address the potential need for further amendments to the rules themselves.

At the outset, although a full set of subcommittees had been formed, we thought it would be more efficient to reduce the group to a general implementation subcommittee. With that in mind, we would ask that the following persons be requested to serve on this subcommittee: The Honorable Robert Rose, Supreme Court Justice; John Petty, Esq., Washoe County Discovery Commissioner; Thomas Biggar, Esq., Clark County Discovery Commissioner; Joe Carpenter, Esq., Supreme Court Deputy Supervising Staff Attorney; The Honorable Jack Lehman, Chief Judge of the Eighth Judicial District; The Honorable Mark Handelsman, Chief Judge of the Second Judicial District; Sally Loehrer, Esq.; John Wanderer, Esq.; Harold Albright, Esq.; Kimberly Morgan, Esq.; Margo Piscevich, Esq.; and the undersigned. It was felt that these persons were in the best positions to evaluate, firsthand, the efficiency and progress of the system over the next several months. While it is not intended that we meet on a frequent basis, we do hope to gather information

92-5

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June 10, 1992

A. William Maupin, Esq.
Thorndal, Backus, Maupin & Armstrong
1100 East Bridger Avenue
P. O. Drawer 2070
Las Vegas, Nevada 89125-2070

Re: ADR Training Seminar

Dear Bill:

I submit the following list of questions that were provided to me concerning the ADR training seminar. These would be suggestions for amendments to the Supreme Court Rules.

1. We need to specify how the parties register as arbitrators and how they prove their certification. You might check with Lans to make certain that their certification is sent to the State Bar for having attended our class.

2. We must determine whether or not a resume is to be sent to the people at the time the list of arbitrators is mailed out by the discovery commissioner.

3. It seems that we should amend Rule 16(b) to specifically allow interest so that the judgment that can be entered is $25,000.00, plus pre-judgment interest.

4. Can the rules be made to apply to small medical malpractice cases?

5. I think the rules should be amended to specify that it is $25,000.00 per defendant, rather than $25,000.00 per arbitration.

6. In the forms that we prepare, the Arbitrator's Award should be put in a proper form so that it can be exemplified for use in sister states. Generally what happens when an order of an arbitrator is submitted, the district court simply types on it, "it is so ordered" and signs it. If the judgment itself is not in a good form, then it is almost impossible to execute on the judgment and use it in a sister state proceeding.

Thank you for your attention to these matters and if I can be of any help I certainly will be pleased to do so.

Sincerely,

HAROLD G. ALBRIGHT

HGA/np

THOMAS A. COLLINS
Attorney and Counselor at Law
Licensed in Nevada and California

rec'd 6/19/92 10:40 am N.P.

June 17, 1992

VIA MESSENGER SERVICE

Harold Albright
124 Ridge Street
Reno, NV 89504

RE: COURT ANNEXED ARBITRATION

Dear Harold:

The seminar on Thursday, June 4th, was great. I would like to receive a copy of the proposed forms as they have been developed to date.

In regards to the fee-payment situation, I believe it would be best to require the payment of the fee up front. However, it does appear to be inequitable to require the Plaintiff to prepay the entire fees and costs unless there is also a mechanism built in to allow the Plaintiff to recover the pro-rata portion of the fees and costs from the Defendant. I believe it would be best to require the payment of the fees at the time of filing. The fee would then be collected from the Clerk or the Arbitrator would be authorized to collect the fee at the time of arbitration to place the money in his Trust Account, send the bill out and then after the time period for a comment on the bill has passed, to allow the attorney to pay him or herself from their Trust Account and remit the balance.

Another question I had relates to the potential liability of an Arbitrator. Are Arbitrators to be afford immunity from civil suits and individual liability as Judges are? If not, then each Arbitrator will have to determine from his or her insurance carrier if they are covered by their own E & O insurance.

Thank you.

Sincerely,

THOMAS A. COLLINS

TAC:ks

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July 24, 1992

Honorable Robert E. Rose, Justice
Supreme Court of Nevada
Capitol Complex
Carson City, Nevada 89710

Re: ADR

Dear Justice Rose:

In working with the new arbitration rules, I have discovered a weakness in their procedures. Specifically, as the rules now stand, no discovery can be had until after the meeting with the arbitrator as required by NAR 11. The evidence exchanged at that meeting will essentially parallel the evidence that would otherwise be exchanged at an NRCP 16.1 conference. In a personal injury action, the evidence typically includes the medical records of the plaintiff that directly relate to the incident referenced in the complaint. Unfortunately, in 90% of the cases that I have handled, the plaintiff does not provide defense counsel with any prior medical records. without these records, it is impossible to assess the nature and the extent of the damages caused to the plaintiff.

In pre-arbitration cases, prior medical records were obtained in a two step process. First, interrogatories were propounded to the plaintiff requesting the identity of each and every health care provider with whom the plaintiff consulted or treated in the five years preceding the accident. When these answers were received, defense counsel would obtain medical records from those health care providers using either a release form provided by the plaintiff or a subpoena duces tecum.

Under the arbitration rules, defense counsel must obtain the permission of the arbitrator to propound interrogatories to the plaintiff. The plaintiff will then have a reasonable time (30 days) within which to answer the interrogatories. It is only after defense counsel receives the plaintiff's answers, that he can then gather the plaintiff's prior medical records, and assess their impact on the case.

Because prior medical records often reveal preexisting medical conditions, they often necessitate further discovery which could not be foreseen prior to the production of those records. The further discovery will be difficult, if not impossible, to conduct within the compressed time frames of the present arbitration procedures.

To remedy this situation, I propose that the rules be amended to authorize any party to propound limited written interrogatories (five or ten in number, including sub-parts) to any other party within ten days of the date that the answer is served. In this way, the preliminary documentary discovery will be largely completed by the time the parties meet with the arbitrator. Thus, the parties and the arbitrator will then be able to fashion a discovery plan that truly meets the needs of a given case.

Propounding these limited interrogatories immediately after the answer is filed will not increase substantially the cost of the arbitration proceedings. Further, because the interrogatories would be propounded shortly after the answer is served, this limited discovery should not in any way affect the time table for proceedings that fall within the scope of the Nevada Arbitration Rules.

I hope that this suggestion is helpful to the court in administering the arbitration program. If I can be of any assistance to you or the court in the future in this or any other matter, please do not hesitate to contact me.

Very truly yours,

LYLES, AUSTIN & BURNETT, LTD.

John R. Hawley, Esq.

JRH/msf

cc: Honorable John Mowbray, Chief Justice
Honorable Charles E. Springer, Justice
Honorable Cliff Young, Justice
Honorable Thomas L. Steffen, Justice
Joseph F. Carpenter, Deputy Supervising Staff Attorney
✓Bill Maupin, Esq.
Tom Biggar, Esq.
Harold Albright, Esq.