

# United States Court of Federal Claims

## MEMORANDUM

**TO:** Members of the 2016 Advisory Council

**FROM:** Chief Judge Patricia E. Campbell-Smith, Chair  
Sarah L. Wilson, Co-chair

**CC:** Committee Chairs  
Staff Attorney & Chambers Liaisons  
Judicial Officers of the Court

**RE:** May 2, 2016 Meeting Proceedings and Follow-up

**DATE:** May 19, 2016

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Greetings, members of the court's 2016 Advisory Council.

In the wake of this month's meeting of the full Advisory Council, we would again like to thank you for your time and interest in the work of the court. We remain pleased with the work being done by each of the Advisory Council's eight committees, and are delighted with the "robust" discussions that this work elicits.

Below, you will find a summary of the proceedings of the May 2, 2016 meeting and suggestions regarding what you may see from the eight committees at the next meeting tentatively scheduled for Tuesday, November 15, 2016. In addition to this summary of the current proposals and the minutes of the meeting, you may additionally view the meeting agenda and materials provided at the meeting by clicking [here](#).

Over the course of the next six months, we expect that each of the eight committees will be convening in person and by teleconference to discuss ideas already in development or come up with new projects for the betterment of the court. We plan to meet with each committee to learn what's in the works and, if appropriate, formalize proposals to be developed for the next meeting in November 2016.

Once you have reviewed this information, if you have any questions or concerns, please do not hesitate to contact us: Chief Judge Campbell-Smith at (202) 357-6357 or Co-chair Sarah Wilson at (202) 662-1881. If you have any logistical questions, or need help finding materials, please contact Senior Staff Attorney Meredith Miller at (202) 357-6432.

## **Report on the Proceedings of the May 2, 2016 Advisory Council Meeting**

### **State of the Court & the Bar Association**

Chief Judge Campbell-Smith reported that the court is still awaiting the confirmation of five nominees for the court's six judicial vacancies. To assist with case work, the court has recalled four senior judges to active service:

- Judge Loren Smith started his recall service on January 19, 2016, under a letter of recall that currently contemplates one year of service;
- Judge Robert Hodges started on February 1, and will also serve for one year under his current letter of recall;
- Judge Robert Yock started on April 4, and will serve for 90 days; and,
- Judge Bohdan Futey started on April 11, and will also serve for 90 days.

Chief Special Master Nora Beth Dorsey reported that the Office of Special Masters (OSM) received 950 filed petitions in 2015 and anticipates that as many as 1200 petitions will be filed in 2016. Chief Special Master Dorsey also shared that OSM's Special Processing Unit (SPU) is handling approximately 40% of OSM's open cases that have been deemed amenable to early resolution, and noted that the SPU is working well. OSM is working on finalizing a new section on the SPU and its practice for the court's Guidelines for Practice Under the National Vaccine Injury Compensation Program.

Chief Judge Campbell-Smith announced that Clerk of Court Hazel Keahey was to retire the next day, on May 3, 2016, after which Chief Deputy Clerk Lisa Reyes would become the Acting Clerk of Court.

Chief Deputy Clerk Reyes reported that, since last year, the court's filings are up 30% for both vaccine petitions and general jurisdiction complaints, with the majority of that increase coming from vaccine petitions. General jurisdiction complaints alone are up 4%.

Altom Maglio, President of the Court of Federal Claims Bar Association, reported that the Bar Association's Pro Bono/Attorney Referral Pilot Program has been a success and that the Young Lawyers Division is active. Mr. Maglio noted that the Bar Association is creating an "Outside the Beltway" taskforce in an effort to engage with Bar Association members living outside the DC metro area.

## **Rules Committee Consideration of ADR Program Revisions**

Judge Eric Bruggink, Chair of the Emeritus Leadership Committee, reported on the status of the committee's recommendation that the court's ADR program be revised. The court's Rules Committee considered the proposed changes to the ADR program, and on April 29, 2016, the court proposed amendments to its Rules, including proposed revisions to Appendix H (Procedure for Alternative Dispute Resolution). The public comment period on these proposed changes ends on June 13, 2016.

Judge Bruggink reported that the proposed amendments to Appendix H would terminate the court's ADR pilot program and create an ADR Committee that would initially be comprised of Judges Wiese, Wheeler, Wolski, Williams, Firestone, Bruggink, Lettow, and Horn. These judges would be available to conduct ADR in the court and consider new procedures for ADR in the court as needed. The revised ADR rules would encourage parties to work with an assigned judge to identify an ADR judge. Parties would also retain the ability to engage third-party neutrals at no cost to the court.

Judge Bruggink also noted that (1) Rule 3(e) of Appendix H, along with an amended Rule 16, would permit the assigned judge to issue sanctions if any party or its counsel fails to maintain the confidentiality of an ADR proceeding; (2) Rule 3(i) would permit the Clerk's Office to survey the parties after the conclusion of ADR to gather basic statistics; and (3) Rule 3(j) would offer specific guidance regarding information helpful in an ADR context for intellectual property cases.

## **Status of Proposals**

### **1) Guidance on Cases Involving Classified Information**

Judge Mary Ellen Coster Williams, Chair of the Bid Protest/Contract Committee, presented her committee's proposal for new guidance regarding cases involving classified information. Judge Williams reported that the committee had changed the proposed guidance based on comments made at the November 2015 meeting of the Advisory Council.

During the Council's consideration of this proposal, members of the Advisory Council suggested further edits. After Judge Williams reviewed the proposed edits, Judge Bruggink moved to adopt the proposed guidelines with those edits incorporated, and his motion was seconded. Accordingly, the full Advisory Council has adopted the proposed Guidance on Classified Information. This proposal will be formally presented to the court once the committee finalizes the language as discussed.

## **2) Amendment of 28 U.S.C. §§ 2401 and 2501 re: Statute of Limitations**

Judge Thomas Wheeler, Chair of the Takings/Tribal Claims Committee, introduced committee member Professor Gregory Sisk, who discussed the committee's previously introduced proposal to amend 28 U.S.C. §§ 2401 and 2501 to establish that the time periods prescribed in these statutes would no longer be jurisdictional. Professor Sisk proposed the following language to effect this change: "The periods of limitations stated in this section are affirmative defenses subject to tolling."

The full Advisory Council considered the proposal, and several members from the Department of Justice questioned their authority to vote on matters that implicate the United States' sovereign immunity. Judge Braden suggested that it might be more useful for Professor Sisk to write a letter to the Congressional committee considering these amendments, rather than having the Advisory Council take action on it. Judge Wheeler concurred. The matter was not voted on by the Advisory Council.

### **Committee Reports**

The chairs of the Advisory Council committees were asked to briefly summarize the status of their committee meetings and discussions, highlighting potential projects of interest for 2016 and beyond.

#### **1) Bid Protest/Contracts Committee**

Judge Mary Ellen Coster Williams reported that the committee has recently discussed three potential projects: (1) data collection for bid protest actions; (2) guidelines for cases involving International Traffic in Arms Regulations (ITAR); and, (3) bid protest rules.

Regarding bid protest data collection, Judge Williams reported that the private bar has expressed concern about the "sustain" rate in bid protest actions; as such, members of the committee are planning to meet with staff in the Clerk's Office to discuss gathering data and statistics for bid protest cases.

Regarding potential guidelines for ITAR, the committee has concluded that it is an isolated issue that arises infrequently in this court, and therefore has decided not to pursue it.

Finally, regarding the creation of rules for bid protest actions, the committee learned there is potential legislation that would direct the court to adopt the GAO's timeliness rules, thus eliminating a party's "second bite at the apple." The committee is tracking the legislation.

## **2) Intellectual Property Committee**

Judge Braden provided the Advisory Council with a written report on the committee's activities and distributed a draft of new local patent rules. She reported that her committee had surveyed model patent rules from other courts before drafting these proposed rules.

## **3) Military Claims/Civilian Pay Committee**

Judge Marian Blank Horn reported that her committee has been looking into educational opportunities for the court and bar, noting that many practitioners have limited knowledge about military review boards. Thus, her committee is exploring how to bring together members of the review boards for an educational session. Judge Horn believes that this effort would dovetail nicely with the Bar Association's Pro Bono/Attorney Referral Pilot Program, given that military pay cases are good areas for pro bono work.

Judge Horn reported that her committee is looking into potentially providing guidance on how to create manageable administrative records in military and civilian pay cases, and also exploring whether to recommend a uniform set of class action procedures for civilian and military pay cases.

## **4) Takings/Tribal Claims Committee**

Judge Wheeler reported that, apart from forwarding the statute of limitations proposal described above, his committee had provided some input into the proposed revisions to the ADR program, was tracking the legislative updates to 28 U.S.C. § 1500, and had proposed changes to Rule 68 at the November meeting that are still under discussion within the committee. Judge Wheeler concluded by saying the committee is soliciting ideas for future projects.

## **5) Tax Committee**

Judge Lettow reported that his committee is following the repeal of TEFRA, which would affect Appendix F of the court's Rules. According to Judge Lettow, the Tax Court has proposed interim rules; the repeal of TEFRA is not effective until January 1, 2018. Parties have the ability to opt in prior to the effective date. The comment

period on those interim rules has ended; the committee plans to review the interim rules and, if appropriate, propose new language for the court's Rules.

Judge Lettow also reported that the committee has surveyed judges of the court about the use of stipulations in tax cases before them, and is developing a survey to reach out to parties who have used stipulations in their tax cases to learn about their practices. Staff Attorney Megan Donley is assisting the committee in identifying the appropriate attorneys and drafting that survey.

Judge Lettow concluded by saying that the committee is exploring changes to the court's rules for sealed documents in tax cases.

### **6) Vaccine Committee**

Special Master Brian Corcoran reported that his committee continues to focus on problems attendant to attorney's fees disputes, specifically the issue of hourly rates. The committee has been unable to agree upon a defined hourly rate, but is pursuing a range of different rates based on the type of petition involved. The committee hopes to have a proposal on this issue for Advisory Council consideration in the near future.

The committee is also exploring OSM's response to ethical issues within the vaccine bar, and exploring whether there is something OSM can and should be doing when it learns of ethics violations apart from alerting the court pursuant to RCFC 83.2.

### **7) Emeritus Committee**

Judge Bruggink reported that the Emeritus Committee is waiting for its next assignment.

### **8) Law Clerk Alumni Committee**

Senior Staff Attorney Meredith Miller reported that after introducing its proposal to allow DOJ to file electronically in pro se cases in November 2015, Chief Judge Campbell-Smith and Clerk of Court Hazel Keahey considered the proposal and advised that it not go forward, based on (1) court concerns regarding the equity of allowing only one party in a case to file electronically, and (2) the fact that the court has been informed that the next version of CM/ECF currently under development ("Next Gen") may provide pro se filers with some enhanced access to the electronic record.

Ms. Miller reported that her committee continues to develop an alumni network via LinkedIn and plans to partner with the Bar Association and its “Outside the Beltway Taskforce” to develop a network of speakers and materials to support a U.S. Court of Federal Claims “speaker’s bureau.”