U.S. Court of Federal Claims Advisory Council
Emeritus Leadership Committee

Alternative Dispute Resolution Proposal: Revisions to Rule 16(f), Appendix A, and Appendix H: Procedures for Alternative Dispute Resolution

November 5, 2015

Introduction

This proposal presents recommended changes to the court's existing alternative dispute resolution (ADR) procedures set forth in Appendix H of the Rules of the U.S. Court of Federal Claims (RCFC). The proposed changes reflect the discussion at the last Advisory Council meeting on May 12, 2015, at which Judge Eric Bruggink described the work of his Committee surveying the bench and bar and conducting case studies of other courts in order to formulate a proposal to improve the current ADR procedures at the U.S. Court of Federal Claims (USCFC).

At the direction of the Chief Judge and Chair of the Advisory Council, the Committee asked for specific recommendations from each of the Advisory Council committees. Input was provided by a number of committees, and will be made available to the Advisory Council in advance of the upcoming September 24, 2015, via the Advisory Council page on the court's website. The input was considered by the Committee in drafting this recommendation. It should be noted that the Vaccine Committee has directed its efforts toward evaluating Section 5, Chapter 4 of the Guidelines for Practice under the National Vaccine Injury Compensation Program (August 3, 2015), which provides supplemental ADR guidance.

The Court's ADR Pilot Program

At the May 2015 meeting, the Committee recommended eliminating the court's longstanding ADR pilot program through which certain general jurisdiction cases are automatically assigned to a settlement judge. The pilot program is eliminated in the redlined Appendix H procedures, attached. However, in recognition of the value of involving a settlement judge or other third party neutral early in some cases as the pilot did, the Committee recommends that the program preserve the option of any assigned judge to suggest the use of early neutral evaluation in cases for which the assigned judge believes it may expedite resolution of the case, among other options.

Related to early neutral evaluation, the Committee considered a proposal to maintain one of the perceived benefits of the current ADR pilot program by amending Appendix A to suggest that the Department of Justice notify the assigned judge and a plaintiff represented by counsel when a clear jurisdictional defect is apparent on the face of a complaint. Following consideration, this proposal was not included in the ADR proposal, although the Committee agrees that assigned judges, counsel, and parties will

be well served by making an effort to evaluate jurisdictional issues early in a matter, before extensive motion practice has taken place.

Department of Justice Involvement in ADR

The Committee recommends that the ADR procedures reflect the unique issues associated with conducting ADR with the government as a party. The recommendation does not include any specific language to reflect the limitations on government attorneys in agreeing to settle cases; instead, the proposed Appendix H revision retains the requirement for the settlement judge or third-party neutral to prepare a memorandum of understanding among the participants at the outset of the process. The Committee believes that any special limitations on government attorneys in negotiating settlement terms should be discussed openly with the parties and expressly reflected in all settlement discussions and documents.

Who Should Mediate

Many of the court's judges are trained and experienced in ADR techniques, and have an expressed an interest in providing ADR services to parties. Based on input shared with the Committee, in most cases, parties prefer to use USCFC judges over outside third-party neutrals for ADR. The Committee recommends that the parties continue to have the option to identify a preferred settlement judge to mediate a dispute. The proposed changes to Appendix H reflect these recommendations and provide that parties may identify a preferred settlement judge or rank their preferences.

The proposal also provides for the use of private third-party neutrals when the parties agree on using someone from the private sector, a decision that should be made independently by the parties. Third-party neutrals will only be assigned upon request and with agreement of the parties. The Committee has coordinated this proposal with the Bar Association, which has agreed that it may maintain a list of Bar Association members interested in serving as mediators.

Mediating Related Cases

The Committee recommends that the court explore whether USCFC settlement judges may mediate cases pending in other courts that are related to cases before the USCFC. The Committee sees a value in having settlement judges involved in resolving related cases at the request of parties or the assigned district court judge. A potential challenge is that the Code of Conduct for Judges does not allow judges to act as arbitrators or mediators in cases not before their court, unless expressly authorized by law. See Canon 4A(4). There is, however, a narrow exception that may apply to related cases. The Committee recommends that the court work with the Administrative Offices of U.S. Courts and/or the Judicial Conference to resolve any barriers to allowing USCFC settlement judges to be involved in resolving related cases pending in other federal courts.

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Mediating Cases under 28 U.S.C. § 1498 Involving Patents and Copyrights

The input of one committee—the Intellectual Property Committee—provided a set of specific recommendations to capture the special issues raised in those cases. Those recommendations have been included in the proposed revisions to Appendix H, and are attached.

Collecting Better Statistical Data on the Use of ADR in the Court

The Committee recognizes a need for the court to build a confidential internal process to track and manage cases that are referred to ADR. The Committee recommends that the Clerk's Office explore ways to support the work of USCFC ADR judges, and that ADR judges should work with the Clerk's Office to manage ADR communications and collect data regarding the use of ADR in the court (e.g., number of hours spent on ADR and settlement results).

Conclusion

The attached proposed revisions to Appendix A and H reflect the recommendations of the Emeritus Leadership Committee first discussed at the May 2015 Advisory Council meeting. The Committee looks forward to discussing the proposed changes at the November 19, 2015 Advisory Council meeting and at the Judicial Conference on May 3, 2016.

PROPOSAL

U.S. Court of Federal Claims Advisory Council
ADR Proposal from the Emeritus Leadership Committee
Revisions to Rule 16(f), Appendix A, and
Appendix H: Procedures for Alternative Dispute Resolution
November 5, 2015

PROPOSED REVISIONS TO RCFC 16(f)

(f) Sanctions.

(1) ***In General.*** On motion or on its own, the court may issue any just orders, including those authorized by RCFC 37(b)(2)(A)(ii)–(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate—or does not participate in good faith—in the conference; ~~or~~

(C) fails to obey a scheduling or other pretrial order; or,

(D) discloses documents generated solely for ADR proceedings or communications made within the scope of an ADR proceeding to a judge, counsel, or party not a part of the ADR proceeding.

(2) ***Imposing Fees and Costs*****.** Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

RULES COMMITTEE NOTES

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Rules Committee Notes
2016 Revision

The language of RCFC 16(f) has been amended to include as a sanctionable action the disclosure of information produced in connection with an ADR proceeding conducted in the court pursuant to Appendix H.

PROPOSAL

DRAFT PROPOSED REVISIONS TO APPENDIX A
CASE MANAGEMENT PROCEDURE

I. PURPOSE

1. These case management procedures are intended to promote cooperation among counsel, assist in the early identification of issues, minimize the cost and delay of litigation, and enhance the potential for settlement. (As used in this appendix, "counsel" shall be construed to include unrepresented parties.)

2. Uniformity of practice within the court also is an important goal of these procedures. For the purpose of promoting the efficient administration of justice, a judge may modify these procedures as appropriate, or the parties may suggest modification of these procedures to meet the needs of a particular case.

II. EARLY MEETING OF COUNSEL

3. Subsequent to the filing of defendant's answer or, if applicable, a reply to a counterclaim, and, in any event, within sufficient time to permit the parties to file a Joint Preliminary Status Report in accordance with paragraph 5, below, plaintiff's counsel shall communicate with defense counsel, and counsel shall confer . . . .

[*Additionally renumber the remainder of this Appendix, which will tie to the cross-references changed in App. H below…]*

PROPOSAL

PROPOSED REVISIONS TO APPENDIX H
PROCEDURE FOR ALTERNATIVE DISPUTE RESOLUTION

1. General. The United States Court of Federal Claims recognizes the value of encouraging the use of facilitative alternative dispute resolution (ADR) in appropriate cases. ~~a variety of voluntary, non-binding alternative dispute resolution (ADR) tools for use in appropriate cases. ADR techniques include but are not limited to mediation, mini-trials, early neutral evaluation, and non-binding arbitration. These processes may be conducted either by a settlement judge or a third-party neutral.~~

(a) Goal. The goal of ADR is to aid parties' efforts to negotiate a settlement of all or part of the dispute.

(b) Techniques. The most commonly requested technique is mediation conducted by a settlement judge. Other techniques also available upon request include early neutral evaluation,[1] mini-trials, outcome prediction assistance, and non-binding arbitration. In addition, parties are free to pursue ADR with a private sector ADR provider to serve as a private third-party neutral.

(c) Vaccine Program cases. In addition to these guidelines, the Office of Special Masters has established its own alternative dispute resolution guidelines. *See* Section 5, Chapter 4 of the Guidelines for Practice under the National Vaccine Injury Compensation Program (Aug. 3, 2015).

2. Terms.

(a) Assigned Judge. The judge regularly assigned to the case.

~~(a)~~**(b) Settlement Judge.** A judge of the court, other than the assigned judge. Appointment of a settlement judge permits ~~the~~ parties to engage in a confidential, frank, in-depth discussion of the strengths and weaknesses of each party's case before a judicial officer without the inhibitions that might exist before the assigned judge. A settlement judge may act both as a mediator and as a neutral evaluator. ~~This process should be employed early enough in the litigation to avoid~~

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[1] Early neutral evaluation ("ENE") is available if the assigned judge determines it would be beneficial.

~~needless expense and delay.~~ Use of a settlement judge permits ~~the~~ parties to gain the benefit of a judicial perspective without jeopardizing their ability to gain a resolution of their case by the assigned judge should settlement efforts fail.

~~**(b) Assigned Judge. The judge regularly assigned to the case.**~~

(c) Private Third-p~~P~~arty Neutral~~s~~. ~~In consultation with the bar, the court will maintain a list of qualified individuals who have indicated their willingness and demonstrated their ability to serve as neutral evaluators and mediators. Parties may select a third-party neutral who is not on the court's list.~~There are numerous private sector providers of ADR services. Parties are free to select any third-party neutral.

(d) Mediation. A flexible and voluntary dispute resolution procedure in which a settlement judge or a third-party neutral, acting as the mediator, facilitates negotiations to reach a mutually agreeable resolution. The mediation process involves one or more sessions in which counsel, litigants, and the mediator participate and may continue over a period of time. The mediator can help the parties improve communication, clarify interests, and probe the strengths and weaknesses of their own and their opponents' positions. The mediator can also identify areas of agreement and help generate options that lead to settlement.

(e) Early Neutral Evaluation ("ENE"). Early in the litigation—preferably before or shortly after the filing of the JPSR—the assigned judge may suggest that the case is appropriate for assignment to ~~Using the services of a third-party neutral or~~ a settlement judge knowledgeable in the subject matter of the litigation to assess the strengths and weaknesses of ~~the~~ parties' positions. In this manner, ~~the~~ parties may gain a more realistic view of their prospects for success, thus narrowing the issues and facilitating settlement. If parties agree to ENE, a settlement judge will be assigned or parties may elect to secure their own private third-party neutral to conduct an early evaluation.

(f) Mini-trials. A flexible, abbreviated procedure in which ~~the~~ parties present their case, or a portion of it, to a ~~third-party neutral or a~~ settlement judge or third-party neutral.

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(g) Outcome Prediction Assistance. A procedure by which a settlement judge or third-party neutral reviews the facts and law in dispute and informs parties how he or she believes the litigation should be resolved.

(h) Non-binding Arbitration. A procedure by which a settlement judge or a third-party neutral, acting as an arbitrator, makes a determination of the rights of parties to the dispute, but the determination is not binding upon parties, and no enforceable arbitration award is issued.

3. Procedures. -RCFC 16 and Appendix A, paragraphs 3, ~~(f) and~~ 4(f)~~(i)~~, and 5(i), set out ~~the~~ parties' obligations with respect to consideration of ADR. At any point in the litigation, however, ~~the~~ parties may notify the ~~court~~ assigned judge of their desire to pursue ADR.- There is no single format for ADR. -Any procedures agreed to by the parties and adopted by the settlement judge or third-party neutral may be used. -Certain basic ground rules will be observed, however, as follows:

(a) ADR is voluntary. A party's good-faith determination that ADR is not appropriate in a particular case should be respected by other parties and ~~by~~ the court.

(b) When ~~the~~ parties have indicated their agreement to ADR to the assigned judge, ~~the assigned judge, if in agreement, will forward the request to the clerk of the court for assignment to a settlement judge or a third-party neutral as selected by the parties.~~

the assigned judge will forward the ADR request to the clerk of the court for ADR assignment:[2]

(1) if parties request a private third-party neutral, the assigned judge will notify the clerk of court of the assignment of the private third-party neutral with that neutral's contact information;

(2) if parties request the assignment of a specific settlement judge and/or provide a list of preferred settlement judges, in assigning the case to an ADR settlement judge, the clerk will attempt to accommodate such preferences; or

Commented [MM1]: These cross-references change as a result of proposed addition to App. A, above.

PROPOSAL

[2] All information regarding the participation and identity of a settlement judge or of a private third-party neutral will be kept under seal and confidential by the clerk of court, unless otherwise agreed to by the parties.

(3) if parties do not request assignment to a specific settlement judge or identify a preference, the clerk will make an assignment from the list of court judges who have expressed an interest in and have experience conducting ADR.

(4) Additionally, if parties wish to request non-binding arbitration or a mini-trial, the assigned judge will include that information in the referral.

(c) ~~In the event the parties agree to use ADR, the settlement judge or third-party neutral and the parties will develop procedures appropriate to that case.~~ The settlement judge or third-party neutral and ~~the~~ parties will develop a written memorandum of understanding at the outset of the process~~statement~~, to be executed by the settlement judge or neutral, outlining the terms of the settlement process, including an indication of assent to confidentiality by all parties.[3] ~~Neither this statement nor any other materials developed for use solely within the ADR process will be filed with the court.~~ All orders issued by the settlement judge and written communications from the parties will be maintained by the clerk of court in a separate confidential docket, accessible only by the settlement judge and parties to the ADR proceeding.

(d) ~~There will be no transcript of any ADR proceeding.~~ All ADR proceedings, including documents generated solely for the proceedings and communications within the scope of the proceedings, are confidential and will not be provided to a judge of the court who is not the settlement judge in the dispute or any party that did not take part in the proceedings. In the event a party or counsel fails to maintain the confidentiality of such documents and communications, the assigned judge may issue an order for sanctions pursuant to Rule 16(f)(1)(D). Documents and information that are otherwise discoverable or admissible do not lose that characteristic merely because of their use in the ADR proceedings.

(e) Participation in ADR constitutes agreement by the parties not to subpoena or seek in any way the testimony of the settlement judge or third-party neutral in any subsequent proceeding of any kind.

[3] Special procedures for cases filed under 28 U.S.C. § 1498 are set forth in subsection (i).

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(f) During the ADR process, the matter will remain on the docket of the assigned judge and parties shall submit regular status reports to the assigned judge indicating whether they wish to continue the ADR proceedings.

(g) At the conclusion of the ADR process, the settlement judge or the third-party neutral will notify the assigned judge and the clerk of the court only of the outcome of the ADR, i.e., whether a proposed settlement has been reached ~~the matter has been settled~~in whole or in part and the next steps, if any, that remain in the litigation.~~.~~

(h) Within 14 days of the entry of judgment following an ADR settlement, the clerk of court may provide to parties a confidential survey designed to elicit quantitative data to assist the court with its statistical reporting requirements on the use of ADR in the court.

(i) Special mediation procedures for cases filed under 28 U.S.C. § 1498: [4]

(1) Patent Cases.

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The following core information should be disclosed by plaintiff in any ADR proceeding involving a claim of a patent:

- Preliminary identification of accused devices, systems, or processes, and preliminary infringement contentions in the form of a claim chart, showing how plaintiff contends claims infringe on the accused device. This type of information will provide an indication of why plaintiff is requesting construction of specific claim language.
- A statement of plaintiff's contentions regarding the priority date, including the date the invention was conceived and reduced to practice, together with a statement of the filing date of plaintiff's patent application. If plaintiff claims an earlier conception date, it must proffer documents to support conception and reduction to practice.

The following core information should be disclosed by defendant in any ADR proceeding involving a patent:

[4] For most cases filed under 28 U.S.C. § 1498, ADR should be suggested by the assigned judge at any time—including following the court's claim construction decision—unless ADR is agreed to by the parties earlier in the case. After claim construction, parties will meet with the assigned judge to determine if ADR would be appropriate in resolving: (1) whether there has been an infringement and (2) if so, what damages, if any, are owed. The court may determine what discovery is needed to help minimize costs. The procedures enumerated herein may be modified as appropriate and within the discretion of the settlement judge.

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- A listing of contracts awarded, including use of the accused devices, systems or processes and the amount of the awarded contract. Where possible, the contracts should be produced.
- A preliminary identification of defendant's invalidity contentions, including prior art references.

(2) Copyright Cases. The following core information should be disclosed by parties in any ADR involving a copyright:

- A copy of a valid copyright registration and deposit, together with any correspondence with the Copyright Office.
- When compensatory damages are sought, a statement of the estimated amount of damages claimed.

The following core information should be disclosed by defendant:

- Identification of all uses of the subject work by the defendant, including any contractual agreements.
- A preliminary identification of any invalidity and/or fair use contentions.

PROPOSAL