Attached, please find a summary of the results of the Emeritus Leadership Committee’s “ADR Multiple Case Study.” The purpose of this study was to supplement earlier ADR survey efforts with some personalized and in-depth feedback from parties who have participated in ADR at the court. To elicit this information, I was asked by the Emeritus Leadership Committee to interview judicial officers and counsel for both parties who had been involved in representative ADR proceedings in the Court of Federal Claims.

I interviewed the parties and judicial officers who were involved in nine cases identified by judges of the court as representing a diverse array of ADR experiences in a number of different jurisdictional areas.

I hope that the results will provide useful background to the Emeritus Leadership Committee and the full Advisory Council as they consider revision of the court’s ADR program.

If you have any questions or comments, please do not hesitate to get in touch.
**Responders**

- 3 judges
- 7 plaintiffs’ counsel
- 6 defendants’ counsel
- Other attorneys no longer in same positions/couldn’t be located. No one expressly declined to participate.

**Methodology**

Judges of the court identified nine cases that were deemed to provide a diverse representative sample of ADR proceedings in the court. The interviewer contacted the ADR judge and the parties involved in each case to conduct interviews. All but one of the interviews were conducted by telephone; one responder preferred to provide feedback by email. While there was no set series of questions, the interviewer did ask for particularized feedback related to the specific case that was included in the Multiple Case Study:

- Thoughts on the court’s existing Pilot Program
- Thoughts on the ADR process as deployed in the specific case
- Things that went well or were not as successful in the ADR
- Best practices that stood out

Responders were informed that their participation in the interviews was discretionary, and that all results would be presented without attribution to an individual or a case.

Each bullet below represents a discrete comment made by a responder. Duplicate comments have been retained in order to indicate the frequency with which a particular topic was addressed.

The feedback has been grouped into categories that were common themes identified by interviewees.
Results

Thoughts on Current Program/Pilot Program

- “Keeping the program free is very important.”
- Strongly support keeping judges as mediators.
- The flexibility of Appendix H to go facilitative vs. evaluative is useful.
- Rarely do Pilot Program referrals move forward, maybe one per year.
- “Dump the pilot program.”
- Anything the court can do to incentivize participating in ADR would be positive. It’s now an underused resource.
- Early on, some parties said that they wanted to pick their ADR judges. But over time, the core group of ADR judges was recognized as being good at it, so initial assignments made sense.
- “As is, it is a fantastic tool in the toolbox, please keep it available!”
- Some types of cases may be good for an automatic assignment to an ADR senior judge.
- “Current Rules are good in preserving flexibility and ensuring voluntariness and confidentiality.”
- Pilot did some things well. Initially designed to get an ADR program rolling, it was a new thing then. Purpose was to assign ADR judge to be used as a resource, an “advertisement of the system.”
- Pilot Program designed to encourage early conferences; could be used to knock out jurisdictional issues via ADR. (Assigned judges could alternatively do this by engaging in those issues prior to JPSR.)
- Cost savings of ADR is enormous to *everyone*. A responder had two cases with similar sets of claims to compare: $2.5m for the litigation vs. six months of preparation then two days of mediation to settle.
- The ADR system in the court works. A majority of cases that enter ADR settle, usually the entire case.
- Keep the flexibility so that complex cases can come to an ADR judge for small issues.
- Mediation program should be more widespread in its techniques (e.g., use ENE more often).

Ideal Timing of ADR

- “ADR should be mandatory and very early in the process. In my case, it identified jurisdictional issues before too many resources were wasted.”
- ADR should be mandatory at two times in the life of a case: ENE within 120 days of filing and then no later than one year after filing.
• Mediation too early can be detrimental. “In my case, the parties reported that settlement did not work. The case settled a year later. I think this was because there was too much ‘shorthand’ used during the ADR, and the plaintiff didn’t appreciate it at the time.”
• “Early neutral evaluation is not helpful, that’s been demonstrated by the Pilot.”
• Case was very unique, and mediation was appropriate before discovery. Our mediator was very willing to jump in early.
• In a case with decades of prior of litigation, mediation helped to focus issues and “transcend decades of abuse” with a new judge.
• Discovery was complete and the government had filed a summary judgment motion. “The assigned judge saw a need for ADR based on questions, because there were facts in dispute. ADR was more efficient than trial.”
• The case was well into the litigation; motions for SJ had been fully briefed. The plaintiff reached out to DOJ. There were few facts in dispute; it was a purely legal issue. “The parties requested mediation to understand the litigation risk,” and negotiations conducted in advance were very far apart.

Best Practices

• Structured opening & closing procedures
  ▪ “Requiring opening and closing sessions was very helpful.”
  ▪ Mediator brought the parties together once most issues were complete, and then had the government list out by number points the issues on which the parties had reached agreement. “That memorialized the results very helpfully.”
  ▪ Pre-meeting briefing papers and confidential statements of position submitted beforehand were very effective.
  ▪ Pre-negotiation statements are helpful, along with expert reports if generated.
  ▪ “Opening statements can be useful to be sure everyone is on the same page.”
  ▪ Need to get something down in writing at the close, can be informal. Especially if it’s a dollar number or pay grade, e.g., in employment cases.
  ▪ Was helpful to have parties provide positions in a summary brief in advance.
  ▪ Obtaining consent from both parties for ex parte conversations upfront was key for candid dealing and eventual success.
• Site visits
  ▪ Site visits are helpful to “frame issues” for the mediating judge.
  ▪ Mediator toured the facility at issue to better understand what was really going on, it “helped the judge come up with positions and strategies.”
  ▪ Site visits can be helpful (e.g., to learn comparables in a land valuation case).
• Use of experts
  ▪ Calling in experts during mediation is productive and useful, a very good tool.
  ▪ “Good to ask the experts to go face-to-face.”
  ▪ Informality of the court’s ADR process was extremely helpful. ADR was used to sort through factual issues raised by competing expert reports. Both parties formed positions, then the true “negotiation” toward settlement commenced.
  ▪ Bringing experts in can be fruitful.
• Ensuring proper authority
  ▪ Not necessarily helpful when judges go over the heads of the negotiating attorneys without full information.
  ▪ ADR judge should require parties to demonstrate that they “have someone available by phone to elevate issues/provide consultation” to be sure that a deal can be delivered.
  ▪ Upper management involvement is required for complicated cases.
  ▪ Up front, the mediator got the government to agree that someone in the agency & someone at DOJ would accept the terms and recommend them to ultimate decision maker to support.
• Location & “Setting the Scene”
  ▪ Providing separate breakout rooms and snacks had a very positive impact on the ADR.
  ▪ “Bake the parties cookies. It improves everyone’s moods.”
  ▪ In-person meetings are very important.
  ▪ Court should tout its technology options to encourage multi-party, multi-location negotiations.
• Use of ADR for Something Other Than Full Settlement
  ▪ “Success” should be a fluid concept. In some cases, where there are questions about both liability and damages, ADR is useful for issue narrowing.
  ▪ Narrowing issues to what can be mediated makes sense; it can drive resolution of the entire case.
• Preparation
  ▪ Mediator getting into the nuts and bolts of a case “adds to the judges’
    credibility and ability to mediate to settlement.”
  ▪ The amount of time and energy mediation judge has to devote to a case
    is key. COFC judges devote lots of time to settlement, and this is very
    helpful.
  ▪ The ADR judge took time to figure out what really needed to be
    resolved and what the parties’ positions were.
  ▪ Judges need to be super familiar with all materials submitted.
  ▪ Thanks to exhaustive preparation, toward the end of the ADR when the
    hardest points were being fought, “the ADR judge had enough
    prestige/credibility to force the parties to give up certain positions
    based on an assessment of litigation risks.”

ADR Case Assignment Methods

• The court should retain flexibility to allow an assigned judge to refer a case to
  a colleague.
• The court probably needs an assignment wheel for “optics,” though please
  give parties the ability to opt out.
• If an ADR wheel is considered, it is potentially dangerous. “Judges should be
  able to opt to participate or not.”
• In one instance, after consenting to ADR, the parties proposed one or two
  ADR judges to the assigned judge.

Comparisons to Other Fora

• ADR is “much easier to get to in the Boards,” and they settle most cases.
• The Federal Circuit has a staff of mediators; “I believe they are equally
  competent to judges.”
• Make sure to preserve judges’ ability to take their time and get deep into
  issues. “Other fora seem rushed in their mediation approaches in
  comparison.”
• Court’s approach to ADR is different given often difficult jurisdictional issues
  up front.

DOJ as a Party

• “I have been an attorney in this court for 26 years and every case in which
  DOJ agreed to ADR settled.”
• Sometimes it takes the DOJ quite a bit of time after ADR to agree to a
  settlement.
• “The real issue is the attitude of DOJ and DOJ’s reluctance to go to ADR. I can get a DOJ attorney to participate in informal settlement discussions much, much easier than I can get a DOJ attorney to agree to formal ADR.”
• The current COFC practice of assigning an ADR judge with the initial trial judge assignment is a very good policy but “not of much use if DOJ continues to refuse to participate.”
• The uncertainty of whether the Attorney General would sign off was discouraging.
• Generally, ADR is not appropriate per DOJ until after discovery, “given all the people who have to be convinced to support it.”
• Success of the mediation “depended on the motivation of the parties. In this instance, the government was very willing to participate in ADR given the nature of the project involved; the agency was pushing DOJ to get the issue resolved” with the participation of the affected plaintiffs.
• The mediating judge had to “go over” the DOJ trial attorney’s head when the government’s position wasn’t acceptable. This did not sit well with the trial attorney, but did get results.
• DOJ’s mediation tactics can be difficult if the agency is not motivated to settle. This made mediation extremely difficult in the case.
• The court doesn’t need a “small claims” procedure, because it won’t be worth DOJ’s time.
• The court’s ADR numbers are very limited by the necessity of DOJ’s participation.
• “In our settlement negotiation, statements were requested by the mediator, and an exchange of numbers that made it apparent the government didn’t have any authority to move from its last offer.” The mediating judge “took control” and “salvaged the situation” by putting out a “mediator’s offer” and gave the parties a day to consider it. It took some strong management of the DOJ attorneys to achieve settlement.
• The government’s unique concerns/ground rules should be outlined in advance.
• “Private parties often aren’t aware of the government’s constraints regarding releases and settlement authority.”

Who Should Mediate?

• The parties pulled in a professional mediator to work with a judge as a team. “It worked very well to blend the professional mediator with the judges’ intense legal knowledge.”
• “You need experienced people who understand how government works” (e.g., a great DOJ attorney and a judge with ample federal government experience).
• In some types of cases, such as Rails to Trails, it’s essential to have a judge as the mediator because it takes so long for DOJ to be responsive. “It’s necessary to have a judge pushing the process.”
• ADR in the court improved the quality of the eventual decision down the line, since two judges were involved.

Training/Education

• “Successful mediation depends on the skill of the mediator.”
• “Some judges need training on shuttle diplomacy and building trust relationships.”
• Good mediators get good concessions out of both parties.
• The mediator “just did what he was going to do,” without much flexibility in the approach. (Luckily it worked in this case.)
• Mediators need to be able to recognize when ADR just won’t work and “cut everyone’s losses.”
• “Some judges are not as adept as others in extracting numbers from parties separated from emotion.”
• The ADR judge gave the parties freedom to express what they thought was unreasonable about the other party’s position.
• The ADR judge was very informal at the start about asking parties to speak ex parte to flesh out issues, which set good tone with all the parties involved.
• Early neutral evaluation should be handled by the assigned judge who assesses the suitability of the dispute for ADR. “Part of ‘case management’ should be figuring out how to efficiently handle a case.”
• Frustration: when a party really doesn’t want to be there (i.e., “the government hopes the judge will beat up on the plaintiff”).
• Mediating judge needs to be encouraged/required to ensure all are there in good faith and will negotiate.
• Goal for a mediating judge should be to have the “marquee” event within three months of the assignment. Mediators should be willing to give ADR priority.
• ADR judges who give their time and access are very valuable, the big value to parties is to learn how a judge will respond to certain arguments.
• “Judges as mediators need to be less ‘hooked’ on the merits of a case once it goes to mediation.”
• Mediators “need people skills to steer out of emotion and focus on what needs to be done to reach resolution.”
• If parties come to ADR, generally they aren’t looking for more work. ADR needs to be viewed by judges as an alternative to litigation, with lighter workloads as a result.
• Great mediators “bring the parties to a solution that is a good result that no one is happy with.”
• Judges must know when a case is ripe, and keep the parties busy working on things until it’s time to settle. This guidance goes for the assigned judge as much as the ADR judge.
• The ADR judge tasked the parties with small negotiation tasks to keep them busy (e.g., reaching out to third parties with potential roles and creative solutions).
• ADR judge focused on the concept of “good faith” to steer negotiating positions.
• To great success, the ADR judge “used ex parte communications as an informal discovery process to learn the context coming into the ADR.”
• In unusual circumstances, ADR can be highly effective: “right issues, right parties, and right judge. Wish it happened more frequently that judges recognized the first two.”
• With electronic case management system, “ADR judges should be able to rely on information already on the record rather than directing creation of new reports.”
• Different sets of skills are valuable to ADR, so not all judges should do it.
• If new judges join the program as mediators, more education should be formalized. Consider having judges who are interested shadow a more experienced judge.
• Assigned judges should be able to identify complicated cases appropriate for referral to ADR, and should require the development of ground rules re: authority and approvals. This would only be appropriate after jurisdictional fights/SJ motions are denied and a trial is looming.
• Consider offering education for the bar/parties re: how and when to avail themselves of ADR, since most ADR comes following a request from the parties.
• Training new judges via shadowing may be unnerving for parties, but maybe shadowing mediators in other for a could be explored?
• Encourage all new judges to go to FJC training, do role plays, etc.
• “Educate new attorneys about the program periodically.”
• “Mediators should recognize when to take charge.” Judges with good strong personalities to direct action when the parties slow are the most helpful mediators.
Make the Program More Transparent

- How the ADR judge is selected must be transparent.
- The court should tout the ability to do things in innovative ways, i.e., with technology. Multi-agency and party negotiations are now possible, which can be huge for the court’s contract and bid protest jurisdictions.
- The court should “make available more standardized forms and information about the court’s and judge’s role” in ADR.
- If there is going to be a wheel, the public needs to know more about the process, how it works, etc.
- Forms and closeouts and statistics and process transparency will be helpful.

Usefulness in Different Types of Cases

- Bid protests
  - Mediating cases instead of remanding them to the Boards might make sense for bid protests.
- Takings & tribal claims
  - There are some cases that are fairly complicated in that “all parties involved know that there will be some legitimacy to claims made against government.” Parties often know enough to know they need ADR help, and allowing the parties to pick experienced ADR neutrals in those cases makes sense. (The “Ken Feinburg" type of cases.)
  - Tribal trust cases are a unique situation. ADR judge must be very familiar with record.
- Cases with claims not yet before the court/included in court’s jurisdiction?
  - Efficiencies are lost when the court cannot mediate all claims in a case.
  - May the court mediate claims that have to be brought in other courts given the COFC’s narrow jurisdiction? (To be researched: basis of the convention that Art. I judges don’t mediate Art. III claims.)
- Military pay cases
  - Rather than remanding a case, think about mediating it.
- Multi-party cases
  - Cases involving third parties present an interesting challenge re: how to have them participate meaningfully. This arises more often in certain types of cases (e.g., patent).
  - “ADR is great for multi-party cases.”
- Pro se ADR should not be considered, except for occasional tax or contract cases.