

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: November 15, 2016 Meeting Proceedings & Requests for Action

DATE: December 1, 2016

Greetings, members of the court's 2016 Advisory Council. Following the November 15, 2016 meeting of the full Advisory Council, we thank you for again taking time out of your busy schedules to convene and share your thoughts on the betterment of the court. Hearing about the work being considered by each of the Advisory Council's eight committees is always energizing, and we appreciate the opportunity that our meetings provide to generate new ideas in support of the court.

Below, you will find a summary of the proceedings of the November meeting and suggestions regarding what you may see from the eight committees at the next meeting scheduled for Friday, May 5, 2017, following the conclusion of the 2017 Anniversary Celebration Judicial Conference at the Turf Valley Resort in Ellicott City, MD. In addition to this summary of the current proposals and the minutes of the meeting, you may also view the meeting agenda and materials provided at the meeting by clicking [here](#).

I personally request that you act upon two matters presented in the proceedings:

- 1) As you will see in the report of the Bid Protest/Contracts Committee that begins on page 5 of the proceedings, I have joined Judge Williams and her committee to ask all of you for input by January 6, 2017, on that committee's upcoming project focusing on electronic discovery.

2) As discussed on page 6 of the proceedings, the Intellectual Property Committee has drafted proposed patent rules that Judge Braden would like to present to the court's Rules Committee for consideration. Before forwarding these rules from the Advisory Council, however, we are opening a comment period during which any member of the Council may submit his or her thoughts. Please review the proposal and provide your comments as directed by January 20, 2017.

Once you have reviewed the proceedings, if you have any questions or comments related to any issue, 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 logistical questions or need help finding materials, please contact Senior Staff Attorney Meredith Miller at (202) 357-6432.

And please do not forget to respond to the requests from the Bid Protest/Contracts Committee and the Intellectual Property Committee.



Proceedings of the November 15, 2016 Meeting United States Court of Federal Claims Advisory Council

State of the Court & the Bar Association

The Court

Following Co-chair Sarah Wilson's welcome to the attendees, Chief Judge Campbell-Smith expressed the court's appreciation for the support of all members of the court's bar as the court continues to operate with reduced resources. The court has great hopes that it will be able to welcome new judges to the bench in the coming year.

The Chief Judge reported on the status of the judges who were recalled to service in 2016:

- Judge Smith started his recall service on January 19, under a letter of recall that contemplated one year of service, and at this time, we anticipate that he will continue to serve for up to an additional year;
- Judge Hodges started on February 1, and will serve for one year under his current letter of recall; and
- Judges Yock and Futey served 90-day periods of recall that have now ended.

With the assistance of a committee of active judges who helped the Chief Judge formulate the contours of the court's recall requests, the judges on recall have been sharing some staff resources and, with their case work, helping the court address some of the deficits created by the vacancies on our active bench.

The Chief Judge and Senior Staff Attorney provided details regarding the court's upcoming 2017 Anniversary Celebration to be held May 4 and 5, 2017, at the Turf Valley Resort in Ellicott City, MD. The basic agenda can be found at <http://uscfc.uscourts.gov/conferences/2017/agenda/>, and will be updated with information on panel topics and speakers as the program is developed.

The Office of Special Masters

Chief Special Master Dorsey reported that the Office of Special Masters remains busy with a caseload that continues to grow. In 2015, approximately 950 petitions were filed. This year, the court expects 1200 or more new claims. The total number of open cases is approximately 1500.

The Special Processing Unit (“SPU”) is handling over 40% of OSM’s open cases. Cases are placed in the SPU if the case appears appropriate for expedited settlement. Six staff attorneys manage these cases under the Chief Special Master’s supervision. As of November 10, 2016, 1170 cases had been assigned to SPU since its inception on July 1, 2014. Of these, all but eight cases from 2014 have been resolved, and 600 petitions filed since January 1, 2015, have been resolved and are now closed. OSM thanks the petitioners’ bar, DOJ, and the OSM staff attorneys for the success of the SPU program.

OSM is now deciding awards for petitioners’ attorneys’ fees and costs. Previously, fee applications were largely resolved by stipulation, but that practice has recently changed. The special masters are working to increase transparency, fairness, and efficiency in this process. OSM has recently prepared and posted on its website ranges of forum hourly rates that should be of assistance to the bar.

Office of the Clerk of Court

Acting Clerk of Court Lisa Reyes reported on the most recent statistics available for the court. During fiscal year 2016, the court disposed of 569 complaints and 887 vaccine petitions. Except for a number of these cases in which no given amounts were claimed, the total amount claimed was \$995,275,774,000.00. Of the cases disposed, the court rendered judgments for claimants in the sum of \$803,511,996.95 (annuity amounts are included in this figure if available) of which \$169,639,838.47 carried interest. Under its non-monetary bid protest jurisdiction, there were 120 cases filed in fiscal year 2016 and the court disposed of 103.

Case filings increased in fiscal year 2016 for both general jurisdiction cases and vaccine injury compensation cases. General jurisdiction cases increased by over 9% while vaccine petitions increased by approximately 40%.

Many of the general jurisdiction case filings in fiscal year 2016 were of increased complexity and national significance. For example, 13% of general jurisdiction cases filed this past fiscal year contained multiple plaintiffs, and 10% involved intervening parties.

Total case terminations increased 11% from 1,314 in fiscal year 2015 to 1456 in fiscal year 2016. Pending cases at the close of the fiscal year increased 13% from 2634 on September 30, 2015, to 2967 on September 30, 2016.

The Bar Association

Bar Association President Altom Maglio reported that membership in the Bar Association continues to be strong, and that this year, the Board of Governors has been focusing on ways to appeal to more of the court's bar members by marketing group memberships to law firms.

Altom praised the work of Danielle Sgro and the Young Lawyers Division ("YLD") for its innovative and vibrant programming directed at attorneys recently admitted to practice before the court, and reported that the Bar Association similarly hosted highly successful education programs this year, including the most recent lunchtime program, "Help Us Help You: An Insider's Guide to Filing Tips and Procedural Innovations at the USCFC," on October 26, 2016.

Mr. Maglio reported that immediately prior to the Advisory Council meeting, he had attended the court and Bar Association's first-ever "Past Presidents and Chief Judges Working Lunch." He had convened the luncheon as a way to end his term as President by setting a course for the Bar Association to expand and grow into the future. The luncheon was highly successful, with attendees tackling a number of topic areas—including how to provide members with more services, how to grow the membership, and ideas for future programming—all while eating a delicious meal in the Tayloe dining room.

Implementation of Two Advisory Council Recommendations

Acting Clerk of Court Lisa Reyes reported on the status of two recommendations previously forwarded by the Advisory Council to the court: the Emeritus Leadership Committee's recommendation for the revision of the court's alternative dispute resolution ("ADR") program and the Bid Protest/Contract Committee's recommendation that the court publish guidelines for cases involving classified information.

Alternative Dispute Resolution

On August 1, 2016, following a public comment period, the court adopted the latest package of amendments to its Rules, including changes to the ADR program effectuated by amendments to RCFC Rule 16 and Appendix H. The court's longstanding "ADR pilot program" that automatically referred some cases to an ADR judge was ended, and an ADR Committee of judges was created, comprised of judges available to provide ADR services at the request of the parties. The committee is initially made up of Judges Wiese, Wheeler, Wolski, Williams, Firestone, Bruggink, Lettow, and Horn, and in the event of changes, the up-to-date list can be found at

<http://www.uscfc.uscourts.gov/court-committees>. The revised ADR rules encourage parties to work with their assigned judge to identify an ADR judge, though parties also retain the ability to engage third-party neutrals at no cost to the court.

Guidance on Cases Involving Classified Information

The Bid Protest/Contract Committee's proposal for new guidance was referred by the Chief Judge to the Clerk of Court following the May 2016 Advisory Council meeting. The Clerk's Office subsequently published two guidance documents: internal guidance for court staff, the "Chambers Guide to Classified Information," which is available on the court's intranet; and "Guidelines for Cases Involving Classified Information," posted on the court's public website at <http://www.uscfc.uscourts.gov/sites/default/files/FINAL-Public-Guide-to-Classified-Information.pdf>.

Committee Reports

The chairs of the Advisory Council committees were asked to briefly summarize the status of their committees' meetings and discussions, highlighting potential projects of interest for 2017 and beyond.

Bid Protest/Contracts Committee

Judge Williams reported that the Bid Protests/Government Contracts Committee is looking for its next project and has two priorities following a meeting of the committee on October 5, 2016.

The first priority is to improve data collection by the court. Judge Williams noted that the committee met with representatives from the Clerk's Office and Acting Clerk of Court Lisa Reyes during its October 5, 2016 meeting to discuss more robust data collection efforts and the possibility of changes to the court's cover sheet to facilitate that effort.

The second priority of the committee is to study the discovery of electronically stored information ("ESI") in the court, in light of upcoming amendments to the FRCP. While the committee has discussed the possibility of promulgating model rules for ESI discovery in the court, the committee is not sure, at this preliminary stage, what form the final recommendation should take. Judge Horn proposed the idea of developing a model clawback agreement, noting that there seems to be a great deal of confusion regarding the clawback rules.

Emeritus Leadership Committee member Lew Wiener (Sutherland) proposed the possibility of collaborating with the Electronic Discovery Institute ("EDI") in some fashion. Mr. Wiener noted that EDI publishes a handbook that is very helpful in his

practice, and offered to forward the materials via Senior Staff Attorney Meredith Miller to any Council member who might be interested in reviewing it. Judge Williams suggested that the judges might benefit from training by EDI in the future, and the court will further explore this recommendation on behalf of the judicial officers.

The committee update concluded with widespread interest from Council members in holding a working meeting on electronic discovery issues during the May 4-5, 2017 Judicial Conference. To this end, Judge Williams suggested that she would like to solicit input from all Council members now, in order to move her committee's work forward in the interim. Here is the formal request from her and the Chief Judge:

Greetings, members of the Advisory Council.

Thank you for your enthusiastic response to the Bid Protest/Contracts Committee's project on ESI discovery. David Ralston and Bondurant Eley are heading the subcommittee spearheading the project, and the court's staff personnel are Meredith Miller and Taryn Fry.

If you have any thoughts or suggestions as to how we might proceed, please email thoughts and comments to Meredith (meredith_miller@cfc.uscourts.gov) and Taryn (taryn_fry@cfc.uscourts.gov) by January 6, 2017. They will compile the input and we will discuss it during the Committee's next meeting in January.

In addition to considering a proposed model order on ESI discovery, Judge Horn proposed that we also consider recommending a model clawback agreement and order. We welcome any further thoughts and comments on that proposal as well.

*Sincerely,
Judge Williams & Chief Judge Campbell-Smith*

Intellectual Property Committee

Chief Judge Campbell-Smith opened the Intellectual Property Committee update by acknowledging the distinguished service and impending retirement of committee member John Fargo, Director of the Intellectual Property Staff at the Department of Justice, on December 31, 2016. Mr. Fargo received a standing ovation from the Advisory Council.

Judge Braden introduced two new committee members: Joshua Kresh (Fried, Frank, Harris, Shriver & Jacobson LLP) and Gary Hausken (DOJ). Judge Braden acknowledged the work done by committee members on the Third Edition of the

Patent Case Management Judicial Guide, a copy of which was given to all council members in attendance. The *Guide* was authored by committee member Professor Peter S. Menell in collaboration with members John Fargo and Michael Sawyer (Covington & Burling).

The IP Committee made available a report at the meeting which is enclosed or can be found by clicking [here](#). The report includes a list of patent decisions issued by the U. S. Court of Federal Claims from October 1, 2004, to September 30, 2016, as well as a spreadsheet detailing the IP docket during that period.

Also included with the report is a set of proposed patent rules that have been developed by the IP Committee and were presented for consideration by the full Advisory Council at the November 15 meeting. In the absence of any objections, the proposal will be formally transmitted by the IP Committee to the Chief Judge and Co-chair Sarah Wilson, to be subsequently forwarded to the Rules Committee for consideration in early 2017.

Judge Braden and the Chief Judge request that you please review the enclosed draft patent rules and provide comments to Staff Attorney Angelica Austin (angelica_austin@cfc.uscourts.gov) by January 20, 2017.

Military Claims/Civilian Pay Committee

Judge Horn reported that the Military Claims/Civilian Pay committee is working to address separately emerging issues in the two distinct and quite disparate subjects under its jurisdiction: military pay claims and civilian pay claims.

With respect to military pay claims, the committee is planning to discuss implementation of an educational program focusing on the differences between military boards in the different service branches. The names of comparable boards vary, making it difficult for practitioners to understand the differences in rules and practice before them. Judge Horn also noted that attorney Phillip Carter (Fluet Huber and Hoang, PLLC) has been invited to present a paper on the subject of military pay at the judicial conference.

With respect to civilian pay claims, the committee is investigating the use of damages models in other litigation contexts—e.g., in housing cases—to learn if similar approaches may be useful in expediting litigation of damages in civilian pay cases.

Takings/Tribal Claims Committee

Judge Wheeler reported that at its last meeting, the Tribal/Takings Committee focused on preparing programming for the 2017 Anniversary Celebration Judicial Conference. The committee plans to present breakout programming focusing on class actions using *Haggart vs. United States*, 809 F.3d 1336 (Fed. Cir. 2016), as a reference point. They also intend to explore the use of class actions in the Court of Federal Claims since RCFC Rule 23 was implemented.

The participants in the last meeting also aided committee member Professor Greg Sisk in his efforts to develop an academic paper to be presented at the conference featuring the top ten most influential cases from the court.

Tax Committee

Judge Lettow reported that the Tax Committee is currently pursuing four projects:

- David Pincus (DOJ) has drafted a proposal to revise RCFC Rule 9(m) to clarify protections for personal information when pleading a tax case.
- The committee is monitoring the interim rules proposed by the Tax Court to implement the partnership tax amendments adopted in the Bipartisan Budget Act of 2015. As this issue unfolds, the committee may develop a proposal to change RCFC Appendix F to update the partnership tax procedures in the court.
- The committee is in the process of developing model pretrial orders on stipulation that could be added to RCFC Appendix A.
- The committee is preparing breakout programming for the judicial conference.

Vaccine Committee

Special Master Corcoran reported that the Vaccine Committee remains focused on enhancing efficiency in the processing of motions for attorneys' fees and costs. To this end, the committee is about to propose a standardized form to be completed by all petitioners' attorneys prior to requesting compensation for attorneys' fees and costs, which will contain all of the data that may be relevant to a fees determination.

The committee has also posted on the U. S. Court of Federal Claims website a link to an hourly rate fee schedule of approved hourly in-forum rates for the years 2015 and 2016: <http://www.uscfc.uscourts.gov/sites/default/files/Attorneys-Forum-Rate-Fee-Schedule-2015-2016.pdf>.

Moving forward, the committee intends to focus on ways to improve front-end case management, with an eye toward making all supportive documentation available as soon as possible after petitions are filed. The committee also intends to address back-end case management issues, with a particular focus on ensuring that litigants follow all applicable procedures so that cases are processed as efficiently as possible. Judge Braden suggested that the committee consider appointing an ombudsman to assist the Office of Special Masters in achieving the forward-thinking goals identified by Special Master Corcoran.

Emeritus Leadership Committee

In the absence of Judge Bruggink, the Chief Judge, Meredith Miller, and Jerry Stouck (Greenburg Traurig, LLP) reported that the Emeritus Committee has been devoting significant time and creativity in developing the historical plenary programming for the 2017 Anniversary Celebration Judicial Conference. Committee members have met twice with judges of the court to brainstorm content and materials in support of the event.

Law Clerk Alumni Committee

Senior Staff Attorney Meredith Miller first introduced the newest member of the Law Clerk Alumni Committee, Gary Campbell (Pepper Hamilton), former law clerk to Judge James Turner.

The committee continues to extend the reach of the LinkedIn account called “U.S. Court of Federal Claims Current and Former Law Clerks,” which now boasts 190 members.

At the request of the Chief Judge and Bar Association President Altom Maglio, the committee has begun developing a template for a Court of Federal Claims Speakers’ Bureau. The committee’s first task has been to learn about how other courts and/or bar associations provide outreach about their work. The committee has identified the following areas of particular relevance to development of a court Speakers’ Bureau:

- the types of audiences where programming about our court would be welcome, e.g., law schools, local bar associations, industry associations;
- topics that would be of interest to these audiences, and how the court and Bar Association can ensure that consistent talking points are available across the nation, regardless of who is representing the court and the bar;
- the ethical guidelines that would apply to participation of the court’s judicial officers in such events; and

- scheduling challenges that our court would face given the nature of our judicial officer's limited and sometimes unpredictable travel outside the Washington, DC area (e.g., cases settle on the eve of trial, trials are postponed).

Following up on a suggestion made by Council members Scott McCaleb (Wiley Rein LLP) and Jerry Stouck (Greenburg Traurig LLP), the court has reached out to the Federal Judicial Center ("FJC") to request its support to produce a series of short educational video programs featuring the court and its history, practice, and jurisdiction. If the FJC agrees to participate in the project, it is anticipated that the videos could be made available to members of the court's bar and the public to help them understand the uniqueness of our court, and could be used as part of the programming offered by the Speakers' Bureau.