

UNITED STATES
COURT OF FEDERAL CLAIMS

PROPOSED AMENDMENTS TO THE
COURT'S ALTERNATIVE DISPUTE
RESOLUTION PROCEDURES



Attached are excerpts from the
Proposed Amendments to the Rules of the
United States Court of Federal Claims
posted for public comment on Friday, April 29, 2016.

Proposed Amendment 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 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 in negotiating 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, mini-trials, outcome prediction assistance, and non-binding arbitration. Additionally, parties may select a private sector ADR provider to serve as a private third-party neutral.

In addition to these guidelines, the Office of Special Masters has established its own ADR guidelines. See Section V, Chapter 4 of the Guidelines for Practice under the National Vaccine Injury Compensation Program (Jan. 7, 2016).

2. Terms.

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

(b)(a) 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 ~~constraints-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 needless expense and delay.~~ Use of a settlement judge permits 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-Party Neutral Neutrals. 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 any qualified individual to serve as a third-party neutral who is not on the court's list.

(d) Mediation. A flexible and voluntary dispute resolution procedure in which a settlement judge or a third-party neutral, acting as ~~a~~ 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 ~~respective 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. Early in the litigation-preferably before or shortly after the filing of the Joint Preliminary Status Report-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 the parties agree to early neutral evaluation, a settlement judge will be assigned or the 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.~~

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

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

3. Procedures. RCFC 16 and Appendix A, paragraphs 3(f), 4(f), and 4(i), set out the parties' obligations with respect to consideration of ADR. At any point in the litigation, however, the parties may notify the ~~assigned judge court~~ 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) If the parties and the assigned judge agree that ADR would be beneficial, the assigned judge will issue an order directing the clerk of court as follows:

(1) to assign the case to an ADR judge who serves on the court's ADR Committee upon the agreement of the parties and both judges; or

(2) to refer the case to a third-party neutral upon whom the parties have agreed, in which case the order will additionally provide contact information for the third-party neutral.

(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 settlement 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.

(d) All orders issued by the settlement judge or third-party neutral and all written communications from the parties will be filed in a separate, confidential docket. All docket entries may be viewed by the public but the content of all filings will be sealed and may be viewed only by the settlement judge or third-party neutral. ~~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.~~

Information that is otherwise discoverable or admissible does not lose that characteristic merely because of its use in the ADR proceedings.

(e) In the event a party or counsel fails to maintain the confidentiality of any documents generated solely for the ADR proceeding or any communications made within the scope of the proceeding, the assigned judge may issue an order for sanctions pursuant to RCFC 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.

(f)(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.

(g)(f) During the ADR process, the matter will remain on the docket of the assigned judge and the assigned judge will require the parties to file periodic reports with the assigned judge indicating the status of the ADR proceeding.

(h) At the conclusion of the ADR process, the settlement judge or 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 in whole or in part and the next steps, if any, that remain in the litigation—the matter has been settled. The details of the ADR proceeding will remain confidential between the parties and the settlement judge or third-party neutral.

(i) Within 14 days after the entry of judgment following an ADR settlement, the clerk of court may request the parties to respond to 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.

(j) **Cases Filed Under 28 U.S.C. § 1498.** For most cases filed under 28 U.S.C. § 1498, the assigned judge may suggest ADR at any time—including following the court's claim construction decision. After claim construction, unless the parties agreed to ADR earlier in the case, the 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. To help minimize costs, the court may determine what discovery is needed. The procedures enumerated herein may be modified as appropriate at the discretion of the settlement judge or third-party neutral.

(1) Patent Cases.

(A) The following core information should be disclosed by plaintiff in an ADR proceeding involving a claim of patent infringement:

(i) for ADR proceedings in which liability is an issue, 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 devices, systems, or processes; and

(ii) a statement of plaintiff's contentions regarding the priority date, and for any patents governed by the patent act predating the America Invents Act of 2011, plaintiff's contentions, if any, regarding the date the

invention was conceived and reduced to practice. If plaintiff claims an earlier conception date, it must proffer documents to support conception and reduction to practice.

(B) The following core information should be disclosed by defendant in an ADR proceeding involving a patent:

- (i)** a listing of contracts awarded, including use or manufacture of the accused devices, systems, or processes and the amount of the awarded contract. Where possible, the contracts should be produced; and
- (ii)** a preliminary identification of defendant's invalidity contentions, including prior art references.

(2) Copyright Cases.

(A) The following core information should be disclosed by the parties in any ADR proceeding involving a copyright:

- (i)** a copy of a valid copyright registration and deposit, together with any correspondence with the Copyright Office; and
- (ii)** when compensatory damages are sought, a statement of the estimated amount of damages claimed.

(B) The following core information should be disclosed by defendant in any ADR

proceeding involving a copyright:

- (i)** identification of all uses of the subject work by defendant, including any contractual agreements; and
- (ii)** a preliminary identification of any invalidity and/or fair use contentions.

Rules Committee Notes

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2016 Amendment

Appendix H has been amended to more comprehensively describe the range of available ADR techniques and to outline the administrative procedures involved in the initiation and pursuit of ADR proceedings. In particular, Appendix H now recognizes that referral of a case to ADR will proceed pursuant to an agreement between the parties and the assigned judge that names either a consenting judge selected from the court's ADR Committee to serve as the ADR judge or a qualified individual to serve as a third-party neutral. Additionally, Appendix H provides for the maintenance of a separate, confidential docket for the filing of all orders, documents, and other communications exchanged during the ADR process with access, by both the public and the parties, to be restricted to viewing the docket entries only. Further, Appendix H stresses the need to maintain confidentiality of all ADR disclosures, permits the imposition of sanctions for the failure to maintain that confidentiality, and notes that documents otherwise discoverable do not lose that character because of their use in ADR. Finally, in regard to patent and copyright cases, Appendix H identifies the core information parties should disclose, including facts and contentions, to meaningfully engage the ADR process.

Proposed Amendment to Rule 16

Rule 16. Pretrial Conferences; Scheduling; Management

(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.

(2) ***Improper Disclosures.*** On motion or on its own, the court may issue any just orders, as specified above, if a party or its attorney to an Alternative Dispute Resolution (ADR) proceeding discloses the following information to a judge, counsel, or party not a part of the ADR proceeding:

- (A) documents or materials produced solely for the ADR proceeding; or
- (B) communications made within the scope of the ADR proceeding.

(3)(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.

(g) **Additional Pretrial Procedures.** See Appendix A to these rules (“Case

Management Procedure”) for additional provisions controlling pretrial procedures.

(As revised and reissued May 1, 2002; as amended Nov. 15, 2007, Nov. 3, 2008, Aug. 1, 2016.)

Rules Committee Notes

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2016 Amendment

RCFC 16(f) has been amended by adding a new paragraph (2) to include as a sanctionable action the disclosure of information produced in connection with an ADR proceeding conducted pursuant to Appendix H.