Intellectual Property Subcommittee Advisory Council
ADR Proposal

Introduction

This proposal discusses the use of Alternative Dispute Resolution ("ADR") for certain intellectual property cases filed in the United States Court of Federal Claims. In practice, the majority of these cases settlefter claim construction as the result of direct counsel-to-counsel negotiations, not ADR. Where, however, direct counsel-to-counsel negotiations do not resolve the parties' claims, *i.e.*, generally small investors and *pro se* plaintiffs, court-proposed ADR may facilitate settlement.

We have considered and discuss herein three factors relevant to the use of ADR in intellectual property cases: (1) what type of ADR has been effective; (2) when ADR should be proposed; and (3) what core information should be exchanged by parties to facilitate ADR.

What Type Of ADR Has Been Effective?

Over the past ten years, mediation has been the most effective method of ADR in settling cases under 28 U.S.C. § 1498. This experience dictates that mediation is the preferred method of ADR to resolve intellectual property cases in the United States Court of Federal Claims.

When Should ADR Be Proposed?

Patent Cases

In patent infringement cases, claim construction often marks a significant milestone in the progress of a case and should occur within the first year of a patent case.[1] Construction entails the interpretation of key words, terms, or phrases in a patent claim and usually is determinative of the court's subsequent infringement determination. Therefore, ADR first should be suggested by the court at the post-*Markman* decision status conference, following the court's claim construction decision.

In that regard, the court should not authorize discovery until the claim construction and initial ADR efforts, if any, are completed. This management technique will help minimize the growing cost of discovery that, in fact, may not be needed.

A second ADR opportunity arises after the infringement decision, because if the case proceeds to damages, the parties face substantial expense in hiring damages experts.

[1] According to the most recent statistics from the Administrative Conference, from 2000 to July 2015, 43,450 patent cases were terminated nationwide; 3,721 were terminated after claim construction. Of the 39,729 remaining cases, 64% were terminated after a jury trial, and 36% after a bench trial.

Therefore, we recommend that the court suggest ADR mediation after claim construction and/or after a liability decision.

Copyright Cases

In copyright cases, the Complaint and Answer typically will provide much of the core information required for effective ADR, including the plaintiff's infringement allegations and the Government's defenses, such as fair use. Therefore, we recommend that the court suggest ADR mediation after the Government files an Answer or after initial discovery that should be limited to the production of core information, such as a valid copyright registration and deposit, and documentation of any use of the work by the Government. A second juncture for the court to suggest ADR mediation is after a determination of liability, particularly in cases where compensatory, as opposed to statutory, damages are sought.

What Information Exchanges Should Occur To Facilitate ADR?

A preliminary exchange of core information both can facilitate ADR and advance the case. The court should require and monitor a limited exchange of information to avoid the expense involved in traditional discovery.

Patent Cases

The following core information should be disclosed by the plaintiff:

- Preliminary identification of accused devices, systems, or processes, and preliminary infringement contentions in the form of a claim chart, showing how the plaintiff contends claims infringe on the accused device. This type of information will provide an indication of why the plaintiff is requesting construction of specific claim language.

- A statement of the 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 the plaintiff's patent application. If the 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 the Government:

- 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 the Government's invalidity contentions, including prior art references.

Copyright Cases

The following core information should be disclosed by the plaintiff:

- 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 the Government:

- Identification of all uses of the subject work by the Government, including any contractual agreements.

- A preliminary identification of any invalidity and/or fair use contentions.

Conclusion

The foregoing summarizes the principal considerations in adopting ADR mediation for intellectual property cases. For further reference, a list of resources that discuss the use of ADR in intellectual property cases follows:

Thomas D. Barton and James M. Cooper, *Advancing Intellectual Property Goals Through Prevention and Alternative Dispute Resolution*, 43 CAL. W. INT'L L. J. 5 (2012);

Scott H. Blackmand and Rebecca M. McNeill, *Alternative Dispute Resolution in Commercial Intellectual Property Disputes*, 47 AM. U. L. REV. 1709 (1998);

Michael H. Diamant, Philip R. Bautista, and Kahn Kleinman, LPA, *Strategies for Mediation, Arbitration, and Other Forms of Alternative Dispute Resolution*, SM017 ALI-ABA 235 (October 2006);

Nancy Neal Yeend and Cathy E. Rincon, *ADR and Intellectual Property: A Prudent Option*, 36 IDEA 601 (1996); and

WIPO Arbitration and Mediation Center (http://www.wipo.int/amc/en/).

ADR comments from the Military and Civilian Pay Committee of the Advisory Council

The Military Pay representatives were each dubious of the value of ADR to their universe of cases. The main reason is that in most cases the possibility of remand and the need to have the military implement revisions to pay and/or disability status with attendant changes to benefits and/or dollars due, reduces the usefulness of ADR in military pay cases. None, however, were willing to rule out the possibility of ADR in the appropriate case.

In Civilian Pay cases, there was agreement that ADR is a frequently utilized tool for individual cases and for class actions. The main issue is when to undertake possible ADR, with a general view by most that the beginning of the case is often too early. It takes time to identify all the plaintiffs, especially for a class action. Moreover, issues regarding liability have to be defined and resolved, often through motion practice or, generally, relatively brief trials, and a certain amount of discovery is generally preferable before serious consideration of undertaking ADR is appropriate. The possible exception could be if the liability issues are relatively established through Federal Circuit precedent and the new case raises the same issues, but with different plaintiffs. The most frequent and often successful use of ADR for civilian pay matters is regarding damages. Although the specific damages are different for each plaintiff, ADR can be used to develop a damages settlement template, and then that template can be used to calculate the specific damages for each plaintiff. ADR also can be appropriate if there is liability uncertainty for both sides, or even for just one side prior to a determination of liability by the court. In sum, the civilian pay cases are often, although certainly not always, ripe for utilization of ADR. Determination of when to initiate serious ADR proceedings has to be up to the parties and the docket assigned judge. Appropriate ADR assistance by a judge not assigned to the case can take the form of damages discovery assistance, encouraging the parties to keep to document and information exchange schedules, or in-person ADR sessions for all or part of a case, including liability or damages alone or both liability and damages.

Statement of the Committee on Bid Protests and Government Contracts

Encouraged by the report of the Advisory Council Emeritus Leadership Committee on the results of the 2015 ADR Multiple Case Study, the Committee on Bid Protests and Government Contracts has discussed the feasibility of ADR in the Court's bid protest matters. It is the consensus of the Committee that ADR has limited use in these cases given the very tight time frames within which protests must be conducted. Our experience is that many issues in these matters are resolved, and some protests are disposed of entirely, by informal discussions among the parties. But, because contract award or performance is often held up while a protest is being heard, and because effective remedies become more difficult as time passes, speedy resolution of these matters is essential. As a result, the judges of the Court necessarily establish aggressive schedules that, as a practical matter, very rarely contain time for a separate ADR proceeding. Further, the use of ADR in litigation involving award of a contract is problematic because parties not involved in the protest may also seek to compete for the contract at issue and thus be interested in the questions being disputed. Settlement among the litigants, therefore, may not preclude further protests on the same procurement.

United States Court of Federal Claims

MEMORANDUM

TO: Chief Judge Patricia E. Campbell-Smith, Chair
Sarah L. Wilson, Co-chair
Emeritus Leadership Forum, Judge Eric Bruggink
Advisory Council (2014-2015)

FROM: Nora Beth Dorsey, Special Master and Chair
Vaccine Committee Members: Daniel Troy, Curtis Webb, Danielle Strait, Professor Ed Kraus, Professor Betsy Grey, Emily Levine, Vincent Matanoski, Wonkee Moon, Francina Segbefia

CC: Chief Special Master Denise Vowell
Meredith Miller, Senior Staff Attorney

RE: Vaccine Committee Recommendations for ADR

DATE: May 1, 2015

Pursuant to its charge, the Vaccine Committee has held a total of four meetings to discuss recommendations on the Court's use of Alternative Dispute Resolution as it relates to the Vaccine Program.[1] In the course of these meetings, the Committee members heard from Chief Judge Patricia Campbell-Smith about the role of the Vaccine Committee. We also discussed the ADR survey results completed by members of the bar, and reviewed information and data from the GAO, DOJ and OSM regarding the number of vaccine cases that are resolved through traditional settlement negotiations and ADR. The data indicate that approximately 80% of claims in the Vaccine Program resolve through settlement, with most of these claims resolved through traditional informal settlement negotiations between counsel for the parties. A small number of cases are referred to ADR, typically mediation. With regard to settlement, we received a report from Chief Special Master, Denise Vowell, regarding the state of OSM, the trend of the increasing caseload, and the new Special Processing Unit (SPU) developed in response to the increased caseload. We also discussed the effect of the SPU on petitioners, the DOJ, and HHS, and reviewed articles and literature on ADR. We have held several roundtable discussions about the use of ADR in the Vaccine Program in general.

The current ADR options and procedures in the Vaccine Program are set forth in the Guidelines For Practice Under The National Vaccine Injury Compensation Program, revised May 28, 2014, available on the Court's website (www.uscfc.uscourts.gov) and attached as Exhibit A. These Guidelines were drafted with input from both the petitioners' bar and attorneys from DOJ, which represents the respondent. The Guidelines cover a number of topics that the Committee members discussed, including the types of ADR options available, the selection of a mediator,

[1] Copies of the minutes of these meetings are available upon request.

issues of confidentiality, and the settlement approval process by Health and Human Services and DOJ. These topics are sufficiently covered by the Guidelines and, therefore, not addressed here.

In addition to reviewing the issues covered in the Guidelines, the Vaccine Committee addressed other relevant areas. In particular, the Committee identified a significant need to educate attorneys, especially new attorneys, about the opportunities for ADR within the Vaccine Program. The Committee also affirmed the principle that ADR should be a consensual and voluntary process. Lastly, the Vaccine Committee recommends tracking the number of cases that are referred to ADR. We recommend the following suggestions for improving the ADR process in the Vaccine Program.

1. **Communication and Education**

   a. **Court Website** – The Guidelines for Practice Under the National Vaccine Injury Compensation Program devote a section to the discussions of settlements and ADR, and are available on the Court's website, under the section on Vaccine Claims, at www.uscfc.uscourts.gov/vaccine-programoffice-special-masters. The Vaccine Committee recommends clearly identifying the portion of the Guidelines that discuss ADR, found in Section V, chapters 1-5, pages 32-41, and placing a link to this section of the Guidelines, or otherwise making them more visible and accessible.

   b. **Judicial Conference** – The Vaccine Committee recommends devoting a session of the Vaccine Program portion of the Judicial Conference in the fall of 2015 to the topic of current practice and trends in settlements and ADR in the Vaccine Program.

   c. **Special Master Encouragement** – The literature suggests that judicial encouragement has an impact on whether lawyers discuss ADR with their clients and whether they use ADR.[2] Recognizing that each case is unique, special masters should be encouraged to discuss ADR with the parties, as appropriate.

2. **Voluntary nature of ADR** – The Vaccine Committee members agree that referral to ADR should occur only with consent of both parties.

3. **Data** – In order to ensure that the Court and OSM can accurately track cases referred to ADR, there should be an order referring a case to ADR filed on CM/ECF for every case that is referred to ADR, including all cases referred to ADR with an outside mediator. The parties should notify the Special Master when they have agreed to ADR with an outside mediator, so that an appropriate order can be filed.

[2] Roselle L. Wissler & Bob Dauber, Leading Horses to Water: The Impact of An ADR "Confer and Report" Rule, 26 The Justice System Journal 3 (2005); Roselle L. Wissler, Barriers to Attorneys' Discussions and Use of ADR, Ohio State Journal on Dispute Resolution, Vol. 19:2, p. 492-494 (Fall 2003).

Since the settlement process in the Vaccine Program is evolving, and the SPU is a new program, the Committee will continue to review data on settlements, ADR, and the SPU and revise these recommendations as appropriate.

GUIDELINES FOR PRACTICE

UNDER THE

NATIONAL VACCINE INJURY COMPENSATION PROGRAM

Revised May 28, 2014

These revised Guidelines represent an effort by the Office of Special Masters, with input from both the petitioners' bar and counsel for the respondent, to provide the bar and pro se petitioners with information that will assist in the prompt and efficient resolution of claims submitted under the National Childhood Vaccine Injury Act ("Vaccine Act"), as amended, 42 U.S.C. §§ 300aa-1 to -34.

Practitioners are cautioned that these Guidelines provide a practical explanation of how to proceed under the Program and are not intended to replace or supplement the Vaccine Act or the Vaccine Rules. The Guidelines do not mandate particular practices or procedures but instead inform practitioners of best practices in preparing and presenting their clients' cases before the Office of Special Masters.

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SECTION V. SETTLEMENTS AND ALTERNATIVE DISPUTE RESOLUTION ("ADR")

Chapter 1. Trends in Settlement in the Vaccine Program.

A significant number of Vaccine Act cases (other than those filed in the Omnibus Autism Program) are resolved by settlement, although the facts and circumstances of some cases may make settlement unlikely. Settlements are an expeditious and efficient method for resolving appropriate cases. Settlements generally occur (1) within the first 12-18 months after the petition is filed; (2) after the Rule 5 status conference; or (3) after a decision on entitlement. Settlements prior to a decision on entitlement generally represent so-called "litigative risk" settlements, in which a party's likelihood of prevailing on the merits modifies the valuation of potential damages. In litigative risk settlements, the respondent does not concede that vaccines are responsible for petitioner's injuries, or that petitioner has satisfied the criteria for compensation, but is willing, without formally conceding entitlement, to pay some compensation.

Chapter 2. Settlements.

A. Reasons to Engage in Settlement.

Settlements significantly reduce the time period between filing of the petition and ultimate receipt of compensation. Both counsel are encouraged to consult with their respective clients soon after the petition is filed regarding settlement. A petitioner should feel free to initiate settlement discussions with respondent's counsel at any point after a petition is filed.

Even with expeditious processing, however, a well-documented but contested off-Table injury case is unlikely to reach a ruling on entitlement in less than 24 months. If entitlement to compensation is found, additional time is required for the damages phase before compensation can be awarded. Many cases take much longer than 24 months to reach a causation decision. Updating and filing records, obtaining expert reviews and opinions, scheduling and conducting hearings, filing briefs, and issuing an entitlement decision take considerable time and effort and may ultimately result in a decision adverse to petitioners.

If a party proposes settlement, that fact will not be considered by the presiding special master should settlement negotiations fail to result in resolution of the case.

B. Initiating Settlement.

Some special masters encourage settlement discussions between the parties soon after the case is filed. Others expect the parties to indicate whether settlement discussions are desired. When the parties engage in early settlement negotiations, most special masters are willing to assist the process by extending deadlines for filing documents and reports to avoid an unnecessary expenditure of resources, or to refer the matter to another special master for mediation purposes. Parties are encouraged to

contact the assigned special master whenever they enter into good faith settlement discussions or desire the guidance or assistance of the special master regarding potential negotiations or settlement. Either party should feel free to initiate settlement discussions at any point after a petition is filed.

To initiate participation in ADR, the parties should contact the presiding special master to request suspension of existing deadlines and the assignment of a mediator. Chapter 4 below contains more information about ADR in general and the types of ADR available.

C. Obtaining Information to Facilitate Settlement.

Often, respondent will need additional documentation from petitioner unrelated to entitlement to enter into any meaningful discussions and to make a reasonable response to a settlement demand. Such documentation may include health insurance plans, information regarding Medicaid payments, income tax returns or Social Security account statements (documenting past earnings), and out-of-pocket health care costs. If a petitioner's counsel anticipates making a settlement demand, early efforts to obtain these documents from a client are necessary so that meaningful discussions can occur.

The Vaccine Program section of the Court of Federal Claims website (www.uscfc.uscourts.gov) can provide a great deal of information about settlements in other cases involving the same vaccines and injuries. However, decisions approving voluntary settlements generally do not include information regarding the extent of the injury claimed or the economic loss suffered.

Chapter 3. Expedited Settlement Track Cases.

A. Special Master Referral.

On recommendation of the parties, special masters may refer appropriate cases to an expedited settlement track. The purpose of the expedited settlement track is to identify cases that are amenable to early resolution through settlement and to minimize litigation costs. As settlement is a voluntary process, a referral to the expedited settlement track will occur only with agreement by both parties.

B. Appropriate Cases.

Appropriate cases for the expedited settlement track include, but are not limited to, cases in which:

1. The petition provides a thorough and concise summary of the allegations on which the claim is based;

2. The petition is filed with a complete set of medical records (including birth and developmental records for infants, and at least three years of pre-vaccination records for adolescents and adults) and the required affidavits;

3. The injury alleged is clearly supported by the medical records;

4. There is a substantial body of case law likely to be influential in resolution of the case, or there is readily available medical literature or other reliable scientific evidence supporting a causal relationship between the vaccine and the alleged injury; and

5. Damages are relatively limited or are otherwise not difficult to ascertain (*i.e*., substantiated by documentation without a need for expert analysis).

If a petitioner believes his or her case is appropriate for the expedited settlement track, the petitioner should indicate this belief either in the petition, in a status report filed prior to the initial Rule 4 conference, or in a motion requesting expedited settlement (using the CM/ECF event "Motion for Fast Track").

If respondent concurs that the case is appropriate for referral to the expedited settlement track, the government will so inform the special master, either during the initial status conference or by filing a joint motion requesting expedited settlement (using the CM/ECF event "Motion for Fast Track") within 30 days after the initial status conference.

If the petitioner has not indicated a position on referral prior to the initial status conference, the respondent may confer with counsel for the petitioner, or with a *pro se* petitioner, and suggest that the case appears appropriate for referral. If the parties agree, they will notify the special master, either in the initial status conference or in a joint status report filed within 30 days after the initial status conference.

C. Effect of Referral.

If on the recommendation of both parties the special master determines that the case is appropriate for the expedited settlement track, the special master will effect referral by an order that:

1. Suspends all further deadlines to allow the parties a period of time in which to engage in settlement negotiations;

2. Directs the parties to file a joint status report (using the CM/ECF event "Fast Track Settlement Status Report") within 90 days after the date of the order reporting their progress in reaching an agreement to settle the case; and

3. Directs the parties to file additional status reports (using the CM/ECF event "Fast Track Settlement Status Report") every 30 days thereafter, up to 180 days from the date of the referral order.

D. Activities During Expedited Settlement Referral.

At any time during the 180-day period, the parties may request ADR assistance, and the assigned special master will follow the procedures for ADR referral set forth in Chapter 4 below.

If at any point during the 180-day period it becomes evident that the case is not amenable to an expedited settlement, the parties may request that it be taken off the expedited settlement track and returned to the regular litigation track. If the parties have not reached settlement by 180 days after referral, the case will automatically be returned to the regular litigation track and the special master will consult with the parties to establish a schedule for moving the case forward.

Failure to settle a case while in the expedited settlement track will not preclude further settlement discussions while the case proceeds.

Chapter 4. Alternative Dispute Resolution Options.

A. ADR in General.

ADR is a term widely used to describe methods and techniques of facilitating settlement of disputes without resort to formal court proceedings. Entry into any type of ADR proceeding is always voluntary, although a special master may strongly encourage the parties to consider ADR because it has been highly successful in resolving Vaccine Act cases. Generally, ADR methods assist the parties in understanding the strengths of both sides of the case, in assessing their chances of prevailing in formal litigation, and in viewing their case objectively from different perspectives. The success of any ADR techniques depends to a great extent on the parties themselves. ADR techniques rely on collaborative discussion rather than adversarial proceedings. When ADR is successful, a voluntary settlement is reached quickly and efficiently. Even if a settlement is not achieved, the parties' understanding of the case is greatly enhanced, resulting in a more focused presentation to the special master and ultimately a quicker resolution.

The ADR techniques available in vaccine cases and the role of the special masters in facilitating the process are discussed below. The parties themselves, subject to the special master's approval, may choose the ADR procedure they believe most appropriate in their case. If one option is unsuccessful, the mediator may suggest another option, or a blending of options, to break a logjam. The parties are not limited to the options listed below and should feel free to suggest others.

B. Preparation for ADR.

The success of any ADR proceeding depends to a great extent on the parties themselves and their preparation for and desire to enter into collaborative discussions. To maximize the potential for success, prior to a negotiation session, the mediator may hold a preliminary conference with counsel for both sides, either separately or together, or both. The mediator may ask the parties to be prepared to discuss certain issues, and may require the submission of a mediation statement or other information. Prior to the initial session with the mediator, the parties should review the file and become familiar with the factual and procedural history of the case, negotiations to date, any key factual or legal disputes, areas of agreement, possible areas of compromise or settlement, and any nonnegotiable areas or items.

C. Types of ADR Options Available.

1. Mediation.

Mediation involves a third party working with respondent and petitioner to facilitate settlement negotiations. The mediator attempts to help the parties improve their communication with one another, identify the key interests of each side, and determine areas of each party's position in which there is enough flexibility to allow for compromise. The mediator usually has an initial meeting with both parties together, including the petitioners themselves, followed by meetings with each side separately in what has sometimes been called "shuttle diplomacy." Mediation may consist of a single session lasting from a couple of hours to a full day, or may consist of more than one session with time periods in between the sessions.

Prior to beginning mediation, the mediator may require the submission of a mediation statement. Even if no mediation statement is required, the parties should review the file and become familiar with and be prepared to discuss the history of the claim and response, the negotiations to date, any key factual or legal disputes, areas of agreement, possible areas of settlement, and any nonnegotiable areas or items.

2. Neutral Evaluation.

In neutral evaluation, a third party evaluates the substance of the case and the parties' respective positions, and then gives each side a frank assessment of the strengths and weaknesses of that party's case. Neutral evaluation can often break a logjam in settlement negotiations, particularly when a client or client agency has an overly optimistic assessment of the strength of the case or of the defense.

3. Early Neutral Evaluation.

Early neutral evaluation involves the evaluation of the case by a special master other than the one to whom the case is assigned. Early neutral evaluation occurs as soon as possible after the petition is filed, once sufficient medical records are filed so

that a special master may assess the strength of petitioner's case. After meeting with the parties together (telephonically or in person) to hear their respective assessments of the case, the early neutral evaluation special master then meets separately with each party, and provides a candid assessment of the likelihood of prevailing on the merits and the probable range of any damages award, should the petitioner prevail.

The advantage of early neutral evaluation is that each party has an opportunity to hear how the other side assesses its own case, but the evaluation by the neutral special master is heard in private. Although additional negotiations are often necessary to reach a settlement of the case, the parties enter into mediation armed with information about how an experienced special master would evaluate the case.

4. Mini-trials.

In a mini-trial, the parties present an abbreviated form of their case with an agreed-on time limit for case presentation. This procedure may be particularly useful when the record as it stands does not yet contain enough information for either side to appreciate fully the strengths of its case. The mini-trial can be conducted as informally as the parties prefer. The parties may choose the person to preside at the mini-trial–*i.e.*, the presiding special master, another special master, or someone else–and to what extent (if any) they wish the presiding official to offer an evaluation of the evidence after the presentation. The basic theory of the mini-trial is that it will give the parties in a short period of time a great deal of insight as to the strengths of each side's case, thus facilitating settlement. Typically, the parties retain their right to put on their entire case before the presiding special master at a later date if settlement fails.

D. Mediator or Evaluator.

Most ADR efforts within the Vaccine Program have involved the use of a special master other than the one to whom the case is assigned. This "settlement master" may engage in mediation, neutral evaluation, or a combination of the two, as dictated by the preferences of the parties, to help the parties reach a settlement. However, the assigned special master may also assist the parties in reaching settlement. The Rule 5 status conference, discussed in Section IV, Chapter 4, above, is, in effect, a neutral evaluation of the case and is often responsible for settlement thereafter. However, the parties may elect to request that a judge of the Court of Federal Claims serve as a mediator or neutral evaluator, or may opt to hire an outside professional mediator. Each option has advantages and disadvantages, as discussed below.

1. Use of a "Settlement Master."

Use of a "settlement master" has the benefit that if the ADR process fails to produce a full settlement, the settlement master will not be the one to decide the case. Therefore, the settlement master is free to give the parties a candid assessment of their respective cases, and the parties may be more amenable to the special master engaging in separate meetings with each party. Moreover, use of a settlement master

may have advantages over ADR proceedings conducted by a professional mediator who is not familiar with Vaccine Act cases. As a judicial officer extensively experienced in hearing and deciding Vaccine Act cases, the settlement master is extremely well qualified to give each party an experienced assessment of the strengths and weaknesses of that party's case. For example, if the dispute concerns the proper amount of compensation, the settlement master will likely have a thorough working knowledge of what amounts special masters have awarded in similar cases–information that could greatly help the parties reach a compromise.

Of course, if ADR by the settlement master fails to produce a settlement, the case will return to the presiding special master for hearing and decision.

2. Use of a Professional Mediator.

Courts nationwide are now using private, professional neutrals in court-sponsored ADR programs with a high rate of success. The chief advantage of this form of ADR is that professional neutrals with practices devoted solely to mediation often have excellent specialized skills in resolving difficult conflicts. They have skills in building trust by remaining neutral at all times and in improving the communications among the parties and counsel.

Professional mediators are often particularly skilled in dealing with emotionally charged cases and in reaching out to the parties. While counsel usually drive legal negotiations, professional neutrals are trained to encourage the clients' direct involvement in settlement discussions to meet the needs and interests of the parties. Further, a professional mediator may bring "a fresh face and look" to a dispute as someone without preconceived notions about the case.

3. Use of the Presiding Special Master.

Using the special master who is already assigned to the case has worked in a number of Program cases. The primary advantage of this option is that the presiding special master already knows much about the substance of the case and can prepare very quickly for the ADR session. Further, to the extent that the special master gives the parties an evaluation of the case, the evaluation will be of considerable weight, since that same special master would be the one to decide the case if settlement efforts fail.

On the other hand, the parties may not wish to discuss their settlement negotiations with the same special master who would decide the case if settlement is not reached. With the presiding special master's approval, the parties could proceed to ADR with the presiding special master, with the agreement that if settlement is not achieved, then the case will be formally transferred to another special master for decision. This option would combine the key feature of the settlement master option (*i.e.*, mediation by a master who will not decide the case if a settlement is not reached)

with the advantage of having mediation by a master who is already familiar with the case.

4. Use of a Court of Federal Claims Judge.

The Court of Federal Claims itself has a robust ADR program with judges experienced in conducting ADR. Because the court's judges hear motions for review in Vaccine Act cases, they have some degree of familiarity with the Act's causation and damages provisions and the cases interpreting them. If the parties are interested in a judge of the Court of Federal Claims conducting the mediation, they should so indicate to the presiding special master.

E. Confidentiality.

Consistent with general principles governing settlement negotiations, written and oral communications made in connection with or during any mediation session are confidential. As such, the mediator, all counsel, the parties, and any other person attending or participating in the mediation are prohibited from disclosing information and materials used in the mediation. Information acquired through mediation must not be used for any purpose, including impeachment, in any pending or future proceeding in this or any other forum. However, information obtained through the usual processing of the case does not become confidential by virtue of its use during the mediation.

Nothing prohibits the disclosure of information to persons not directly participating in a mediation, *e.g*., government officials, supervising attorneys, brokers, and life care planners, whose possession of such information is necessary to further the progress of the ADR proceeding. Individuals given information on this basis are bound by the confidentiality requirements above.

The mediator must not reveal to the presiding special master or others the nature of the discussions or specific offers made during the ADR process. The mediator is not prohibited, however, from providing the presiding special master with a brief general report on the progress of the negotiations and whether a settlement is likely, without disclosing the substance of the negotiations or the positions of the parties.

The parties ordinarily agree that if the ADR proceedings fail to result in settlement, the parties, and any other participants in the proceedings, will be bound by this rule of confidentiality.

In the "shuttle diplomacy" process, the mediator/evaluator will often be required to convey the substance of one party's position or offer to the other party. If any additional information is to be conveyed, the party should explicitly inform the mediator/evaluator of that information and grant permission to disclose it.

Chapter 5. Post-Settlement Processing.

A. Approval Process Time Constraints.

Once a case is tentatively settled, there is a period of time before the settlement is approved and payment can be made. Because both the client agency (Health and Human Services) and the Department of Justice must review any tentative settlement reached by the parties, the agencies must obtain final approval from the authorized agency personnel. The time frames vary, depending on whether entitlement has been determined prior to settlement. If entitlement has been determined prior to the tentative settlement, a proffer is often used, resulting in faster processing. If entitlement has not been determined, the special master will issue a "15-Week Order," setting deadlines for finalizing and filing an executed settlement agreement.

B. Issues Regarding the Purchase of Annuities.

The parties may negotiate that the annuity pay a stream of benefits, usually expressed as annual payments of certain amounts for a specific number of years or for the life of the payee. Alternatively, on some occasions, the parties negotiate a sum certain to be used to purchase an annuity. In such instances, the agreed on settlement amount is the sum used to purchase the annuity. The distinction between these two approaches is significant because fluctuations in market conditions between the time of negotiation and the time the annuity is purchased may affect the annuity's value. If a stream of benefits has been negotiated, then the amount paid to petitioner is certain and any fluctuation will affect the amount the respondent pays for that annuity, increasing or decreasing the cost. If a sum certain has been negotiated, the cost of the annuity is set, and any fluctuation will affect the stream of benefits, increasing or decreasing the amount paid to petitioner.