

In the United States Court of Federal Claims

NOTICE OF PROPOSED AMENDMENTS TO RULES

Pursuant to 28 U.S.C. §§ 2071(b) and 2503(b), the United States Court of Federal Claims hereby provides notice that it proposes to amend its rules and invites public comment on the proposed amendments. The proposed amendments affect (i) RCFC 1, 16, 26, 30, 31, 33, 34, 37, 55, 77.1, 77.3, 80.1, and 84; (ii) Vaccine Rule 2; (iii) Appendix A (“Case Management Procedure”); (iv) Supplement to Appendix B (“Electronic Case Filing Procedure in Vaccine Act Cases”); (iv) Appendix C (“Procedure in Procurement Protest Cases”); (v) Appendix E (“Electronic Case Filing Procedure”); and (vi) Appendix H (“Procedure for Alternative Dispute Resolution”). In addition, this proposal introduces new Forms 3D and 3E (transcript redactions). All proposed changes are shown by strikethrough and yellow highlighting.

Comments must be received by June 13, 2016, and addressed to:

Lisa Reyes
Acting Clerk of Court
United States Court of Federal Claims
717 Madison Place, NW
Washington, DC 20439

Absent further notice, these amendments will take effect August 1, 2016.



Lisa Reyes
Acting Clerk of Court

Issued: April 29, 2016

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Proposed Amendment to Rule 1

Federal Rule

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, ~~and~~ administered, **and employed by the court and the parties** to secure the just, speedy, and inexpensive determination of every action and proceeding.

RCFC

Rule 1. Scope and Purpose

These rules govern the procedure in the United States Court of Federal Claims in all suits. They should be construed, **and** administered, **and employed by the court and the parties** to secure the just, speedy, and inexpensive determination of every action and proceeding.

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

Rules Committee Notes

* * *

2016 Amendment

RCFC 1 has been amended in accordance with the corresponding change to FRCP 1 that became effective December 1, 2015.

Proposed Amendment to Rule 16

Federal Rule

Rule 16. Pretrial Conferences; Scheduling; Management

* * *

(b) Scheduling.

(1) **Scheduling Order.** Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference by telephone, mail, or other means.

(2) **Time to Issue.** The judge must issue the scheduling order as soon as practicable, but in any event unless the judge finds good cause for delay, the judge must issue it within the earlier of 12090 days after any defendant has been served with the complaint or 9060 days after any defendant has appeared.

(3) **Contents of the Order.**

* * *

(B) **Permitted Contents.** The scheduling order may:

* * *

(iii) provide for disclosure, or discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule

RCFC

Rule 16. Pretrial Conferences; Scheduling; Management

* * *

(b) Scheduling.

(1) **Scheduling Order.** The court must will issue a scheduling order:

(A) after receiving the parties' Joint Preliminary Status Report under Appendix A, paragraphs 4–6; or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.

(2) **Time to Issue.** The court must will issue the scheduling order as soon as practicable after the filing of the Joint Preliminary Status Report, but in any event within 14 days after any preliminary scheduling conference.

(3) **Contents of the Order.**

* * *

(B) **Permitted Contents.** The scheduling order may:

* * *

(iii) provide for disclosure, or discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence

Proposed Amendment to Rule 16

Federal Rule

- of Evidence 502;
- (v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;
 - (vi) set dates for pretrial conferences and for trial; and
 - (vii) include other appropriate matters.
- * * *

RCFC

- 502;
- (v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;
 - (vi) set dates for pretrial conferences and for trial;
 - (vii) direct that the parties file any of the submissions set out in Appendix A ¶¶ 14, 15, 16, or 17; and
 - (viii) include other appropriate matters.
- * * *

(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 has been amended in accordance with the corresponding changes to FRCP 16 that became effective December 1, 2015.

Proposed Amendment to Rule 26

Federal Rule

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * *

(b) Discovery Scope and Limits.

(1) **Scope in General.** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable. ~~including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

(2) **Limitations on Frequency and Extent.**

* * *

(C) **When Required.** On motion or on its own, the court must limit the frequency or extent of

RCFC

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * *

(b) Discovery Scope and Limits.

(1) **Scope in General.** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable. ~~including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

(2) **Limitations on Frequency and Extent.**

* * *

(C) **When Required.** On motion or on its own, the court must limit the frequency or extent of

Proposed Amendment to Rule 26

Federal Rule

discovery otherwise allowed by these rules or by local rule if it determines that:

* * *

(iii) the burden or expense of the proposed discovery is outside the scope permitted by Rule 26(b)(1) outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

* * *

(c) Protective Orders.

(1) **In General.** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

* * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

RCFC

discovery otherwise allowed by these rules if it determines that:

* * *

(iii) the burden or expense of the proposed discovery is outside the scope permitted by RCFC 26(b)(1) outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

* * *

(c) Protective Orders.

(1) **In General.** A party or any person from whom discovery is sought may move for a protective order. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

* * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

Proposed Amendment to Rule 26

Federal Rule

* * *

(d) Timing and Sequence of Discovery.

* * *

(2) *Early Rule 34 Requests.*

(A) *Time to Deliver.* More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference.

(23) *Sequence.* Unless, ~~on motion,~~ the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

* * *

(f) Conference of the Parties; Planning for Discovery.

* * *

RCFC

* * *

(d) Timing and Sequence of Discovery.

* * *

(2) *Early Rule 34 Requests.*

(A) *Time to Deliver.* More than 21 days after the complaint is served on a party, a request under RCFC 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) *When Considered Served.* The request is considered to have been served at the Early Meeting of Counsel (see Appendix A ¶ 3).

(23) *Sequence.* Unless, ~~on motion,~~ the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

* * *

(f) Conference of the Parties; Planning for Discovery. [Not used; see Appendix A ¶ 3.]

* * *

(As revised and reissued May 1, 2002; as amended Nov. 15, 2007, Nov. 3, 2008, July 15, 2011, July 2, 2012, Aug. 1, 2016.)

Rules Committee Notes

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2016 Amendment

RCFC 26 has been amended in accordance with the corresponding changes to FRCP 26 that

RCFC 26

Proposed Amendment to Rule 26

Federal Rule

RCFC

became effective December 1, 2015.

Proposed Amendment to Rule 30

Federal Rule

Rule 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

* * *

- (2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

* * *

(d) Duration; Sanction; Motion to Terminate or Limit.

- (1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

* * *

RCFC

Rule 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

* * *

- (2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with RCFC 26(b)(1) and (2):

* * *

(d) Duration; Sanction; Motion to Terminate or Limit.

- (1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with RCFC 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

* * *

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

Rules Committee Notes

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2016 Amendment

RCFC 30 has been amended in accordance with the corresponding changes to FRCP 30 that became effective December 1, 2015.

Proposed Amendment to Rule 31

Federal Rule

Rule 31. Depositions by Written Questions

(a) When a Deposition May Be Taken.

* * *

- (2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

RCFC

Rule 31. Depositions by Written Questions

(a) When a Deposition May Be Taken.

* * *

- (2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with RCFC 26(b)(1) and (2):

* * *

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

Rules Committee Notes

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2016 Amendment

RCFC 31 has been amended in accordance with the corresponding change to FRCP 31 that became effective December 1, 2015.

Proposed Amendment to Rule 33

Federal Rule

Rule 33. Interrogatories to Parties

(a) In General.

- (1) **Number.** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).

* * *

RCFC

Rule 33. Interrogatories to Parties

(a) In General.

- (1) **Number.** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with RCFC 26(b)(1) and (2).

* * *

(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 33 has been amended in accordance with the corresponding change to FRCP 33 that became effective December 1, 2015.

Proposed Amendment to Rule 34

Federal Rule

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

* * *

(b) Procedure.

* * *

(2) Responses and Objections.

(A) **Time to Respond.** The party to whom the request is directed must respond in writing within 30 days after being served or—if the request was delivered under Rule 26(d)(2)—within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) **Responding to Each Item.** For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) **Objections.** An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

RCFC

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

* * *

(b) Procedure.

* * *

(2) Responses and Objections.

(A) **Time to Respond.** The party to whom the request is directed must respond in writing within 30 days after being served or—if the request was delivered under RCFC 26(d)(2)—within 30 days after the Early Meeting of Counsel (see Appendix A ¶ 3). A shorter or longer time may be stipulated to under RCFC 29 or be ordered by the court.

(B) **Responding to Each Item.** For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) **Objections.** An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit

Proposed Amendment to Rule 34

Federal Rule

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RCFC

inspection of the rest.

* * *

(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 34 has been amended in accordance
with the corresponding changes to FRCP 34 that
became effective December 1, 2015.

Proposed Amendment to Rule 37

Federal Rule

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

* * *

(3) *Specific Motions.*

* * *

(B) *To Compel a Discovery Response.*

A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

* * *

- (iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

* * *

- (e) Failure to ~~Provide~~ **Preserve** Electronically Stored Information. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operations of an electronic information system.~~ If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation

RCFC

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

* * *

(3) *Specific Motions.*

* * *

(B) *To Compel a Discovery Response.*

A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

* * *

- (iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under RCFC 34.

* * *

- (e) Failure to ~~Provide~~ **Preserve** Electronically Stored Information. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~ system: If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation

Proposed Amendment to Rule 37

Federal Rule

may:

- (A) presume that the lost information was unfavorable to the party;
- (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
- (C) dismiss the action or enter a default judgment.

* * *

RCFC

may:

- (A) presume that the lost information was unfavorable to the party;
- (B) [not used]; or
- (C) dismiss the action or enter a default judgment.

* * *

(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 37 has been amended in accordance with the corresponding changes to FRCP 37 that became effective December 1, 2015.

Proposed Amendment to Rule 55

Federal Rule

Rule 55. Default; Default Judgment

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(c) **Setting Aside a Default or a Default Judgment.** The court may set aside an entry of default for good cause, and it may set aside a **final** default judgment under Rule 60(b).

* * *

RCFC

Rule 55. Default; Default Judgment

* * *

(c) **Setting Aside a Default or a Default Judgment.** The court may set aside an entry of default for good cause, and it may set aside a **final** default judgment under RCFC 60(b).

* * *

(As revised and reissued May 1, 2002; as amended Nov. 3, 2008, Jan. 11, 2010, Aug. 1, 2016.)

Rules Committee Notes

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2016 Amendment

RCFC 55 has been amended in accordance with the corresponding change to FRCP 55 that became effective December 1, 2015.

Proposed Amendment to Rule 84

Federal Rule

Rule 84. Forms [Abrogated (Apr. 29, 2015, eff. Dec. 1, 2015).]

The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.

RCFC

Rule 84. Forms [Abrogated in FRCP; retained in RCFC.]

Forms referenced in these rules are set forth in the Appendix of Forms.

(As revised and reissued May 1, 2002; as amended Aug. 1, 2016.)

Rules Committee Notes

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2016 Amendment

The title of RCFC 84 has been amended to reflect that its FRCP counterpart was abrogated, effective December 1, 2015.

Proposed Amendments to Appendix A (Case Management Procedure)

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II. EARLY MEETING OF COUNSEL

3. Subsequent to the filing of defendant's answer or, if applicable, a reply to a counterclaim, and, in any event, within sufficient time to permit the parties to file a Joint Preliminary Status Report in accordance with paragraph 4, below, plaintiff's counsel shall communicate with defense counsel, and counsel shall confer:

(a) to initiate preparation of the Joint Preliminary Status Report pursuant to paragraphs 4–6;

(b) to identify each party's factual and legal contentions;

(c) to make or arrange for the disclosures required by RCFC 26(a)(1) and (d)(2);

(d) to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under RCFC 26(a), including a statement as to when disclosures under RCFC 26(a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) any issues relating to disclosure, or discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(4) any issues relating to claims of privilege or of protection as trial-preparation material, including—if the parties agree on a procedure to assert such claims after production—whether to

ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(5) what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed; and

(6) any other orders that should be entered by the court under RCFC 26(c) or under RCFC 16(b) and (c).

(e) to discuss the expected means of resolving the dispute, i.e., whether by trial or dispositive motion; and

(f) to discuss settlement of the action, including use of alternative dispute resolution. See Appendix H.

Participating counsel shall be counsel of record and such other attorneys as necessary so that participating counsel for each party are knowledgeable about the case, the identity of witnesses, and the location of documents.

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Rules Committee Notes

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2016 Amendment

Paragraph 3 has been amended to include the requirements introduced by new FRCP 26(d)(2) (“Early Rule 34 Requests”) and the additive changes to FRCP 16(b)(3) that became effective December 1, 2015.

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.

Proposed Amendment to Rule 77.1

Rule 77.1. Business Hours, Scheduling, and Court Fees

- (a) **Business Hours.** The clerk's office is open to the public from 8:30 a.m. to 4:30 p.m. in the Eastern Time Zone ~~8:45 a.m. to 5:15 p.m.~~ on business days. A night box is provided for filing with the clerk's office between 4:30 ~~5:15~~ p.m. and 12:00 midnight on any business day for any paper due that day. The night box is located inside the gate at the garage entrance on H Street. Counsel are advised to telephone the clerk's office, (202) 357-~~64066400~~, by 9:30 a.m. the following business day to confirm receipt.

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(As revised and reissued May 1, 2002; as amended Mar. 15, 2005, Aug. 2, 2005, Nov. 3, 2008, Aug. 1, 2016.)

Rules Committee Notes

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2016 Amendment

RCFC 77.1(a) has been amended to reflect a change in the court's public business hours— from 8:45 a.m. to 5:15 p.m. to 8:30 a.m. to 4:30 p.m. Subdivision (a) has also been amended to reflect a change in the telephone number for the clerk's office.

Proposed Amendment to Rule 77.3

Rule 77.3. Withdrawing, Disposing of, and Unsealing Papers and Exhibits; Disposing of Classified Information

- (a) **Withdrawing Papers and Exhibits.**
- (1) ***In General.*** A paper or exhibit filed with the court may not be withdrawn from the office or custody of the clerk except by order of the court, but such an order should be entered only in extraordinary circumstances. Any withdrawal of a paper or exhibit pursuant to a court order must be recorded through an appropriate docket entry.
- (2) ***During Trial.*** The court reporter engaged to transcribe a trial proceeding may temporarily withdraw any paper or exhibit for use during that proceeding. All papers and exhibits admitted into evidence or designated to accompany the transcript of the proceeding must remain in the reporter's custody until the transcript is filed with the clerk.
- (b) **Disposing of Physical Exhibits.** All trial exhibits, including models, diagrams, depositions, transcripts, briefs, tables, and charts, will be destroyed or otherwise disposed of by the clerk unless they are removed from the clerk's custody by the party who produced them either:
- (1) within 60 days after the entry of final judgment by this court; or
- (2) in the event of an appeal, within 90 days after the receipt and filing of a mandate or other process or certificate showing a final—the disposition of the case by the appellate court.
- (c) **Unsealing Papers and Exhibits.** Unless otherwise required by statute or order and

absent a timely objection by any party, the clerk, upon notice to the parties, may unseal any paper or exhibit filed under seal either:

- (1) 5 years after the entry of final judgment by this court; or
- (2) in the event of an appeal, 5 years after the receipt and filing of a mandate or other process or certificate showing disposition of the case by the appellate court.

(d) **Disposing of Classified Information.** All classified information submitted to the court will be destroyed or otherwise disposed of at the direction of the clerk unless removed by the party who submitted it:

- (1) within 60 days after the entry of final judgment by this court; or
- (2) in the event of an appeal, within 90 days after the receipt and filing of a mandate or other process or certificate showing a final disposition of the case by the appellate court.

(As revised and reissued May 1, 2002; as amended Nov. 15, 2007, Nov. 3, 2008, July 13, 2009, Aug. 1, 2016.)

Rules Committee Notes

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2016 Amendment

RCFC 77.3 has been amended to address the disposal of classified information.

Proposed Amendment to Rule 80.1

Rule 80.1. Court Reporters

(a) **In General.** Trial proceedings will be recorded and, upon request of a party or the court, will be transcribed by a court reporter provided by the court who will be under the jurisdiction and control of the assigned judge.

(b) **Official Record.**

(1) **Transcript.** When a transcript is filed, the transcript is the official record of the proceeding.

(2) **Recording.** If no transcript is filed, the electronic sound recording is the official record of the proceeding.

(c) **Transcripts.**

(1) **Costs.** A transcript will be prepared at such charges as may be fixed or approved by the court.

(2) **Form; Contents.** A transcript must comply with the form, content, and style requirements established by the court (available on the court's website at www.usfc.uscourts.gov).

(3) **Filing.** If a transcript is requested by a party or by the court, the court reporter must file the transcript of the proceeding within the time period specified by the court.

(4) **Electronic Access.** Except in a proceeding sealed pursuant to RCFC 26(c), the court must provide electronic access to a transcript. Prior to being made electronically available, however, the transcript must conform to RCFC 5.2.

(A) **Availability.** Once a transcript is filed with the court, the transcript will be available at the clerk's office, for inspection only, for a period of 90 days (unless extended by the court).

(B) **Redaction of Personal Identifiers.**

(i) The parties must review the transcript to redact personal information covered by RCFC 5.2. The redactions are subject to the procedures specified in the court's transcript redaction policy (available on the court's website at www.usfc.uscourts.gov).

(ii) Pursuant to the court's transcript redaction policy, a Notice of Intent to Request Redaction and a Transcript Redaction Request must be filed (see Appendix of Forms, Forms 3D and 3E).

(C) **Additional Redactions.** In addition to the redaction of personal information, a party may move the court for additional redactions.

(d) **Exhibits.**

(1) **Labeling.** Unless the court otherwise directs the parties to designate their exhibits, the court reporter must label each exhibit with:

(A) the title and docket number of the case;

(B) the exhibit number;

(C) the party offering the exhibit, whether plaintiff, defendant, or any other party; and

(D) the number of pages in each exhibit.

(2) **Submission.** The court reporter must submit the exhibits admitted into evidence or designated to accompany the record of the proceeding at the conclusion of the proceeding as directed by the court.

(e) **Indexes.** The court reporter must file an index listing each witness testifying and

RCFC 80.1

each exhibit offered and received into evidence in accordance with the requirements established by the court (available on the court's website at www.uscfc.uscourts.gov).

(f) Certifications.

- (1) *Transcript.*** The court reporter must sign and append to the transcript a certificate certifying that the record is a correct transcript of the proceeding. See Appendix of Forms, Form 3C.
- (2) *Recording.*** The court reporter must certify the recordings and notes reported at the proceeding. See Appendix of Forms, Form 3B.

(As revised and reissued May 1, 2002; as amended Aug. 2, 2005, Nov. 3, 2008, Aug. 30, 2013, Aug. 1, 2016.)

Rules Committee Notes

* * *

2016 Amendment

RCFC 80.1(c) has been amended by adding a new paragraph (4) to include the requirement that the court must provide electronic access to transcripts of proceedings, other than those proceedings that are sealed pursuant to RCFC 26(c). New paragraph (4) also adds the requirement that prior to being made electronically available, transcripts must be reviewed to redact personal information covered by RCFC 5.2 and clarifies that any additional requests for redactions must be made by motion to the court.

New paragraph (4) also references the court's transcript redaction policy which sets forth the procedures for redacting personal identifiers and requires that a Notice of Intent to Request Redaction and a Transcript Redaction Request be filed (see Appendix of Forms, Forms 3D and 3E).

FORM 3D
NOTICE OF INTENT TO REQUEST REDACTION

United States Court of Federal Claims

)	
)	
)	
Plaintiff(s),)	No. _____
)	
v.)	Judge _____
)	
)	
THE UNITED STATES,)	
)	
Defendant.)	
)	

NOTICE OF INTENT TO REQUEST REDACTION

Notice is hereby given by _____,
that a redaction request for the transcript filed on _____, will be filed
with the court within 21 days from the filing of the transcript with the clerk of court.

Date: _____

Signature of Attorney of Record

(Address, Telephone, E-mail)

**FORM 3E
TRANSCRIPT REDACTION REQUEST**

United States Court of Federal Claims

)	
)	
Plaintiff(s),)	No. _____
)	Judge _____
v.)	
)	
THE UNITED STATES,)	
)	
Defendant.)	
)	

TRANSCRIPT REDACTION REQUEST

Consistent with the court’s transcript redaction policy, it is requested that the following information be redacted prior to the transcript being made available to the public through the Public Access to Court Electronic Records (PACER).

Transcript Page #	Transcript Line #	Personal Identifier (e.g., SSN xxx-xx-1234)

Additional sheet attached.

Date: _____

Signature of Attorney of Record

(Address, Telephone, E-mail)

NOTE: This request will be filed in CM/ECF using the “Redaction Request – Transcript” docket event. The docket entry can be accessed by court staff and case participants only.

Proposed Amendment to Vaccine Rule 2

Rule 2. Commencing an Action

* * *

(e) **Service.**

- (1) The petitioner must serve one copy of the petition and accompanying documents on the Secretary of Health and Human Services, by first class or certified mail, to:

Secretary, Health and Human
Services
Director, Division of Injury
Compensation Programs
Health Resources and Services
Administration
National Vaccine Injury
Compensation Program (VICP)
5600 Fishers Lane, 08N146B
Rockville, MD 20857.

* * *

(As revised and reissued May 1, 2002; as amended Sept. 15, 2003, Aug. 2, 2005, July 13, 2009, July 15, 2011, Aug. 3, 2015, Aug. 1, 2016.)

Rules Committee Notes

* * *

2016 Amendment

Rule 2. Subdivision (e) has been amended to reflect the current mailing address for the Secretary of Health and Human Services.

Proposed Amendment to Appendix C (Procedure in Procurement Protest Cases)

III. FILING UNDER SEAL

* * *

2. In order to expedite proceedings, plaintiff's counsel must (except in exceptional circumstances to be described in moving papers) provide at least 24-hour advance notice of filing a protest case to:

(a) the Department of Justice, Commercial Litigation Branch, Civil Division;

(b) the Clerk, United States Court of Federal Claims;

(c) the procuring agency's contracting officer by facsimile transmission only; and

(d) the apparently successful bidder/offeror (in cases where there has been an award and plaintiff has received notice of the identity of the awardee).

Such notice must be provided by e-mail or by facsimile transmission during **clerk's office conventional** business hours **as defined in RCFC 77.1**. (The contacts for the clerk of court and the Department of Justice are posted on the court's website—<http://www.uscfc.uscourts.gov>.) The pre-filing notice is intended to permit the Department of Justice to assign an attorney to the case who can address relevant issues on a timely basis and to permit the court to ensure the availability of appropriate court resources. Failure to provide pre-filing notification will not preclude the filing of the case but is likely to delay the initial processing of the case, including the scheduling of the initial status conference. See paragraph 8, below. Plaintiff's counsel must apprise the above entities of any material change in respect to the timing of or the intent to file a protest. Plaintiff is encouraged to provide earlier notice if possible as a courtesy to the court and to government counsel.

* * *

6. A complaint or any related material filed together with the complaint that is to be filed under seal must be:

(a) marked or highlighted in such a way that confidential or proprietary information is indicated; and **must be**

(b) accompanied by a **proposed redacted version of the pleading (i.e., a version that omits confidential or proprietary information), which will be available to the public**. The proposed redacted version will be made available to the public subsequent to the completion of the procedures specified in paragraph 12 of the sample protective order found at Appendix of Forms, Form 8. Failure to file a **proposed redacted version copy** may result in denial of the motion for leave to file under seal.

* * *

Rules Committee Notes

* * *

2016 Amendment

Paragraph 2 has been amended to specify that the pre-filing notice must be provided to the listed entities during clerk's office business hours as defined in RCFC 77.1.

Paragraph 6 has been amended to clarify that a proposed redacted version of a pleading is subject to the redaction procedures specified in Form 8 ("Protective Order") in the Appendix of Forms.

Proposed Amendment to Supplement to Vaccine Rules

* * *

V. FILING PROCEDURES

12. Notice of Filing; Service.

- (a) **Notifying the Parties Filing Users.** At the time a document is filed, the ECF System automatically generates a “Notice of Electronic Filing” and automatically e-mails the notice to all parties case participants who are Filing Users.
- (b) **Notifying Individuals Other Than Filing Users.** The clerk will serve the “Notice of Electronic Filing” (but not the underlying filing) on case participants who are not Filing Users by e-mail, hand delivery, facsimile, or first-class postage-prepaid mail.
- ~~(c) **Service.** The transmission of the “Notice of Electronic Filing” satisfies the service requirement of RCFC 5 and the proof of service requirement of RCFC 5.3.~~

* * *

VII. COURT ORDERS, JUDGMENTS, AND APPEALS

* * *

23. Notice of Filing; Service.

- (a) **Notifying the Parties.** Notice of a filing by the court will be accomplished by delivering to the parties a “Notice of Electronic Filing” in the manner prescribed in paragraph 12(a) or (b).
- (b) **Service.** The transmission of the “Notice of Electronic Filing” satisfies the service requirement of RCFC 77(d).

* * *

Rules Committee Notes

* * *

2016 Amendment

Paragraph 12 has been amended by deleting as no longer necessary former paragraph 12(b) which provided that the clerk “will serve the ‘Notice of Electronic Filing’ (but not the underlying filing) on case participants who are not Filing Users by e-mail, hand delivery, facsimile, or first-class postage prepaid mail.”

In addition, paragraph 23(a) has been amended to delete the reference to former paragraph 12(b).

Proposed Amendment to Appendix E (Electronic Case Filing Procedure)

* * *

Rules Committee Notes

* * *

V. FILING PROCEDURES

12. Notice of Filing; Service.

(a) **Notifying the Parties Filing Users.**

At the time a document is filed, the ECF System automatically generates a “Notice of Electronic Filing” and automatically e-mails the notice to all parties case participants who are Filing Users.

(b) **Notifying Individuals Other Than Filing Users.** The clerk will serve the “Notice of Electronic Filing” (but not the underlying filing) on case participants who are not Filing Users by e-mail, hand delivery, facsimile, or first-class postage-prepaid mail.

(c) **Service.** The transmission of the “Notice of Electronic Filing” satisfies the service requirement of RCFC 5 and the proof of service requirement of RCFC 5.3.

* * *

2016 Amendment

Paragraph 12 has been amended by deleting as no longer necessary former paragraph 12(b) which provided that the clerk “will serve the ‘Notice of Electronic Filing’ (but not the underlying filing) on case participants who are not Filing Users by e-mail, hand delivery, facsimile, or first-class postage prepaid mail.”

In addition, paragraph 23(a) has been amended to delete the reference to former paragraph 12(b).

VII. COURT ORDERS, JUDGMENTS, AND APPEALS

* * *

23. Notice of Filing; Service.

(a) **Notifying the Parties.** Notice of a filing by the court will be accomplished by delivering to the parties a “Notice of Electronic Filing” in the manner prescribed in paragraph 12(a) or (b).

(b) **Service.** The transmission of the “Notice of Electronic Filing” satisfies the service requirement of RCFC 77(d).

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.