

MEMORANDUM

TO: NYSBA - Dispute Resolution Section

FROM: Charles E. Miller

DATE: Client Matter: Z9995.0211

RE: USE OF COURT-ADMINISTERED ARBITRATION IN THE JUDICIAL
REVIEW OF GOVERNMENT AGENCY DECISIONS

The following is a sequential outline of the salient features of the proposed legislation and court rules described in detail in Part II of the main Report.

The proposal pertains to civil actions (e.g., in the U.S. District Court) wherein a government agency (e.g., the Patent and Trademark Office) is the initial sole defendant.

1. Upon plaintiff's timely motion following joinder of issue, the judge, without dismissing the action and acting pursuant to the court's own rules, refers the case to the court's ADR Administrator for arbitration before a tribunal of an odd number of arbitrators as the plaintiff may request. The Administrator serves as the intermediary between the parties and the court, and as case manager acting in consultation with the judge.
2. The plaintiff's motion for arbitration is essentially incontestable by the defendant-agency which is statutorily precluded from opting out of the arbitration, *e.g.*, on grounds of sovereign immunity or due process.
3. Candidates for service on the tribunal are selected by the Administrator from the court's roster of arbitrators, and presented to the parties for approval. Alternatively, the parties may select their own tribunal subject to the court's *pro hac vice* certification of the arbitrators.
4. Arbitrators on the court's roster must be (i) United States citizens domiciled in and residents of this country, (ii) licensed to practice before the agency as may be appropriate, (for example, in patent cases), and (iii) members of the bar of a state or of the District of Columbia, and of the court.
5. Arbitrators serve as independent, non-government-employed contractors certified by the chief judge on the basis of their credentials (for example, in patent law, science and engineering). Arbitrators serving on tribunals are directly accountable to the court in regard to their professional performance.
6. Arbitral proceedings must be held within the United States; they may be conducted in executive session in a locale convenient to the parties.
7. The tribunal controls the disclosure of evidence, has subpoena and contempt powers equal to that of the court, and in patent cases can construe claims in patent specifications.

8. Following the conclusion of the hearing, the tribunal deliberates and then issue a written, reasoned award based on a majority vote of the arbitrators who must apply the apposite law to the evidence made of record during the proceedings. In cases where the operative law is not settled or is non-existent, the tribunal consults with the judge through the Administrator. An award may include a dissenting arbitrator's view(s).
9. The award, prior to its entry as a judgment, is not subject to trial *de novo*, but can be challenged by either party or modified or corrected on any of the grounds specified in the Federal Arbitration Act, or under the doctrine of "manifest disregard of the law."
10. The court enters the award in the form of a judgment as though the case had gone to trial.
11. The judgment would be appealable on the merits (in patent cases to the Federal Circuit).
12. Final judgment entered on the award -- from which no appeal was taken and decided -- would be non-precedential, and binding only on the parties. However, determinations made and expressed in an arbitral award (*e.g.*, claim constructions in patent cases) would be relevant and admissible (albeit not conclusive) in future proceedings.
13. Each arbitrator's fees and expenses, as well as costs (*e.g.*, under 28 U.S.C. § 1920), would be taxed to the plaintiff consistent with the Vesting and Appointments Clauses (and in accordance with fee-shifting provisions in the last sentence of 35 U.S.C. § 145 in patent cases). Thus, the arbitral tribunal would not be influenced by the plaintiff's statutory payment obligation, nor would the arbitrator(s) have any financial stake in the outcome of the case. Once a motion for arbitration has been made, the agency's expenses going forward would not be taxed to the plaintiff.
14. To ensure transparency of the process, the arbitral proceedings would become part of the publicly available court record in the action.

Charles E. Miller