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Gidget Benitez
American University Washington College of Law

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MEDIATION AT THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GIDGET BENITEZ*

THESIS STATEMENT

The mediation program at the Court of Appeals for the Federal Circuit is a helpful program that has encouraged judicial economy by assisting with the caseload of the Supreme Court, lowering costs of litigation to parties, and allowing for creative solutions for parties that a fact-finder may not ordinarily be able to provide. It also provides a bit more certainty in Intellectual Property (“IP”) cases, where a patent or trademark may be found invalid upon appeal. In the time that the mediation program has been implemented, it has been incredibly successful in its purpose.¹

I. HISTORY OF THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Currently, there are ninety-four United States district courts of

* Gidget Benitez. J.D. 2016, American University Washington College of Law; B.S. 2012, University of Central Florida. She is preparing for the Virginia bar exam and her goal is to work as a Trademark Examining Attorney at the United States Patent and Trademark Office. The author would first and foremost like to thank her mother and friends for their unshakeable support in all that she does. She would also like to thank her mentors from American University Washington College of Law, the Hispanic Bar Association of DC, and Gifts for the Homeless, who have provided her guidance, advice, and a second family that will always stay with her.

¹ Statistics are included within this paper.
general jurisdiction throughout the nation, twelve courts of appeals that have broad subject matter jurisdiction with geographic limits, and the Court of Appeals for the Federal Circuit.\textsuperscript{2} The Court of Appeals for the Federal Circuit, located in Washington, D.C., has unlimited geographic jurisdiction nationwide with broad but limited subject matter jurisdiction over specific issues such as patents.\textsuperscript{3} The highest court in the land, the Supreme Court of the United States, has the power to decide appeals on all cases brought in federal court or those brought in state court that deal with federal law.\textsuperscript{4}

The Court of Appeals for the Federal Circuit, now thirty-three years old, was born out of two smaller courts and multiple pieces of legislation from Congress. The court’s first Chief Judge, the Honorable Howard T. Markey, once stated:

Like the famed Phoenix, the United States Court of Appeals for the Federal Circuit rose on October 1, 1982, from the ashes of two former courts. On that day, the 127 year old United States Court of Claims and the 73 year old United States Court of Customs and Patent Appeals went out of existence, leaving a history of outstanding contributions to the administration of justice.\textsuperscript{5}

The imagery of this statement, while vivid, is not entirely accurate. Many gatherings, studies, and pieces of legislation took place before the two courts merged into what we know today as the Federal Circuit. In 1971, the then-Chief Justice Warren E. Burger appointed a Study Group to propose remedies for the growing caseload that had affected the Supreme Court’s docket.\textsuperscript{6} The Freund Committee, chaired by Harvard Law Professor Paul A. Freund, recommended the creation of a National Court of Appeals composed of circuit judges borrowed from other courts.\textsuperscript{7} Theoretically, the


\textsuperscript{3} Id.

\textsuperscript{4} Id.


\textsuperscript{6} Id. at 3.

\textsuperscript{7} Id.
judges would sit on a revolving basis, and screen cases where Supreme Court review was sought. The idea soon died due to Congress’ inertia. Then, in 1972, Congress created a “Commission on Revision of the Federal Court Appellate System.” The Hruska Commission, as it came to be known by way of its Chairman, was composed of four members appointed by the President, four by the Chief Justice, four by the Senate, and four by the House of Representatives. The Hruska Commission held hearings, researched the skyrocketing growth of litigation in the federal courts, and concluded that a National Court of Appeals was needed. One different suggestion, however, was that the screening of petitions for certiorari would still remain with the Supreme Court – drawing criticism and mocking names of the idea, such as “Junior Supreme Court.” The proposal died the same way its predecessors did. Yet another research group, the Advisory Council for Appellate Justice, chaired by Professor Maurice Rosenberg of the School of Law at Columbia University, reached conclusions not inconsistent with the Fruend and Kruska Commissions.

There was a pressing need for a resolution. As patent litigation boomed, so did conflicts, particularly because of the lack of a nationally uniform resolution of patent and federal tax law. Finally, with the appointment of Griffin B. Bell as Attorney General of the United States in the Carter Administration, a solution began to take on physical shape. Within the Department of Justice, Bell established the Office of Improvements in the Administration of Justice. The President then named Professor Daniel J. Meador of the University of Virginia School of Law as the Assistant Attorney General to head this office.

8. Id.
9. Id.
10. Id.
11. Id.
13. Id.
14. Id.
15. Id.
16. Id. at 4.
17. Id.
18. Id.
Professor Meador circulated a tentative proposal for public comment in July of 1978, proposing to merge the appellate functions of the seven-judge United States Court of Claims, the five-judge United States Court of Customs and Patent Appeals, and add three additional judges, to create a new fifteen-judge circuit court of appeals.\(^{19}\) The new circuit would have the appellate jurisdiction of the two forerunner courts, plus exclusive appellate jurisdiction in civil, tax, environmental, and patent cases.\(^{20}\) Unlike regional circuits, however, this court would have nationwide jurisdiction of all appeals covering the subject matter assigned to it – thereby hopefully reducing the caseloads of the Supreme Court and bringing uniformity to crucial areas of law.\(^{21}\)

Additionally, unlike other proposals, this solution would not create another layer to the judicial pyramid, so to speak.\(^{22}\) Despite controversy and divided opinions arising over the tax and environmental jurisdiction, the patent community showed strong support for the proposal.\(^{23}\) Eventually, to strengthen support for the proposed legislation, both tax and environment cases were eliminated from the proposal.\(^{24}\) Further bolstering the push towards the establishment of the court, on February 27, 1979, President Carter urged Congress to establish the United States Court of Appeals for the Federal Circuit on the same tier as the existing courts of appeals.\(^{25}\) This proposal, however, was just the beginning.

The Carter Administration’s bill, S. 677, was introduced in the Senate “on request,” by Senator Edward M. Kennedy, Chairman of the Senate Judiciary Committee, and by Senator Dennis W. DeConcini, Chairman of the Senate Judiciary Subcommittee for Improvements in Judicial Machinery.\(^{26}\) After several other introductions of bills in the House and Senate, hearings held, and fierce opposition of extraneous amendments to bills – legislation


\(^{20}\) *Id.* at 5.

\(^{21}\) *Id.*

\(^{22}\) *Id.*

\(^{23}\) *Id.*

\(^{24}\) *Id.*


\(^{26}\) *Id.*
died with the end of the 96th Congress.27

With a new presidential Administration came apprehension. Supporters of court legislation did not know the intentions of the Reagan Administration, regarding the proposed laws to create the new Federal Circuit and to institute miscellaneous reforms applicable to all federal courts.28 Concern did not last long. The Judicial Conference of the United States, who spoke for the entire judicial branch of the government, embraced the legislation, and as support in the private sector for patent jurisdiction intensified, Congress listened.29

Again, the legislative wheels began to turn, as several new bills were introduced in the 97th Congress.

In addition to jurisdiction of all appeals formerly heard by the Court of Customs and Patent Appeals and the Court of Claims, the proposed Court of Appeals for the Federal Circuit was finally given exclusive jurisdiction of appeals from the district courts in patent cases, the boards of contract appeals, and the Merit Systems Protection Board, along with the review of certain final determinations of the Secretary of Commerce relating to imports, and appeals from decisions of the Secretary of Agriculture under the Plant Variety Protection Act.30

Additionally, trial functions of the United States Court of Claims were split off from the Federal Circuit for handling by a new sixteen-judge United States Court of Claims Court, created under Article I of the Constitution with enhanced jurisdiction.31 Its decisions would be appealable to the Federal Circuit.32

Finally, on April 2, 1982, surrounded by the judges of the new Federal Circuit, legislators, and a few invited guests, President Reagan signed into the law the Federal Courts Improvement Act of

27. Id. at 5-6.
28. Id. at 6.
29. Id.
31. Id.
32. Id.
1982.\textsuperscript{33} It did not take long for the Federal Circuit to ease the caseload of the Supreme Court. During the 1983 fiscal year, the Federal Circuit received as many as 959 appeals on its docket.\textsuperscript{34} That number skyrocketed to 2,430 in the 1985 fiscal year, the highest number of filed appeals the court has ever seen.\textsuperscript{35} The second highest amount of appeals the court received took place in 1995, at 1,847 cases.\textsuperscript{36}

As of December 2015, the Federal Circuit has received as many as 1,710 cases.\textsuperscript{37} Of those, a majority of the appeals have been intellectual property-related, particularly focused on patents.\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{33} Id. at 7-8.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id.
\item \textsuperscript{37} Id.
\item \textsuperscript{38} United States Court of Appeals for the Federal Circuit, \textit{Appeals Filed By Category, Statistics} (Last Accessed: March 12, 2016), http://www.cafc.uscourts.gov/sites/default/files/Caseload\%20by\%20Category\%202015\%29.pdf
\end{itemize}
United States Court of Appeals for the Federal Circuit
Historical Caseload

Note: Includes reinstated, cross- and consolidated appeals.

United States Court of Appeals for the Federal Circuit
Appeals Filed, by Category
FY 2015

Source: United States Court of Appeals for the Federal Circuit, Appeals Filed By Category, Statistics
II. HISTORY OF THE FEDERAL CIRCUIT’S APPELLATE MEDIATION PROGRAM

The United States Court of Appeals for the Federal Circuit began its Appellate Mediation Program in 2005. 39 The court originally saw little need and limited prospects for their mediation program, but as its caseload grew, a greater sense of need arose among the members of the Federal Circuit. 40 Despite the need, many doubted that the mediation program would be effective, especially in patent cases, which is why the program began as purely voluntary. 41 At least five reasons were expressed to justify the court’s initial reluctance to adopt a mediation program, two of them being that both incentives and opportunities to discuss settlement were reduced on appeal. 42 Other reasons included the suggestions that: (1) “complex patent cases [were] ill-suited for mediation; (2) when the government is a party, settlement approvals [were] problematic;” and (3) there were few mediators available for the task.” 43 Nevertheless, the Federal Circuit Bar Association (“FCBA”) formed a “Dispute Resolution Committee,” allowing members of the FCBA to join the committee and assist in the development of the mediation program. 44

Later, in 2006, the Federal Circuit Appellate Mediation program strengthened and became mandatory. 45 In 2009 alone, the mediation program assisted in the settling of forty-eight cases, thirty-one percent of them being patent appeals. 46 Some have even said that a rough calculation estimates the program “adds capacity to dispose of appeals equal to at least one additional active judge.” 47 The program, just over ten years old, continues to thrive as the court encourages parties and their counsel to mediate, and settle, when possible.

41. Id.
43. Id. at 26-7.
44. Id at 27.
45. Michel, supra, at 1205.
46. Id. at 1205-06.
47. Id. at 1206.
III. HOW DOES THE FEDERAL CIRCUIT’S APPELLATE MEDIATION PROGRAM WORK?

Initially voluntary, the court adopted a permanent, mandatory appellate mediation program on September 18, 2006. The program is administered by the Circuit Executive, through the Office of General Counsel. A three-judge committee monitors the program, and periodically makes suggestions and recommendations of changes to the Chief Judge.

All counseled cases are eligible for participation in the mediation program, but participation is mandatory for those cases that are selected to participate in mediation. The Circuit Executive, through the Office of General Counsel, contacts principal counsel in cases selected, to determine whether the case is a good candidate for the program. The Circuit Executive also seeks the opinion of counsel regarding participation in the program, particularly thoughts on cooperation of the parties. If it appears at the outset that mediation will not be helpful, mediation efforts cease.

Additionally, counsel may jointly request that a case be included in the mediation program. A docketing statement is included in the docket packet sent from the Clerk’s Office to be completed by the principal attorney of record. The form must be completed within fourteen days of docketing, except when the United States or its officer or agency is a party; then, all counsel must complete the form within thirty days. The docketing statement is the initial screening tool used by the mediation staff in considering whether appeals

50. Id.
51. Id.
52. Id.
53. Id.
54. Id.
55. Id.
56. Dean, supra, at 370.
57. Guidelines, supra, at 2.
might be good candidates for mediation.\textsuperscript{58} In reviewing a case for mediation potential, court staff will also review “notice(s) of appeal, judgments, and briefs” to aid in selection.\textsuperscript{59} If, at the beginning of the case, the designated court officials feel that mediation will not be productive, court mediation efforts come to a stop.\textsuperscript{60}

Once it has been decided that a case will go through the mediation program, however, the parties are notified and a date for an initial face-to-face or telephone-based mediation session is set.\textsuperscript{61} At that point, a mediator is also assigned.\textsuperscript{62} The court has a substantial roster of outside mediators, including magistrate judges and volunteer mediators, all of whom are distinguished, experienced attorneys with expertise in substantive areas of the Federal Circuit’s jurisdiction – as well as expertise in mediation.\textsuperscript{63} Volunteer mediators are required to “not be in active practice,” meaning that they are

\textit{[N]ot appearing, and will not appear while a member of the court’s mediation panel (i) as counsel for a party or amicus in any matter that would or could be appealed to [the Federal Circuit], or (ii) as counsel for a party or amicus in any appeal to [the Federal Circuit].}\textsuperscript{64}

Parties may also choose their own mediator, but must agree to pay any travel, lodging, and out-of-pocket expenses of the mediator, in addition to the mediator serving pro bono.\textsuperscript{65} Lastly, before the final selection and assignment of a volunteer mediator, a conflict of interest check is run.\textsuperscript{66} Volunteer mediators are required to decline to participate in any cases in which there is a conflict of interest, or in which they, or another reasonable person, perceive a conflict.\textsuperscript{67}

Volunteer mediators are given wide latitude on how they choose

\begin{itemize}
  \item \textsuperscript{58} Dean, \textit{supra}, at 370.
  \item \textsuperscript{59} Guidelines, \textit{supra}, at 2.
  \item \textsuperscript{60} \textit{Id.} at 1.
  \item \textsuperscript{61} Dean, \textit{supra}, at 370.
  \item \textsuperscript{62} \textit{Id.}
  \item \textsuperscript{63} Guidelines, \textit{supra}, at 2.
  \item \textsuperscript{64} \textit{Id.}
  \item \textsuperscript{65} \textit{Id.} at 3.
  \item \textsuperscript{66} \textit{Id.}
  \item \textsuperscript{67} \textit{Id.}
\end{itemize}
to conduct the mediation process after assignment, but mediations are commonly conducted at the Federal Circuit facilities in Washington, D.C.\textsuperscript{68} Additionally, at least one week before the initial mediation session, the parties submit confidential mediation statements to the Chief Circuit Mediator, all of which remain completely confidential; they are not made part of the public record and are not shared with opposing counsel.\textsuperscript{69} The statements require identification and candid discussion of related cases, relevant authority, jurisdictional issues, prior settlement efforts, and even positions that cannot be compromised on.\textsuperscript{70} The court’s Guidelines provide for maximum confidentiality at all stages of the mediation process, and even the fact of participation in mediation is typically unknown to the court.\textsuperscript{71}

Finally, the process, though mandatory, is quite flexible. Mediation can, and does, stop at any time the mediator decides that further efforts will not be fruitful.\textsuperscript{72} Additionally, because the purpose of mediation is settlement of a case, global settlements are allowed to be included in the solution.\textsuperscript{73} This is especially helpful for large companies with global locations and subsidiaries, where travel costs may become expensive and parent companies wish to settle difficult cases quickly.

Just because the process is flexible, however, does not mean that it is lax. The Federal Circuit enforces its mandatory mediation program with sanctions against those who do not materially comply with the process once chosen to participate in it.\textsuperscript{74} Despite the confidentiality rules, the court may be informed by the Circuit Executive or the Office of General Counsel about the substance of the mediation at hand, only to the extent necessary to explain any recommendation for sanctions.\textsuperscript{75} As a result, any judge ruling on a recommendation of sanctions is recused from hearing the same case on the merits.\textsuperscript{76} As to kinds of sanctions are enforced against those who do not comply with mediation rules, it is unclear; there is,

\begin{itemize}
\item \textsuperscript{68} Dean, supra, at 371.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Id.
\item \textsuperscript{71} Id.
\item \textsuperscript{72} Guidelines, supra, at 4.
\item \textsuperscript{73} Id.
\item \textsuperscript{74} Guidelines, supra, at 6.
\item \textsuperscript{75} Id.
\item \textsuperscript{76} Id.
\end{itemize}
however, some guidance on the topic, from the Federal Circuit’s “Attorney Discipline Rules.” Pursuant to Rule 2 of the Attorney Discipline Rules, the Federal Circuit explains that “Conduct Unbecoming” is grounds for discipline. Furthermore, in Rule 3, discipline for misconduct can include “disbarment, suspension for a definite period, monetary sanction, or any other disciplinary action that the court deems appropriate.”

IV. RESULTS: HAS THE APPELLATE MEDIATION PROGRAM WORKED?

As of September 30, 2011, the Federal Circuit mediation program had conducted “350 mediations, 156 of which resulted in a settlement, yielding a success rate of approximately forty-five percent.” Judges and litigants alike consider the mediation program a valuable service to the FCBA, and to the court as well. The mediation program assists with judicial economy, as “[i]t . . . saves clients time and expense, [since] usually the settlement is reached early in the appellate process, before expensive briefs are written.”

Another somewhat unspoken benefit of mediation is that it can provide liberties and advantages generally unavailable in traditional appellate court proceedings, especially for intellectual property litigants. Benefits like quicker resolution can be especially helpful, particularly in disagreements over trademark or patent infringement. Against the backdrop of the Federal Circuit’s growing workload and the absence of increased adjudicative resources, a resolution that begins within weeks of docketing versus months later is appealing for several reasons. One of those reasons might very well be the avoidance of losing profits. If, for example, you have two companies

78. Id.
79. Id.
81. Michel, supra, at 1206.
82. Id.
83. Dean, supra, at 368.
84. Id.
in a dispute over a trademark, the longer the trademark is disputed in court, the higher the chance for the court case and media to affect potential consumers. It could potentially give the impression of instability. This alone could damage the goodwill of a trademark, no matter who the victor is.

Another major benefit is the freedom to be flexible and creative with resolutions. Generally, the Federal Circuit can only give a thumbs up or a thumbs down – which does not allow for the parties to incorporate new solutions that may be “fitted” to benefit them specifically. In contrast, a mediated remedy may incorporate innovative solutions to long-running disputes. For example, a cross-license may be of mutual interest to parties regarding a patent infringement dispute. Parties with global competing interests may be able to come to an agreement by implementing geographic limitations or narrowing the scope of a contract, and the opportunity to trade a patent right for a trade secret or copyright is completely plausible in mediation whereas it would not be possible on a straightforward appeal. Essentially, parties are free to think “outside the box” and to explore such things as royalty rate negotiation, cross licensing, mergers and any other business (versus judicial) solution that could possibly be imagined.

Additionally, with business benefits and the ability to disclose information for the mutual benefit of the other party, comes the concern of privacy and confidentiality. Courtroom records and pleadings typically become public, exposing different kinds of information to the world. The federal circuit mediation program, however, demands confidentiality. There are no written transcripts or opinions, and settlement terms can be kept secret with the parties and mediators bound by confidentiality agreements.

Finally, from a comprehension of technology standpoint, mediation allows for communication to take place and be completely understood. Parties have the ability to choose from an array of

85. Id. at 369.
86. Id.
87. Id.
88. Id.
89. Id.
90. Guidelines, supra, at 3-4.
91. Dean, supra, at 369.
mediators, many of them seasoned attorneys who may have hands-on experience determining complex patents. Thus, mediation with an expert well-versed in patent law offers a strong alternative to litigation.

The benefits of mediation at the Federal Circuit have also been seen by way of numbers, over the years. One year after the inception of “mandatory” status, in 2007, the appellate mediation program saw at least ninety-two appeals go through mediation. Of those, thirty-nine appeals settled and fifty-three went forward with appellate proceedings. Only three years later in 2010, the mediation program saw eighty-four appeals attempt mediation. Of those appeals, thirty-six settled successfully, and forty-eight terminated mediation. Additionally, in 2014, thirty-six appeals went to mediation, with twenty of them settling successfully. Finally, in 2015, the Federal Circuit’s mediation program saw twenty-four appeals go to mediation. Of those, nine appeals were successfully mediated, a majority of them patent-related.

To answer the question of whether the program has achieved its purpose so far, one would reason that it has, indeed. Though exact comments are not accessible, due to confidentiality, the Federal Circuit does provide parties with the opportunity to give candid feedback on their experience with the mediation program. At the conclusion of the mediation process in an individual case, the

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94. Id.


96. Id.


99. Id.
mediator notifies the Circuit Executive’s mediation administrator of the conclusion of the mediation.\textsuperscript{100} The Office of General counsel then sends a questionnaire to counsel and the mediator, inviting them to provide candid, confidential responses.\textsuperscript{101} As a result, this information is summarized and analyzed by the Office of General Counsel – without identification of any specific case – to evaluate the mediation program and compile statistics.\textsuperscript{102} The summary is then given to the court for the purpose of assessing the program, without revealing any details about or names of cases.\textsuperscript{103}

**United States Court of Appeals for the Federal Circuit**

**Circuit Mediation Office Statistics**

**2007 Calendar Year**

(Through December 31, 2007)

<table>
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<td>* Patent:</td>
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<td>* Non-patent:</td>
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<tr>
<td>Appeals not settled; mediation terminated:</td>
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</tr>
<tr>
<td>* Patent:</td>
<td>43</td>
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<tr>
<td>* Non-patent:</td>
<td>10</td>
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<td>Success rate - overall:</td>
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<tr>
<td>* Patent:</td>
<td>42%</td>
</tr>
<tr>
<td>* Non-patent:</td>
<td>33%</td>
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</tbody>
</table>


\textsuperscript{100} Guidelines, supra, at 6.

\textsuperscript{101} Id.

\textsuperscript{102} Id.

\textsuperscript{103} Id.
United States Court of Appeals for the Federal Circuit

Circuit Mediation Office Statistics
2010 Calendar Year
(January 1, 2010 through December 31, 2010)

Appeals settled: 36
  • Patent: 30
  • Non-patent: 6
Appeals not settled; mediation terminated: 48
  • Patent: 44
  • Non-patent: 4

Success rate - overall (of appeals selected for mediation): 43%
  • Patent: 41%
  • Non-patent: 60%

Source: United States Court of Appeals for the Federal Circuit, Circuit Mediation Office Statistics 2010 Calendar Year, Statistics
United States Court of Appeals for the Federal Circuit

Circuit Mediation Office Statistics
2014 Calendar Year
(January 1, 2014 through December 31, 2014)

Appeals settled: 20
  • Patent: 11
  • Non-patent: 9

Appeals not settled; mediation terminated: 16
  • Patent: 16
  • Non-patent: 0

Success rate - overall (of appeals selected for mediation): 56%
  • Patent: 41%
  • Non-patent: 100%

Source: United States Court of Appeals for the Federal Circuit, Circuit Mediation Office Statistics 2014 Calendar Year, Statistics
United States Court of Appeals for the Federal Circuit

Circuit Mediation Office Statistics
2015 Calendar Year
(January 1, 2015 through December 31, 2015)

<table>
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<td>Appeals not settled; mediation terminated:</td>
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</tr>
<tr>
<td>• Patent:</td>
<td>14</td>
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<tr>
<td>• Non-patent:</td>
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<tr>
<td>Success rate - overall (of appeals selected for mediation):</td>
<td>38%</td>
</tr>
<tr>
<td>• Patent:</td>
<td>36%</td>
</tr>
<tr>
<td>• Non-patent:</td>
<td>50%</td>
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</tbody>
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United States Court of Appeals for the Federal Circuit, Circuit Mediation Office Statistics 2015 Calendar Year, Statistics

CONCLUSION

All in all, the Federal Circuit Appellate Mediation Program, though initially met with hesitation, has grown into a valuable resource available for litigants of all kinds. Despite the majority of recent appeals filed being of the intellectual property variety, the mediation option may be used for any type of case that comes before the Federal Circuit, including contract disputes and vaccination issues. With the ability to maintain confidentiality, produce creative, personalized solutions, and to lower litigation costs, the program encourages better solutions for nationwide appeals. One can only hope that the trend of mediation continues, and that the program continues to improve from this point forward.