

U.S. International Trade Commission

Users' Manual for Commission Pilot Mediation Program for Section 337 Investigations

1. Introduction

The Commission has approved the creation of a voluntary pilot program for the mediation of disputes investigated under section 337 of the Tariff Act of 1930, as amended ("section 337"), pursuant to the Administrative Procedure Act, as amended. *See* 5 U.S.C. § 556(c)(6)-(8), 572-74, 583.

The administrative management of the mediation program is coordinated by the Supervisory Attorney for Docket Services who will work with a professional mediator for conducting a settlement conference. The pilot program is supervised by the Office of the Chairman in conjunction with the other members of the Commission.

The purpose of the mediation program is to facilitate settlement of disputes.

2. Selection of Investigations

All section 337 investigations are eligible for participation in the mediation program. Investigations will be nominated for participation by the presiding Administrative Law Judge or, alternatively, by request of one or more private parties to the investigation. A presiding Administrative Law Judge wishing to nominate an investigation shall indicate the same to the Supervisory Attorney for Docket Services.¹ Counsel may so request by filing a Confidential Request to Enter Mediation, with copies served on all private parties. A request form will be available from the Office of Dockets and the <http://www.usitc.gov> website. Such a request should be submitted to:

James R. Holbein
Supervisory Attorney, Docket Services
U.S. International Trade Commission
500 E Street SW, Room 112
Washington, DC 20436

While it is expected that all or nearly all selections will be made at the initiative of the presiding Administrative Law Judge or counsel for the parties, the Supervisory Attorney for Docket Services may select additional investigations for inclusion in the pilot program at the direction of the Office of the Chairman. If an investigation is selected for the pilot program but a private party does not wish to participate, that party should indicate the same

¹ The Supervisory Attorney for Docket Services may in his discretion delegate duties and responsibilities identified in this users' manual to case managers under his direct supervision.

in a letter filed with the Supervisory Attorney for Docket Services, at the address above, and serve copies on all the private parties. The letter should state the reasons that the party declines to participate in the pilot mediation program.

3. Mediators

The mediators are outside volunteers experienced in both patent litigation and mediation. The Commission maintains a roster of mediators, most of whom have served as mediators for the U.S. Court of Appeals for the Federal Circuit.²

Mediators and applicants to be mediators must not be in active practice. For purposes of these guidelines “not be in active practice” means that the applicant or mediator is not appearing, and will not appear while a member of the Commission’s mediation roster as a counsel for a party or amicus in any matter before the Commission or from the Commission.

Mediators are not paid for their services, but, for purposes of the pilot program, are reimbursed by the Commission for travel and lodging inside the United States. When available at the Commission, space will be provided for the mediation to take place. Reimbursements for travel and lodging are subject to government regulations, and mediators should coordinate with the Commission in advance of travel.

The Supervisory Attorney for Docket Services selects the mediator for each investigation from the roster of mediators, giving preference when practicable to any mediators from the roster agreed upon by the parties. If counsel jointly propose a mediator not on the roster, then the Supervisory Attorney for Docket Services has the option of appointing that mediator, provided the parties agree to pay any travel, lodging, and out-of-pocket expenses of the mediator and the mediator agrees to serve pro bono. Parties are free, in any event, to participate in mediation outside of the Commission’s pilot program under terms to which they agree, whether or not the investigation is selected by the Commission for its mediation program.

Before selecting a mediator, the Supervisory Attorney for Docket Services will inquire into conflicts of interest. If a mediator is affiliated with a law firm and that law firm represents or has represented a party to the investigation within the last five years, the mediator will recuse him or herself. The mediator must not represent either party or any amicus for any purpose, must disclose all past relationships that he or she has had with counsel, counsels’ firms, and the parties, and must disclose any potential “issues” conflicts. Mediators are required to decline from participating in any investigation in which there is

² Individuals wishing to serve as mediators may submit an application to the Commission. The application will be available on the Commission website.

a conflict of interest, in which they perceive a conflict of interest, or in which a reasonable person would perceive a conflict of interest. Mediators are required to err in favor of recusal when in doubt.

After assignment, the mediator may ask the representatives whether that party thinks the investigation is amenable to settlement and why or why not, which issues are negotiable, and whether there are any jurisdictional issues. The mediator may review the complaint, any answers to the complaint, any relevant licensing agreements, and the pleadings and/or decisions in any case arising out of the same dispute. The mediator may also ask for brief confidential written submissions to help evaluate areas of negotiation. Confidentiality is discussed further in Section 4 of this manual, below.

4. Confidentiality

Confidentiality is ensured throughout the mediation process except as noted in this manual. Any confidential written submissions for the mediator are for the eyes of the mediator only and are not part of the record of the investigation and will not be shared with other parties, an Administrative Law Judge, or the Commission in any way. The mediator communicates about mediation with the Supervisory Attorney for Docket Services only. The Supervisory Attorney for Docket Services does not communicate with the Administrative Law Judges, the Office of Unfair Import Investigations, the Office of the General Counsel, or the Commissioners about the substance of mediation proceedings. The Commission investigative attorney may review any settlement agreement that arises out of a successful settlement in making a recommendation to the Administrative Law Judge regarding whether a settlement is in the public interest, but will not conduct, participate in, or have knowledge of the proceedings.

During the pilot program, the Commission may from time to time have discussions with the Supervisory Attorney for Docket Services and mediators with a view to revising the overall program while it is ongoing, as appropriate and necessary. Communications concerning statistical information needed to assess the program are not prohibited.

The substance of the mediation is confidential and may not be disclosed by the mediator or any participants, except in the course of litigation concerning enforceability of any agreements reached through mediation. All mediators must protect the confidentiality of the substance of all proceedings and are prohibited from complying with subpoenas or other requests for information about mediated investigations. The fact that a case is in mediation is not confidential.

5. Participation in Pilot Program for Mediation

Mediation is a flexible process intended to help the parties achieve settlement where possible. Often the mediator is not bound by a defined formula or approach to mediating a case and the mediator conducts the mediation as he or she deems appropriate. Mediation ceases at any time the mediator concludes that further efforts will not be fruitful.

The purpose of mediation is a settlement of the case. This may include a global settlement. Under the pilot program, the mediator is not asked to narrow the issues in dispute, although the parties are free to agree to do so. A narrowing of the issues may be reflected in party briefs to the Administrative Law Judge.

Although the Administrative Law Judge and the Commission have the power under the Administrative Procedure Act to require attendance at a settlement conference, including the use of alternative dispute resolution, the Commission has determined that parties' participation in the pilot program for mediation will be on a volunteer basis. At the same time, the mediator will conduct the mediation only if he or she believes that the case would benefit from mediation and has settlement potential.

If the parties do agree to participate in mediation, the mediator may require the attendance at the mediation of a person with actual settlement authority. "Actual settlement authority" does not simply mean sending a person allowed to accept or offer a minimum or maximum dollar amount. Rather, the party representative should be a person who can make independent decisions and has the knowledge necessary to generate and consider creative solutions, *e.g.*, a business principal. These requirements may be modified or waived by the mediator if the circumstances dictate and the Supervisory Attorney for Docket Services concurs.

6. No Delay to Proceedings Before the Presiding Administrative Law Judge

The Commission does not contemplate that mediations would be a cause for extensions of time in proceedings before the presiding Administrative Law Judge. The goal of mediation is to help the parties achieve an expeditious resolution to any disputes, not to cause delay.

7. The Conclusion of Mediation

The purpose of the mediation program is to help the parties achieve settlement. The mediation program provides a confidential, risk-free opportunity for parties to resolve their dispute. Unlike arbitration, where a decision may be binding, mediation will result in a settlement only if all parties agree on that resolution. If settlement is reached, then the agreement must be in writing and binding on all parties. If the parties have settled their dispute, the parties jointly must file a motion for termination of the investigation based upon a settlement agreement or seek a consent order regarding termination.

8. Noncompliance Sanctions

Although the program is voluntary, the program is subject to heightened standards of confidentiality in addition to normal rules of protection of confidential business information and all other applicable rules of conduct which govern other proceedings before the Commission. Motions for sanctions may be made to the Chief Administrative Law Judge who may assign the motion to an Administrative Law Judge other than the presiding Administrative Law Judge. Notwithstanding the confidentiality provisions of

Section 5 of this manual, the mediator or the Supervisory Attorney for Docket Services may communicate with the judge ruling on the motion only to the extent necessary to explain any recommendation for sanction.

9. Evaluation

At the conclusion of any mediation, an evaluation questionnaire will be given to the parties who are encouraged to return the evaluation questionnaire to the Supervisory Attorney for Docket Services.