

Section 337 Mediation Program - User Manual

Introduction

The Commission has approved the creation of a program for the mediation of disputes arising in investigations 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 Secretary to the Commission. The 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. The mediation program provides a confidential opportunity for parties to resolve their dispute.

Important Aspects of the Program

Pro-Bono, Single-Day Session

Program mediators have agreed to offer a single-day session free of charge to the litigants. Nevertheless, a mediator may charge the parties for time incurred in set-up and preparation for the first session with the prior consent of the parties. Program mediators are reimbursed by the Commission for travel and lodging inside the United States attributable to the single-day, pro-bono session. Reimbursements for travel and lodging are subject to government regulations and budgetary constraints. Mediators should coordinate with the Commission in advance of travel. No mediator is expected to serve in a pro-bono capacity beyond the required single-day mediation session, as defined above. The parties are free to engage the mediator on terms agreeable to all and consistent with the protections indicated in this manual if they wish to extend the mediation beyond the original single-day session.

Confidentiality

Mediation communications are confidential as provided by law, by non-disclosure agreement, by the Standing Commission Protective Order for Mediation, by the protective order of the Administrative Law Judge, and by program design. Neither the Administrative Law Judge nor any Member of the Commission nor any member of the Office of the General Counsel conduct, participate in, or have knowledge of the mediation proceedings, other than the fact that an investigation is in mediation, as explained more fully herein. The Office of Unfair

Import Investigations may participate in the mediation session(s) upon request of the parties.

Each mediator must sign a nondisclosure agreement which is then returned for countersignature by the Secretary. Each party representative and any in-house counsel participating in the mediation must sign a non-disclosure agreement. Each outside counsel participating in the mediation must sign a non-disclosure agreement. The non-disclosure agreements place the participants under the Standing Commission Protective Order for Mediation which supplements any protective order issued by the presiding Administrative Law Judge in an investigation. The non-disclosure agreements also supplement the existing legal protections for confidentiality provided, inter alia, by 5 U.S.C. § 574, as set forth therein.

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, any Administrative Law Judge, or the Commission in any way. The mediator communicates about mediation only with the Secretary to the Commission. The Secretary does not communicate with the Administrative Law Judges, the Office of

the General Counsel, or the Commissioners about the substance of mediation proceedings, or any settlement that may result from mediation. Any settlement agreement that may result from mediation will be reviewed for consistency with the public interest by the Commission investigative attorney, the presiding Administrative Law Judge, and the Commission under the normal procedures of Commission rule 210.21.

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, or as permitted by the terms of the non-disclosure agreements and statute. All mediators must protect the confidentiality of the substance of all proceedings, as set forth in the non-disclosure agreement for mediators.

The Secretary may discuss statistical information with the Commission needed to assess the mediation program itself. During the program, the Commission may from time to time have discussions with the Secretary and mediators with a view to revising the overall program while it is ongoing, as appropriate and necessary.

Is Confidentiality adequately protected in mediation?

Under the Commission's mediation program, the parties, their representatives, and the mediator are required to sign confidentiality agreements. Those agreements assure that the mediation process is completely separate from the investigative process before the ALJs and the Commission. Furthermore, the mediator holds in confidence all of the information disclosed during the mediation process under the terms of a special protective order, so there is no risk in communicating with the mediator or with opposing counsel/parties. Neither the ALJ assigned to the investigation nor the Commissioners have access to anything that is disclosed or exchanged in the mediation process. If a settlement results, then the only information known to the ALJ and the Commissioners will be the confidential settlement agreement that is filed with the ALJ, when termination of the investigation is requested.

No Delay to Litigation

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.

Non-Compliance Sanctions

The program is subject to the standards of confidentiality provided, *inter alia*, in the non-disclosure agreements and the Administrative Dispute Resolution Act (5 U.S.C. § 574) 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 Secretary may communicate with the judge ruling on the motion only to the extent necessary to explain any recommendation for sanction.

The Mediation Process

Certification of Receipt of Program Materials and Discussion

Upon institution of an investigation based on a properly filed complaint, each named complainant and respondent will receive materials explaining the Commission mediation program, including a copy of this Users' Manual. The materials will include a certification relating to the receipt and understanding of these materials which must be filled out and returned. The certification requirement may be satisfied in one of two ways: If a party has retained counsel, the lead counsel for the party may sign a certification that the

If an ALJ suggests mediation, is it a sign that your case is weak?

The Mediation Program User Manual makes clear the ALJ's authority to order the parties to attend at least an initial consultation on mediation. Therefore, parties and their attorneys should not equate exploration of settlement through mediation as a negative reflection on the merits of their case. In fact, negotiated settlements are favored by the Commission and the courts as a matter of policy. An ALJ encouraging negotiations or mediation can be seen as a recognition that sometimes business solutions exist that have little to do with the merits of a dispute.

party under his or her representation has received the materials and that counsel has discussed them with the party. If the party is not represented by counsel, a representative of the party (*i.e.*, a business principal), may sign and return the certification attesting that he or she has read the materials. The required certification shall be returned to the Secretary:

Secretary to the Commission
U.S. International Trade Commission
500 E Street SW, Room 112
Washington, DC 20436

Initiating Mediation

All section 337 investigations are eligible for participation in the mediation program.

Private parties may request participation by submitting a Confidential Request to Enter Mediation form. This request form is available on the USITC website at http://www.usitc.gov/intellectual_property/mediation.htm and should be submitted to the Secretary to the Commission. The parties do not file the request on EDIS. They may submit the request to the Secretary via email at 337Mediation@usitc.gov.

Can mediation be successful if the parties could not reach settlement in their own negotiations?

Mediation is often used successfully to resolve disputes after the parties have unsuccessfully negotiated on their own. Unlike party-to-party negotiations, mediation uses an experienced mediator to facilitate communications between the parties and to avoid or overcome issues that can create an impasse to settlement. Furthermore, although mediation is a form of negotiation, it is a unique process that can be tailored to meet the parties' particular needs and circumstances. Likewise, while complaints are often filed following failed negotiations with individual respondents, mediation provides the opportunity for facilitated settlement negotiations between the complainant and all of the respondents contemporaneously. Convening at the same time parties who have a mutual interest in the use of the intellectual property at issue permits an expanded discussion that can be collaborative and resolve the dispute between the complainant and respondents in a single settlement. A mediator can assist the parties in identifying complementary interests and addressing concerns to reveal previously unexplored areas of common interest/benefit.

The presiding Administrative Law Judge may also refer investigations to the Secretary, who may discuss the possibility of mediation with the parties. Pursuant to 5 U.S.C. § 556(c)(6),(8), the presiding Administrative Law Judge may require attendance at a mediation session not to extend beyond one day.

While it is expected that all or nearly all participation will be initiated by the counsel for the parties or the presiding Administrative Law Judge, the Secretary

may also suggest mediation to the parties in an investigation, or to the presiding Administrative Law Judge, for inclusion in the program.

Selecting a Mediator

The Commission maintains a roster of pre-screened mediators who have agreed to provide a single pro-bono session for Commission investigations.¹ The mediators are outside experts and consultants experienced in both patent litigation and mediation. Many of these mediators have served in a similar capacity for the U.S. Court of Appeals for the Federal Circuit, as well as other Federal and state court mediator panels. 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.

The Secretary assists the parties in selecting a mediator for each investigation. Parties may select a mediator from the roster of program mediators. The parties may also select a private mediator that they have identified on their own. If parties select a private mediator, the mediation is not considered to be under the 337 Mediation Program. Accordingly, parties would compensate the mediator by private contract between the parties and the mediator.

¹ Program mediators have agreed to offer a single-day session free of charge to the litigants. Nevertheless, a mediator may charge the parties for time incurred in set-up and preparation for the first session with the prior consent of the parties. (Please see the section of this Guide titled "Pro-Bono, Single-Day Session").

Individuals wishing to serve as mediators may submit an application to the Commission. The application is available on the USITC website at http://www.usitc.gov/intellectual_property/mediation.htm.

Before approving a mediator, the Secretary 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 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.

Participating in Mediation

Mediation is a flexible process intended to help the parties achieve settlement where possible.

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. 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 pleadings and documents available on EDIS 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. (See the section of this Guide titled "Confidentiality").

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 or the settlement or narrowing of some issues in dispute.

When available at the Commission and desired by the parties, space will be provided for the mediation to take place.

Who Should Attend the Session(s)

If the parties agree to participate in mediation or the Administrative Law Judge has required attendance at a mediation session, 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, *i.e.*, a business principal. These requirements may be modified or waived by the mediator if the circumstances dictate and the parties concur.

Can a case settle through mediation even in the early stages when little or no discovery has occurred?

There are many reasons parties choose to settle a case irrespective of how much information they have obtained from the other parties. To mediate, the parties only need sufficient information to reasonably assess risk and analyze options. Parties do not have to produce anything at the mediation that they do not wish to disclose.

Concluding Mediation

The purpose of the mediation program is to help the parties achieve settlement. The mediation program provides a confidential 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 during mediation, the agreement is reduced to a writing, and is signed by 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.

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, any Administrative Law Judge, or the Commission in any way. The mediator communicates about mediation only with the Secretary to the Commission. The Secretary 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.