

User Manual for Commission Mediation Program for Section 337 Investigations

1. 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 who will work with a professional mediator for conducting a settlement conference. 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.

2. CERTIFICATION OF RECEIPT OF PROGRAM MATERIALS AND DISCUSSION

Upon filing a complaint, each complainant will receive materials explaining the Commission mediation program, including a

copy of this Users’ Manual. Each proposed respondent will receive these same materials upon receipt of the complaint. The materials will include certifications relating to the receipt and understanding of these materials. A certification of receipt and understanding 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 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:

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

3. SELECTION OF INVESTIGATIONS

All section 337 investigations are eligible for participation in the mediation program. Private parties may request participation by filing a Confidential Request to Enter Mediation, with copies served on all private parties. A request form will be available from the Docket Services Division in the Office of Secretary and the <http://www.usitc.gov> website. Such a request should be submitted to the Secretary to the Commission.

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

While it is expected that all or nearly all participation will be initiated by the counsel for the parties

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.

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.

4. MEDIATORS

The mediators are outside experts and consultants experienced in both patent litigation and mediation. The Commission maintains a roster of mediators who have agreed to serve in a pro-bono capacity for Commission investigations, and who have been pre-screened by the Commission.¹ Most of these mediators have served in a similar capacity for the U.S. Court of Appeals for the Federal Circuit.² The Commission also maintains an open list of private mediators.

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 mediators who have agreed to serve in a pro-bono capacity. The pro-bono mediators are reimbursed by the Commission for travel and lodg-

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.

ing inside the United States, and mediation is at no cost to the parties. Reimbursements for travel and lodging are subject to government regulations, and mediators should coordinate with the Commission in advance of travel. The parties may also select a mediator from the open list of private mediators maintained by the Commission. The parties may also select a private mediator that they have identified on their own. Parties that select a private mediator would compensate the private mediator by agreement among the parties and the private mediator.

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.

After assignment, the mediator may ask the representatives wheth-

¹ No mediator is expected to serve in a pro-bono capacity beyond the required, single-day mediation session. The parties would be 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.

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

er 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 public 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. Confidentiality is discussed further in Section 5 of this manual, below.

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

5. 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 Commission investigative attorney nor 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.

Each mediator must sign a non-disclosure agreement. Each party representative and any in-house counsel must sign a non-disclosure agreement. Each outside counsel must sign a non-disclosure agreement. The non-disclosure agreements place the participants under the Standing Commission Protec-

tive 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 Unfair Import Investigations, the Office of the General Counsel, or the Commissioners about the substance of mediation proceedings.

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. Nevertheless, the substance of mediation discussions is not shared with the Commission investigative attorney, the presiding Administrative Law Judge, the Office of the General Counsel, or the Commissioners.

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.

6. PARTICIPATION IN 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 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.

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.

7. 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.

8. 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

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.

investigation based upon a settlement agreement or seek a consent order regarding termination.

9. NONCOMPLIANCE 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 Ad-

ministrative 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.

10. 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 Secretary.