



United States International Trade Commission

Section 337 Mediation Program



Publication No. 4198

November 2010

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Program Overview - Section 337

EXECUTIVE SUMMARY

The U.S. International Trade Commission (“Commission”) offers an important forum for the litigation of intellectual property matters involving imported goods. The Mediation Program offers a risk-free, inexpensive, confidential and quick mechanism to evaluate whether settlement can be achieved in these cases. Even if settlement of all claims and issues is not possible, mediation may help narrow issues and claims in the investigation. All parties in Section 337 practice will be made aware of the Mediation Program when new investigations are instituted.

BACKGROUND ON SECTION 337

Under Section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), the Commission conducts investigations into allegations of certain unfair practices in import trade. Most Section 337 investigations involve allegations of patent or registered trademark infringement. Other forms of unfair competition, such as misappropriation of trade secrets, trade dress infringement, passing off, false advertising, and violations of the antitrust laws, may also be asserted.

Section 337 investigations are initiated by the Commission following the receipt of a properly filed complaint that complies with the Commission’s Rules. A Commission notice announcing the institution of an investigation is

published in the Federal Register whenever the Commission votes to institute a Section 337 investigation.

When an investigation is instituted, the Chief Administrative Law Judge at the Commission assigns an Administrative Law Judge (“ALJ”) to preside over the proceedings. Section 337 investigations are conducted in accordance with procedural rules that are similar in many respects to the Federal Rules of Civil Procedure. These Commission procedural rules (found in 19 C.F.R. Part 210) are typically supplemented by a set of Ground Rules issued by the presiding ALJ. The procedural rules and ALJ’s Ground Rules provide important instructions and details regarding such matters as the taking of discovery and the handling of motions.

A formal evidentiary hearing on the merits of a Section 337 case is conducted by the presiding ALJ in conformity with the adjudicative provisions of the Administrative Procedure Act (5 U.S.C. §§ 551 et seq.). Hence, parties have the right of adequate notice, discovery, cross-examination, presentation of evidence, objection, motion, argument, and other rights essential to a fair hearing.

Following a hearing on the merits of the case, the presiding ALJ issues an Initial Determination (“ID”) on whether Section 337 has been violated. That ID is certi-

Program Benefits

- Based on CAFC program
- Program goal is settlement
- Experienced professionals
- Heightened confidentiality
- Narrows issues and/or claims in dispute
- Potentially shortens time for case resolution
- Cannot be used as basis for delay or extension of time in proceeding before ALJ
- Businesses have greater certainty of settlement outcomes
- Reduced costs for business while maintaining control of IP

fied to the Commission along with the evidentiary record. The Commission may review and adopt, modify, reverse or remand the ID, or it may decide not to review the ID. If the Commission adopts or declines to review an ID, the ID becomes the final determination of the Commission.

In the event that the Commission determines that Section 337 has been violated, the Commission may issue an exclusion order

barring the products at issue from entry into the United States, as well as “cease and desist” orders directing the violating parties to cease certain actions. The Commission’s exclusion orders are enforced by U.S. Customs and Border Protection. Commission orders become effective within 60 days of issuance unless disapproved by the President for policy reasons. Appeals of Commission orders entered in Section 337 investigations are heard by the U.S. Court of Appeals for the Federal Circuit.

By statute, Section 337 investigations must be completed “at the earliest practicable time.” Accordingly, the Commission places great emphasis on the expeditious adjudication of Section 337 investigations.

The Commission Rules provide that a party may move to terminate an investigation as to one or more of the respondents on the basis of a licensing or other settlement agreement, Rules 210.21(a) (2) and (b), 19 C.F.R. § 210.21(a)

(2) and (b). The Commission Rules also provide that an investigation may be terminated as to one or more respondents on the basis of a Consent Order. See Commission Rule 210.21(c). Consent Orders are typically entered upon the joint request of the complainant and a respondent in the form of a motion which contains the parties’ joint proposed Consent Order, but such proposed orders can be proffered by a respondent alone.

In recent years, the Section 337 workload has increased substantially. For each of the last three fiscal years, October 1 to September 30, there were at least 85 active cases. In FY 2010, 51 new cases were instituted, exceeding the number of cases in any prior year. There is no sign that the pace of new complaint filings will decline in the foreseeable future.

ADVANTAGES OF SECTION 337

There are several advantages for litigants who choose to use Section 337 to litigate IP disputes. It is a “rocket docket” that is

usually faster than federal district courts, where IP cases can take several years to complete. The USITC has experienced judges who work exclusively on IP cases. The possible remedies of exclusion orders and cease and desist orders provide a powerful tool with real commercial value to complainants. The companies involved are often large corporations, but small businesses can, and do, assert their rights and succeed in this venue. Products that have been the subject of past cases include Red Bull energy drinks, Nintendo Wii game systems, Vizio HDTVs, Apple and Nokia cell phones, and underground cable and pipe locators. Cases can be relatively small, involving two companies and one or two patent claims. They can also be complex, involving 20 or more companies and dozens of patent claims.

BACKGROUND ON SECTION 337 MEDIATION PROGRAM

On October 28, 2008, the Commission established a pilot

Does mediation deprive the parties of an adjudication (i.e., “win” or “loss”) on their claims and defenses?

If the parties settle their case in mediation then they would not proceed to an evidentiary hearing that would determine which party “wins” or “loses” on their claims and defenses. Eliminating the winner/loser dynamic is a very important benefit of mediation because it creates a conciliatory environment for settling a case. Also, removing the identification of a “winner” or “loser” can help to preserve the business relationship of the parties, which can be of critical long-term benefit to them. Even if the case doesn’t settle from the mediation, the issues may be streamlined for adjudication. The parties may also obtain a clearer understanding of the strengths/weaknesses of the case. Clients report high satisfaction with court mediation processes generally. Parties maintain control of the process and outcome, unlike at a trial.

mediation program for Section 337 investigations. On August 30, 2010, the Commission issued a revised User Manual that converted the pilot program into a permanent agency program. This program is aimed at facilitating the settlement of disputes and enhancing the efficiency of Section 337 by reducing the number of issues, patent claims, and/or respondents and otherwise assisting the Commission to manage its growing caseload.

All Section 337 investigations are eligible for participation in the program. An ALJ may nominate a particular 337 investigation for inclusion in the program or the litigating parties may individually or jointly request to participate. The Supervisory Attorney in Docket Services manages the program, providing administrative support to the mediators and parties. Further information about the program may be found on the Commission's website at http://www.usitc.gov/intellectual_property/mediation.htm.

ADVANTAGES OF MEDIATION PROGRAM

The mediation program provides a confidential, risk-free opportunity for parties to resolve their disputes expeditiously, at a lower cost and in a manner that can provide more business certainty. The basic documentation consists of a Users Manual and a Federal Register Notice. The Mediation Program is flexible so the parties remain in control of the proceeding. It is not "a cause for extensions of time," so delay of

If the parties pursue mediation will it slow down the Section 337 investigation?

A Section 337 Investigation is designed to provide swift resolution and mediation doesn't disrupt the timeline for completion of the investigation. The preparation for mediation is minor in comparison with the preparation for the evidentiary hearing, so there is no wasted effort. Once the preliminaries are out of the way, mediation will often take a single day.

the litigation cannot be the objective. The program is modeled on the successful Court of Appeals for the Federal Circuit Mediation Program. The roster is composed of experienced IP mediators, most of whom are listed on the Federal Circuit's mediator roster or are former judges. Strict conflict-of-interest standards apply. Mediations are intended to last one day, and are normally conducted at no expense to the litigants. If longer mediation sessions are required, it is expected the parties will compensate the mediator as a professional service provider.

Under the program, the mediator is likely to 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. The participation of decision makers greatly increases the likelihood of

obtaining a written agreement at the conclusion of mediation that spells out the terms of settlement. At a minimum, the mediation meeting should provide both sides with a realistic assessment of their case and some idea whether there is room for settlement.

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 Supervisory Attorney for Docket Services 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 Supervisory Attorney for Docket Services:

James R. Holbein
Supervisory Attorney,
Docket Services
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 Office of Dockets and the <http://www.usitc.gov> website. Such a request should be submitted to the Supervisory Attorney for Docket Services.

The presiding Administrative Law Judge may also refer investigations to the Supervisory Attorney for Docket Services, 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 Supervisory Attorney for Docket Services 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 Supervisory Attorney for Docket Services 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

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.

mediators are reimbursed by the Commission for travel and lodging 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. 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 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 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.

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.

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 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 agree-

ments 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 Supervisory Attorney for Docket Services. 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.

Any settlement agreement that may arise 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 Supervisory Attorney for Docket Services 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 Supervisory Attorney for Docket Services 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

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.

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.

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 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.

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 Supervisory Attorney for Docket Services.

Federal Register Notice

ISSUANCE OF REVISED USERS' MANUAL FOR COMMISSION MEDIATION PROGRAM UNDER SECTION 337 OF THE TARIFF ACT OF 1930

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Commission has issued a revised Users' Manual for its program for the mediation of investigations under section 337 of the Tariff Act of 1930.

FOR FURTHER INFORMATION CONTACT: James Worth, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3065. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: On November 8, 2008, the Commission published notice that it had approved the initiation of a voluntary pilot mediation program for investigations under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 ("section 337"). *73 Fed. Reg.* 65615 (Nov. 8, 2008).

The Commission has determined to issue a revised Users' Manual for its program for the mediation of investigations under section 337 of the Tariff Act of 1930. The revised Users' Manual reaffirms the authority of administrative law judges and the Commission under the Administrative Procedure Act to require attendance at a settlement conference, including the use of alternative dispute resolution; reaffirms the confidential nature of mediation proceedings; provides that parties will receive materials regarding the program upon the filing of a complaint and certify receipt and reading/discussion thereof; and provides that the Commission will maintain an open list of private mediators in addition to the roster of pre-screened pro-bono mediators.

The authority for the Commission's determination is contained in the Administrative Procedure Act, as amended, see 5 U.S.C. § 556(c)(6)-(8), 572-74, 583, and in sections 335 and 337 of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1335, 1337.

By order of the Commission.

/s/

Marilyn R. Abbott
Secretary to the Commission

Issued: August 30, 2010

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.

Standing Protective Order for the Section 337 Mediation Program

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

COMMISSION ORDER

On October 29, 2008, the Commission issued notice of the initiation of a pilot program for the mediation of disputes in investigations conducted under section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337) (“section 337”). 73 *Fed. Reg.* 65615 (November 4, 2008). The Commission also approved a Users’ Manual for the Commission Pilot Mediation Program (“Users’ Manual”). *Id.*

In accordance with Commission rules 201.6, 210.5, 210.34, and 210.39 (19 C.F.R. §§ 201.6, 210.5, 210.34, and 210.39), the Commission hereby **ORDERS THAT --**

1. The parties to an investigation that has been submitted for mediation are permitted to disclose confidential business information covered by a protective order in the investigation to a Mediator, appointed by the Commission pursuant to the pilot mediation program to assist in the settlement of an investigation, who has signed the Commission Non-Disclosure Confidentiality Agreement for Mediators.
2. The parties to an investigation subject to mediation may also designate additional material as confidential business information and provide it to a Mediator solely for the purpose of the mediation process.
3. Upon the conclusion of the mediation, the Mediator shall destroy all confidential business information, including any position papers submitted by the parties and exhibit books, all notes, papers, and all other confidential business information in his or her possession.
4. All confidential business information provided to the Mediator and all communications with the Mediator are subject to the confidentiality provisions of 5 U.S.C. § 574, the terms of the Commission Users’ Manual, and the Commission Non-Disclosure Confidentiality Agreements for Mediators, Parties, and Authorized Representatives.

For the purposes of the pilot mediation program, the Commission hereby invokes the provisions of Commission rule 201.4, 19 C.F.R. § 201.4, to issue this protective order under Commission rule 210.34(a). This order shall serve as a standing protective order under 19 U.S.C. § 1337(n) for all Commission investigations under section 337 submitted for mediation.

By order of the Commission.

/s/

Marilyn R. Abbott
Secretary to the Commission

Issued: June 17, 2009

Mediator Roster and Biographies

The Commission maintains a roster of experienced professionals who have volunteered to serve as mediators for Commission investigations. These experts have significant experience in both patent litigation and mediation, have met the Commission's pre-screening criteria, and have agreed to serve in a pro-bono capacity.

The Supervisory Attorney for Docket Services assists parties in selecting a mediator for each investigation. The Commission's current Mediator Roster includes:

- **KAREN I. BOYD**
California
- **PAUL MICHEL**
Washington, DC
- **GEORGE L. GRAFF**
New York
- **DAVID WILLIAM PLANT**
New York
- **WALTER D. KELLEY, JR.**
Washington, DC
- **HARRIE SAMARAS**
Pennsylvania
- **JUDITH MEYER**
California, Pennsylvania, Idaho
- **GEORGE H. SPENCER**
Washington, DC

Wouldn't it be better to meet with the ALJ at a settlement conference and proceed to a hearing if settlement fails than to meet with a mediator who doesn't have the power to decide the case?

Mediation's significant advantage over litigation is control over the outcome. The USITC has compiled a roster of outside volunteers who are experienced in both patent litigation and mediation to serve as mediators. They assist parties in negotiating an outcome that meets their particular needs. That outcome is not limited to the remedies available from the Commission -- exclusion or cease and desist orders. For example, the litigation cannot result in a joint venture, a licensing or cross-licensing agreement or provide monetary compensation for past infringement. It cannot include other intellectual property or resolve other ongoing disputes between the parties that were not a part of the complaint. As with any settlement agreement, there is no need to amend the complaint for the mediated settlement to include provisions, territories, technologies, and details far exceeding the scope of the complaint. Mediation is an opportunity for the parties to explore their underlying interests and creative settlement options, not limited to exclusion orders or cease and desist orders.

Mediator Biography

Karen I. Boyd

Founding Partner, Turner Boyd LLP, California

Karen I. Boyd is a founding partner in Turner Boyd LLP. She is an Intellectual Property litigator representing emerging and established life sciences and high technology companies in intellectual property and related litigation. She also serves as a private and Court-appointed mediator, specializing in dispute resolution and case management mediation of intellectual property cases and other complex civil litigation. Her broad experience makes her a frequently invited speaker at conferences on patent and biomedical issues

Before founding Turner Boyd, Ms. Boyd was a partner at Fish & Richardson P.C. in Redwood City, CA. At Fish & Richardson, Ms. Boyd was a patent litigator, focusing on the pharmaceutical field (both branded and generic), as well as biotechnology and medical devices.

Ms. Boyd has been a Lecturer on Biotechnology and Chemical Patent Law at U.C. Berkeley School of Law, Berkeley, CA, since 2002. She was also an Adjunct Professor focusing on Patent and Trade Secret Law at U.C. Hastings College of the Law, San Francisco, CA. She was a Law Clerk to the Honorable Paul R. Michel at the United States Court of Appeals for the Federal Circuit, Washington, D.C. She is a graduate of U.C. Berkeley School of Law and earned her M.A. in Molecular Biology at U.C.L.A. where she taught genetics to biology major undergraduates, and biotechnology and social policy honors seminar to non-science majors. She attended California State University, Northridge, CA where she earned her B.A. in Environmental Biology.

Ms. Boyd is a Mediator in the Northern District of California Alternative Dispute Resolution Mediation Panel, and formerly served on the mediation panel for the Court of Appeals for the Federal Circuit. She serves as a Director on the Boalt Hall Alumni Association Board of Directors.



Mediator Biography

George L. Graff

IP Expert on Wide Range of Technologies, New York

George L. Graff has extensive experience in dispute resolution, licensing and acquisition of intellectual property rights and technology. He has acted as lead counsel in numerous bench trials, jury trials, ITC investigations, arbitrations, appeals and dispute resolution negotiations involving patents, copyrights, trade secrets, software and technology licensing, trademarks and related antitrust and commercial issues. He has also advised and represented clients in the negotiation of intellectual property and technology licenses and acquisitions in a wide variety of fields, including semiconductor design and manufacturing, software development, entertainment, pharmaceuticals and dietary supplements, medical and dental devices, telecommunications, fiber optics, automotive components, apparel, travel services, internet services, and investment banking.



In addition to the ITC roster of mediators, Mr. Graff serves on the mediation panel for the Federal Circuit Court of Appeals, the National Panel of Neutrals of the American Arbitration Association, the Technology Panel of Neutrals and International Patent Commission of the International Institute for Conflict Prevention and Resolution (CPR), the mediation panel of the Bankruptcy Court of the Eastern District of New York and the arbitration panel of the United States District Court for the Eastern District of New York. He has served as a neutral arbitrator or mediator in numerous cases involving intellectual property, licensing and technology related issues. He has participated in numerous mediation and arbitration training courses sponsored by CPR, the American Arbitration Association, the Chartered Institute of Arbitrators and the United States District Court for the Eastern District of New York.

Mr. Graff has served as a partner of Paul, Hastings, Janofsky and Walker, LLP and Milgrim Thomajan and Jacobs, PC. He graduated, *magna cum laude*, from Columbia University School of Law in 1967, where he served as an editor of the *Columbia Law Review*. Following law school, he served for three years as law clerk to Chief Judge Stanley H. Fuld of the New York Court of Appeals. Before commencing his legal career, Mr. Graff served on active duty in the United States Navy, where he attained the rank of Lieutenant Commander.

Mr. Graff represented the American Bar Association as advisor to the drafting committee of the Uniform Computer Information Transactions Act (UCITA), which establishes a nationwide legislative framework for licensing of software and electronic databases. He has also represented the Intellectual Property Owners Association (IPO) as an amicus curiae in patent related appeals in the Federal Circuit Court of Appeals and served as vice chair of its Amicus Committee. He has also served as a member of the Council of the ABA section on science and technology and as chairman of the State Legislation Committee of the Association of the Bar of the City of New York. He has been recognized as a leading U.S. intellectual property attorney in several publications, including *The Legal 500*, *New York Super Lawyers*, and *Who's Who in American Law*.

Mediator Biography

Walter D. Kelley, Jr.

Former Federal Judge, Washington, DC

Prior to joining Jones Day in June 2008, Walt Kelley served as a U.S. District Court Judge in the Eastern District of Virginia. He was nominated by President Bush in 2003 and unanimously confirmed by the United States Senate in 2004. While a judge, Walt presided over numerous criminal and civil cases, including the longest jury trial in Eastern District of Virginia history.

Walt was in private practice for 23 years before taking the bench. He handled a wide variety of business cases during that time, including antitrust, intellectual property, and corporate control disputes. Walt was named repeatedly to The Best Lawyers in America in the category of business litigation, was voted each year by his peers as one of the “Legal Elite” in Virginia Business magazine’s annual survey, and was rated AV by Martindale-Hubbell. He has tried more than 25 jury cases to verdict.

While in private practice, Walt was heavily involved in bar association activities. He served as president of the Virginia State Bar’s Young Lawyer’s Conference (1988-1989); chair of the Virginia State Bar’s Section of Antitrust, Franchise and Trade Regulation Law (1990-1991); and a delegate to the American Bar Association’s House of Delegates. Walt was also elected a master of the James Kent Inn of Court. He is admitted to the State Bar of Virginia.

Walt is an alumnus of Washington and Lee University (B.A. cum laude 1977; J.D. magna cum laude 1981; Order of the Coif; Omicron Delta Kappa; Lead Articles Editor, Washington and Lee Law Review). He served as a Law Clerk to Judge Ellsworth A. Van Graafeiland, U.S. Court of Appeals, Second Circuit.



Mediator Biography

Judith Meyer, Esquire

Mediator, Special Master, Judge Pro Tem & Professor, Pennsylvania

Judith Meyer is the Founder of JPMeyer Associates' Commercial Dispute Solutions. She mediates and arbitrates complex commercial disputes in contract, environment, construction, employment, attorney and accounting malpractice, securities, insurance coverage, franchise and bankruptcy. Her mediation expertise in the commercial trade, IT and IP fields spans a variety of cases. A representative sampling includes:

- patent infringement, misappropriation of trade secrets claims and unfair business practices and unfair competition claims by the manufacturers of a patented design purchased by the U.S. Armed Services;
- a dispute over patent license assignments and income sharing;
- the infringement of copyright registration and trade dress rights in a commercially distributed food product;
- charges of unfair trade practices brought by a national franchisees' association against franchisor;
- a dispute over patent license assignments and income sharing brought by a domestic corporation against a corporation registered in Ireland; and,
- claims of breach of the exclusive global distribution rights to software technology, failure to market the technology, and the misappropriation of confidential information.



From 1973 to 1995, Judith was an associate and then a partner in Meserve, Mumper & Hughes, Los Angeles, a partner in Lande, Rolston & Meyer, in Beverly Hills, and, of counsel to Bazelon, Less & Feldman in Philadelphia. She worked as a civil trial lawyer, representing clients in eminent domain takings; leasing and UCC claims; commercial construction; real estate; insurance; commercial lending litigation; and, in appellate matters.

Judith is certified by the International Mediation Institute and chairs the Independent Standards Commission of the Institute. She is a Fellow of the Chartered Institute of Arbitrators, a member of the Academy of Court-Appointed Masters, a Distinguished Fellow and Former Board Member of the International Academy of Mediators, and a member of the College of Commercial Arbitrators. She is appointed to the mediation and/or arbitration panels of the CPR International Institute for Conflict Prevention and Resolution, the American Arbitration Association, the U.S.-China Business Conciliation Center (CCPIT Beijing), FINRA, the EEOC, the American Health Lawyers' Association, the U.S. Federal Circuit Court of Appeals, the U.S. International Trade Commission, the Business and Technology Case Management Program for the State Courts of Maryland, and the Superior Courts of New Jersey. She serves as a Judge Pro Tem for the Commerce Court of Philadelphia, as Special Master for the Commonwealth Court of Pennsylvania, and as Referee in insurance bankruptcy liquidation matters. She appears in Best Lawyers in America, in ADR, 2006 through 2010.

Judith teaches negotiation and mediation at Cornell Law School. She has lectured on negotiation in the University of Pennsylvania, Wharton School of Business Executive Education Program. She writes and lectures frequently on ADR.

Judith is admitted to the bars of the U.S. Tax Court and the States of California, Idaho and Pennsylvania. She maintains residences in Haverford, Pennsylvania and Ketchum, Idaho.

Mediator Biography

Paul Michel

Former Chief Judge, Court of Appeals for Federal Circuit, Washington, DC

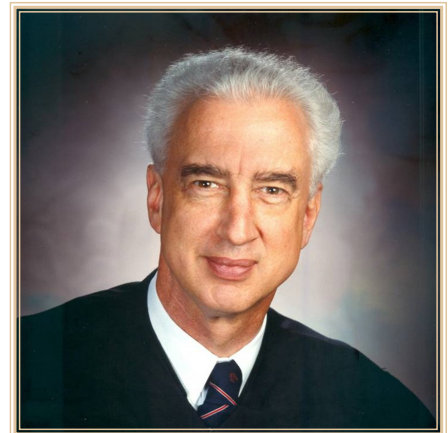
Paul Redmond Michel was the chief judge for the United States Court of Appeals for the Federal Circuit. He joined the court in 1988 after being nominated by President Ronald Reagan. Michel retired from the court effective May 31, 2010.

Michel graduated from Williams College with his Bachelor's degree in 1963 and later graduated from Virginia Law with his J.D. degree in 1966 and also served in the U.S. Army Reserve from 1966 to 1972. He was admitted to practice in Pennsylvania in 1967, in U.S. district court in 1968, in U.S. circuit court and before the U.S. Supreme Court in 1969.

Michel began his career with the Philadelphia District Attorney's Office as Assistant District Attorney and later Deputy District Attorney for Investigations from 1966-1974 before becoming an Assistant Watergate Special Prosecutor from 1974 to 1975 before becoming Assistant Counsel for the U.S. Senate Intelligence Committee from 1975 to 1976 before becoming Deputy Chief and Lead prosecutor in the Koreagate Scandal in the Public Integrity Section of the U.S. Department of Justice from 1976 to 1978 before becoming Associate Deputy U.S. attorney general from 1978 to 1981. Michel became Counsel and Administrative Assistant to Pennsylvania U.S. Senator Arlen Specter from 1981 to 1988. He has taught academically as an Adjunct faculty at George Washington Law and at John Marshall Law since 1991.

Michel served as a judge for 22 years on the U.S. Court of Appeals for the Federal Circuit. He served as the chief judge of the Federal Circuit from 2004 until his retirement in 2010. As chief judge, Michel created the court's Mediation Program.

He authored Patent Litigation and Strategy LCCN 2003-267792 with fellow Federal Circuit Judge Kimberly Ann Moore and patent attorney Raphael Lupo. He has also written several articles on effective advocacy and the work of the Federal Circuit.



Mediator Biography

David William Plant

Mediator, Arbitrator, Special Master, & Professor, New York

From 1957 through 1998, Mr. Plant practiced law in New York City with Fish & Neave. For 25 years, and exclusively since January 1999, he has served as a neutral and a teacher.

Mr. Plant holds degrees in engineering and law from Cornell University. He is a member of the bars of New York, the United States Supreme Court, various United States courts of appeals and district courts, and the United States Patent and Trademark Office.

While at Fish & Neave, Mr. Plant's practice focused on trials and appeals in federal courts, proceedings before the ITC, FTC, and USPTO, and various ADR processes, the majority of which related to patent matters. He served as managing partner of Fish & Neave, chair and director of various professional committees and organizations, and on various ADR panels in both court-annexed and voluntary procedures.

He has served as a Special Master in U.S. district courts, and as a mediator or arbitrator in more than 350 domestic and international disputes, including ICC, Stockholm, UNCITRAL, AAA, ICDR, CPR, WIPO, court-annexed, and ad hoc mediations and arbitrations, the majority of which have related to patent matters.

He has written and spoken on ADR issues in the U.S., Canada, Europe, Japan, Australia, Africa, and South America, and has led courses and workshops in arbitration and mediation at the ICC, WIPO, UNITAR, Cairo Regional Centre for International Commercial Arbitration, and bar associations. Among his publications are [We Must Talk Because We Can](#), ICC Feb. 2008 (author), [Resolving International Intellectual Property Disputes](#), ICC 1999 (author), [Guide To ADR For IP Disputes](#), AIPLA 1995 (editor), and various chapters in texts and articles in journals.

He is an adjunct professor at Cornell University Law School and University of New Hampshire School of Law, and has taught, as a Senior Fellow, at the University of Melbourne Law School in 2002, and as an adjunct professor, at Hong Kong University Law Faculty in January 2009, and at the University of Fribourg, Switzerland in December 2009.

He has completed hundreds of hours of basic and advanced training as a neutral.

Mr. Plant is a Fellow of the Chartered Institute of Arbitrators (both Arbitration and Mediation), the American College of Civil Trial Mediators, and the College of Commercial Arbitrators (and a Director), as well as a Distinguished Fellow of the International Academy of Mediators, and an accredited CEDR and IMI mediator. He has been listed in [The Best Lawyers In America](#), [Guide To The World's Leading Experts & Lawyers In Commercial Arbitration](#), [Guide To The World's Leading Patent Law Experts](#), and [Guide To the World's Leading Trade Mark Law Practitioners](#). In August 2006, Mr. Plant received the American Bar Association Section of Dispute Resolution's "Lawyer As Problem Solver Award".



Mediator Biography

Harrie Samaras

Founder, ADR & Law Office of Harrie Samaras, Pennsylvania

Ms. Samaras founded the ADR & Law Office of Harrie Samaras. She mediates and arbitrates complex commercial domestic and international cases focusing on intellectual property, business and technology issues.

Ms. Samaras is a Harvard trained mediator who has received certification from the International Mediation Institute. She is a Fellow of the Chartered Institute of Arbitrators. Her training includes programs administered by the American Arbitration Association (AAA) and the Chartered Institute of Arbitrators. Ms. Samaras serves as a Neutral on an ad hoc basis and for such widely respected domestic and international ADR organizations as: the CPR International Institute for Conflict Prevention and Resolution, AAA, the World Intellectual Property Organization (WIPO), the U.S. Council for International Business and the Financial Industry Regulatory Authority, Inc. (FINRA).



During the past twenty-five years, Ms. Samaras has worked as an attorney in the corporate and private sectors, for the U.S. government as a staff attorney and law clerk at the U.S. Court of Appeals for the Federal Circuit, and as a Patent Examiner at the U.S. Patent and Trademark Office in the biomedical arts. In private practice, Ms. Samaras represented clients at the trial and appellate levels in IP litigation and mediations. She has served as Director of Intellectual Property Litigation for a Fortune 500 telecommunications company and as Vice President Intellectual Property, Legal, for a business unit of a multi-national pharmaceutical company.

Serving as a neutral and representing clients, Ms. Samaras has handled disputes involving mechanical, chemical and software IP with an emphasis in medical devices, pharmaceuticals and biotechnology.

Ms. Samaras chairs the Subcommittee on neutrals for CPR's International Commission on Patent Disputes and she serves on various advisory committees for the AAA, ABA and the Center for Resolution (Media, PA). Ms. Samaras has chaired ADR committees for the American Intellectual Property Law Association, the ABA and the Federal Circuit Bar Association.

She is a frequent speaker on ADR topics for national and local bar associations and other legal organizations. She has lectured to law, business and graduate students on the subject of ADR. Ms. Samaras holds a B.S. and an M.S. degree in the life sciences, a J.D. degree, and an LL.M. degree in Patent and Trade Regulation Law.

Mediator Biography

George H. Spencer, Esquire

Founding Partner, Spencer & Frank, Washington, DC

George H. Spencer is an attorney who focuses his practice on all aspects of intellectual and industrial property law, including Alternative Dispute Resolution.

Mr. Spencer received his Bachelor of Engineering degree from Yale University and his Juris Doctor degree from Cornell University. He has served as a Patent Examiner in the United States Patent and Trademark Office and was thereafter associated with Toulmin & Toulmin, a long-established patent law firm which had obtained the early patents for the Wright Brothers. Mr. Spencer then established his own practice in Washington, D. C., and shortly thereafter became the senior founding partner of Spencer & Kaye, later Spencer & Frank, which, as a firm of twenty attorneys specializing exclusively in intellectual and industrial property law, had obtained well over ten thousand patents and over a thousand trademark registrations, combined in 1998 with the general law firm of Venable LLP, on whose Management Board Mr. Spencer served.



Mr. Spencer's experience covers the entire range of patent and trademark prosecution, patent, trademark and copyright enforcement, unfair competition, licensing and negotiations in the field of intellectual and industrial property, and litigation in the courts and before government agencies, including the International Trade Commission which has the authority to prevent the importation of products that infringe a U.S. patent or were made outside of the United States by a process covered by a U.S. patent.

He is fluent in German and French and has extensive experience in representing domestic as well as foreign clients, principally European ones, in the United States. Mr. Spencer has lectured extensively at home and abroad and has served as an arbitrator while on the Panel of Arbitrators of the American Arbitration Association. He is on the Panel of Arbitrators and Mediators of the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO), a Geneva, Switzerland, based agency of the United Nations, and he has also served as a judge in numerous moot court competitions administered by law schools and by federally sponsored organizations. Mr. Spencer is a Master of the Bench of the Prettyman-Leventhal American Inn of Court, whose focus is administrative law.

Earlier, Mr. Spencer served in the U. S. Army Reserve. He saw active duty in the Signal Corps and served as Captain in the Army's Judge Advocate General Corps, including a tour of duty in the JAGC Patents Division in the Pentagon.

Mr. Spencer is admitted to the bars of the District of Columbia, the State of New York, the United States Supreme Court and various Federal District Courts and Courts of Appeal, including the Court of Appeals for the Federal Circuit which is the appellate court that hears appeals in patent related matters. He is registered to practice before the United States Patent and Trademark Office and the Canadian Intellectual Property Institute and is a member of numerous domestic and international bar associations, including the Lawyer-Pilot Bar Association.

Mediation Program Forms

The 337 Mediation Program is protected under a standing Commission Order. Prior to allowing participation in the confidential mediation process, the Commission requires all parties, mediators, and other actively involved program participants to sign, agree to, and be bound by non-disclosure agreements executed under the current Commission Order. Mediation forms for each step of the process include:

- **Certification of Receipt and Reading/Discussion of Mediation Materials:** documents the receipt and reading of mediation materials.
- **Confidential Request to Enter Mediation:** used to nominate section 337 investigations for mediation.
- **Non-Disclosure Confidentiality Agreement for Parties, or Employees or Inside Counsel:** outlines terms of the mediation process and provides the consent to said terms of all actively-involved program participants.
- **Non-Disclosure Confidentiality Agreement for Parties and Authorized Representatives of Parties:** outlines terms of the mediation process and provides the consent to said terms of each party's authorized representatives.
- **Non-Disclosure Confidentiality Agreement for Mediators:** provides terms of the mediation process and mediator's consent to said terms.
- **Confidential Evaluation of Mediation:** requests background information from potential mediators for the Commission's pre-screening process.

If we reveal settlement proposals to our opponents during mediation and a settlement does not result for any reason, are we stuck with those proposals for future attempts to settle the case?

Mediation is a confidential, facilitated negotiation and a negotiation is always nonbinding until there is a signed agreement. Any party can leave mediation if it feels another party is negotiating in bad faith, or a complainant may disengage from mediation with one or more respondents and continue mediating with the others. All of the parties and the mediator must sign non-disclosure agreements that place them under the Commission's standing protective order for the Mediation Program. This bars disclosure of settlement or mediation proposals. Therefore, the parties are not bound in any way by mediation discussions for the purposes of the underlying Section 337 investigation.

U.S. International Trade Commission

Certification of Receipt and Reading/Discussion of Mediation Materials

Pursuant to the Commission's Users' Manual for the Commission Mediation Program for Section 337 Investigations, a certification of receipt and reading/discussion of materials shall be filled out and returned to the Supervisory Attorney for Docket Services as below:

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

If a party is represented by counsel, the certification may be filled out by counsel as follows:

I, _____, as the lead counsel for _____, a complainant or respondent in an investigation under section 337 of the Tariff Act of 1930 before the U.S. International Trade Commission, hereby attest that I have received the materials sent by the Commission upon the filing of a complaint by the complainant regarding the Commission's mediation program and discussed them with the party under my representation.

or

If a party is not represented by counsel, the certification may be filled out by a representative of the party (*i.e.*, a business principal) as follows:

I, _____, a representative of _____, a complainant or respondent in an investigation under section 337 of the Tariff Act of 1930 before the U.S. International Trade Commission, hereby attest that I have received and read the materials sent by the Commission upon the filing of a complaint by the complainant regarding the Commission's mediation program.

CONFIDENTIAL REQUEST TO ENTER MEDIATION

Return to:

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

The parties listed below request that:

Inv. No. 337-TA-_____

Certain _____

be included in the U.S. International Trade Commission’s mediation program for section 337 investigations (indicate name of party and counsel)

Multiple parties nominating an investigation may do so jointly or separately. Additional pages may be attached if necessary.

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

**NON-DISCLOSURE CONFIDENTIALITY AGREEMENT
FOR PARTIES, OR EMPLOYEES OR INSIDE COUNSEL THEREOF**

--To be signed by each party, or employee or inside counsel thereof,

that participates in the mediation process--

I, _____, a party, or employee or inside counsel thereof in
Inv. No. _____, intending to be legally bound, hereby consent to the terms in this
Agreement in consideration of me being granted conditional access to certain information,
including all communications (written or oral) provided by the U.S. International Trade
Commission ("Commission") and the private parties to this investigation under section 337 of
the Tariff Act of 1930, 19 U.S.C. § 1337, including all confidential business information and all
information provided in the mediation.

1. I will not disclose communications made by other private parties in a joint session, unless otherwise required by law.
2. All forms of communication (written and oral) are to be protected.
3. Communications of information that is otherwise public may be disclosed.
4. I will not make a verbatim recording of the mediation such as an audio tape or a stenographic record.
5. I and any entity that I may represent in Inv. No. _____ agree to hold the mediator harmless from any and all claims or actions associated herewith.
6. Although the Commission investigative attorney is a full party to the investigation, the Commission investigative attorney will not have knowledge of the contents of the mediation proceedings, except that the Commission investigative attorney may review any settlement agreement that arises from a successful mediation in making a recommendation to the presiding administrative law judge about whether a settlement is in the public interest.
7. I agree to comply with the provisions of 5 U.S.C. § 574, the Federal Rules of

Evidence, the Administrative Procedure Act, 19 U.S.C. § 1337(n), and other applicable laws, as well as the terms of this agreement.

8. If I am served with a subpoena or other demand, I shall promptly advise the General Counsel of the Commission of the service of the subpoena or demand, the nature of the documents or information sought, and all relevant facts or circumstances. I am aware that mediation communications and confidential business information are subject to the assertion of privilege as set forth in this document and in applicable laws. The Chairman of the Commission may assert privilege for the information described herein. The General Counsel will defend the assertion of privilege on behalf of the mediator and the Commission. If a court rules that a demand made upon me must be complied with, I shall respectfully ask the court to wait for the General Counsel to submit an explanation to the court of the nature of the privilege being asserted.

Signed

Title

Date

Sample

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

**NON-DISCLOSURE CONFIDENTIALITY AGREEMENT
FOR AUTHORIZED REPRESENTATIVES OF PARTIES
(OUTSIDE COUNSEL)**

--To be signed by each authorized representative of a party (outside counsel)

that participates in the mediation process--

I, _____, an authorized representative of a party (outside counsel) in Inv. No. _____, intending to be legally bound, hereby consent to the terms in this Agreement in consideration of me being granted conditional access to certain information, including all communications (written or oral) provided by the U.S. International Trade Commission (“Commission”) and the private parties to this investigation under section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, including all confidential business information and all information provided in the mediation.

1. I will not disclose communications made by other private parties in a joint session, unless otherwise required by law.
2. All forms of communication (written and oral) are to be protected.
3. Communications of information that is otherwise public may be disclosed.
4. I will not make a verbatim recording of the mediation such as an audio tape or a stenographic record.
5. I, my firm, and any client that I represent in Inv. No. _____ agree to hold the mediator harmless from any and all claims or actions associated herewith.
6. Although the Commission investigative attorney is a full party to the investigation, the Commission investigative attorney will not have knowledge of the contents of the mediation proceedings, except that the Commission investigative attorney may review any settlement agreement that arises from a successful mediation in making a recommendation to the presiding administrative law judge about whether a settlement is in the public interest.

7. I agree to comply with the provisions of 5 U.S.C. § 574, the Federal Rules of Evidence, the Administrative Procedure Act, 19 U.S.C. § 1337(n), and other applicable laws, as well as the terms of this agreement. Outside counsel who have subscribed to the protective order of the presiding administrative law judge will comply with any obligation thereunder not to share confidential business information with parties under representation, with executives or employees of parties under representation, or with counsel who are not under the protective order of the presiding administrative law judge.

8. If I am served with a subpoena or other demand, I shall promptly advise the General Counsel of the Commission of the service of the subpoena or demand, the nature of the documents or information sought, and all relevant facts or circumstances. I am aware that mediation communications and confidential business information are subject to the assertion of privilege as set forth in this document and in applicable laws. The Chairman of the Commission may assert privilege for the information described herein. The General Counsel will defend the assertion of privilege on behalf of the mediator and the Commission. If a court rules that a demand made upon me must be complied with, I shall respectfully ask the court to wait for the General Counsel to submit an explanation to the court of the nature of the privilege being asserted.

Signed

Title

Date

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

NON-DISCLOSURE CONFIDENTIALITY AGREEMENT FOR MEDIATORS

--To be signed by the mediator--

I, _____, a mediator, intending to be legally bound, hereby consent to the terms in this Agreement in consideration of my being granted conditional access to certain information, as specified below:

1. This information includes all communications (written or oral) provided by the U.S. International Trade Commission (“Commission”) and the private parties to this investigation under section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, including all confidential business information and all information provided in the mediation. The mediation is confidential and is protected by the confidentiality provisions of the Alternative Dispute Resolution Act, 5 U.S.C. § 574. A dispute resolution communication between a mediator and a party that is protected from disclosure under 5 U.S.C. § 574 is also protected from disclosure under FOIA (5 U.S.C. § 552(b)(3)), as provided by 5 U.S.C. § 574. The parties’ communications are also protected by other applicable authorities, including the Federal Rules of Evidence, the Administrative Procedure Act, and 19 U.S.C. § 1337(n). By my being granted conditional access to the information indicated above, the Commission has placed special confidence and trust in me and I am obligated to protect this information from unauthorized disclosure, in accordance with the terms of this Agreement and the laws, regulations, and directives applicable to the specific categories of information to which I am granted access.
2. This agreement is made and intended for the benefit of the Commission and may be enforced by the Commission. By granting me conditional access to information in this context, the Commission, or any authorized representative, may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement. I understand that if I violate the terms and conditions of this Agreement, I could be subjected to administrative, disciplinary, civil, or criminal action, as appropriate, under the laws, regulations, or directives applicable to the category of information involved and the Commission has not waived any statutory or common law evidentiary privileges or protections that it may assert in any administrative or court proceeding to protect any sensitive information to which I have been given conditional access under the terms of this Agreement.
3. All forms of communication (written and oral) are to be protected.

4. Communications made by the private parties in joint session may not be disclosed to anyone not participating in the session.
5. Communications of information that is otherwise public may be disclosed.
6. If I am served with a subpoena or other demand, I shall promptly advise the General Counsel of the Commission of the service of the subpoena or demand, the nature of the documents or information sought, and all relevant facts or circumstances. The Chairman of the Commission may assert privilege for the information described herein. *See Touhy v. Ragen*, 340 U.S. 462 (1951). If the Chairman asserts privilege over the information, I shall respectfully decline to produce the requested documents, to testify, or to otherwise disclose requested information. The General Counsel will defend the assertion of privilege on behalf of the mediator and the Commission. If a court rules that a demand made upon me must be complied with, I shall respectfully ask the court to wait for the General Counsel to submit an explanation to the court of the nature of the privilege being asserted.
7. I will make no verbatim recording of the mediation such as an audio tape or a stenographic record.
8. Although the Commission investigative attorney is a full party to the investigation, the Commission investigative attorney will not have knowledge of the contents of the mediation proceedings, except that the Commission investigative attorney may review any settlement agreement that arises from a successful mediation in making a recommendation to the presiding administrative law judge about whether a settlement is in the public interest.
9. As described in the Users' Manual, the Commission may communicate with the Supervisory Attorney for Docket Services and with mediators with a view towards revising the pilot mediation program. The Supervisory Attorney for Docket Services or the mediator may also communicate with an administrative law judge regarding a motion for sanctions, only to the extent necessary to make a recommendation on sanctions. In both situations, the substance of the communications remains confidential.

10. In addition to the above terms regarding confidentiality of communications made during a mediation, I will not disclose any confidential business information to any person not covered by a protective order. A protective order covers those counsel who have been subscribed to a protective order by the administrative law judge or the Commission, but does not cover parties under representation, does not cover executives or employees of parties under representation, and does not cover those counsel who are employed directly by the party (inside counsel).

_____ Signed	_____ Mediator	_____ Date
_____ Signed	James R. Holbein Supervisory Attorney for Docket Services	_____ Date

Sample

CONFIDENTIAL EVALUATION OF MEDIATION FORM

Return to:

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

Please attach additional pages if you require additional space.

1. Please indicate the name and number of the investigation involved in the mediation.
2. Please indicate your name and the party you represent.
3. Did your client attend any of the mediation sessions? Yes/No_(circle one)_____
4. Did the mediator have expertise in the legal issues involved in the case? Yes/No
5. What impact did the mediator's expertise have on the mediation?
6. Please provide a candid evaluation of the mediator assigned to this investigation.
7. At what point in the investigation did the mediation occur?
8. How many hours of attorney and party time were spent in mediation? How much money?

9. How many hours of attorney and party time were saved by mediation? How much money?

10. Was the mediation useful in identifying settlement options? In helping the parties to evaluate their case? To communicate with each other?

11. Did the mediation result in a settlement? A narrowing of the issues? A clarification of the issues? A decrease in the level of conflict?

12. Do you consider the mediation to have been successful? Yes/No
Why?

13. Were you satisfied with the outcome of the mediation process?

13. What suggestions do you have for improving the program?

14. Would you recommend the mediation process to other litigants?



500 E Street, SW
Washington, DC 20436