

## ■ V. Preparatory Organization of the Mediation

### WIPO Mediation and Arbitration Workshop

**Palo Alto**  
**November 12 and 13, 2015**

Scott Donahey, WIPO Mediator and Arbitrator, Palo Alto  
Peter Michaelson, WIPO Mediator and Arbitrator, New York

2

## Working with the Mediator on Process

- Contacts with the Mediator (Art. 11 of the WIPO Mediation Rules)
  - Initial session – joint or separate meetings
- What Type of Mediation?
- Information Sharing
  - Prior approval of disclosing party
- Withholding Information

## Preparatory Organization

- Agreeing on the Ground Rules
- Initial (Telephone) Conferences
- Getting Ready for the Mediation Meeting
- Preparing a Party Statement
  - Confidential vs. Shared
- Dealing with Documents

## Ground Rules for Mediation

- Dates and Timings (Art. 12 of the WIPO Mediation Rules)
- Personnel
- Facilities
- Confidentiality (Arts. 14 to 17 of the WIPO Mediation Rules)
  - Potential legal limitations on confidentiality

## Initial Telephone Conferences

- Joint or Individual
- Lawyers only or with Party Representatives
- Developing Trust
- How Much Information

## Getting Ready for the Mediation Meeting

- Selecting the Right Team (Art. 8 of the WIPO Mediation Rules)
- The Role of the Party Representative(s)
- Experts
- Allocating Roles
- Levels of Authority
- Access to Decision Makers

## Preparing a Party Statement

- Setting the Tone
- Making Sure the Other Party Listens
- The Facts
- What You Want From Mediation
- What You Want the Mediator To Do
- Setting an Agenda

## Preparing a Party Statement

- Written summary of case
- Exchanging Statements
- Do you Include Solutions?
- Additional information for the Mediator
  - Status of any settlement discussions
  - Other business between parties
  - Possible business solutions
  - Anticipated fees/costs through trial
  - Upcoming key dates in the underlying litigation

## Dealing with Documents

- Pleadings
- Key Documents
- Survey or Other Evidence
- How Much? How Little?

## Practical Example

- Mediation was ordered by a Court in a patent infringement case
- In the initial telephone conference, which in this case was done individually, the patent owner explained that its impediment to settlement was concern over triggering MFN clauses in other license agreements
- That led mediator to request confidential Party Statements and to ask for copies of all license agreements with MFN's that might be impacted by a deal with the defendant
- Knowing the impediment and having access to all the pertinent facts, allowed the Mediator to help the parties find a creative solution

**Thank You**