

■ III. Preparing and Commencing the Mediation

WIPO Mediation Workshop

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Preparation of Parties for Mediation

- Clarifying the Lawyer's Role
- Conducting a Realistic Risk Analysis
- Getting the Other Party to Agree to Mediation
- Preparing the Case – the Mediation Plan
- Identifying Required Qualifications of the Mediator
- Conveying and Emphasizing the Parties' Role

The Lawyer's Role

- Initial Instructions
- Explaining the Process & Outcomes
- Timing
 - insuring the availability on the selected date of the person(s) with full authority to settle
- Realism
 - the merits of dispute
 - the legal fees and costs
 - the business disruption associated with discovery and/or trial
- Planning
- Preparing the mediation statement
 - ex parte vs. shared
- Rehearsal

Risk Analysis

- Resolving your Own Dispute (or Establishing Precedent)
- Preserving Relationships (or Preserving Principle)
- Avoiding Precedents (or Deterring Future Claims)
- Creative Remedies (or Vindication)
- Confidentiality (or Establishing Precedent)
- Transnational (or Domestic)
- Revenue Generating (or Draining)
- Exit Strategy Door-opener (or door-closer)

Getting the Other Party to Agree to Mediation

- Education
- Non-Binding, Confidential Process
- Neutral Location
- Mediation Benefits
- Pledges
- Mediation Agreements

Preparing the Case – The Mediation Plan

- BATNA & WATNA
- Mediation Goals
- Lines of Principle
- Possible Options
- Possible Outcomes

Identifying Required Qualifications of the Mediator

- Information Gathering
 - Neutral Qualifications
 - Due Diligence
 - Interview Criteria
- Types of Mediator
- Skills and Co-Mediation
- Who Will the Other Party Listen To?

The Parties' Role

- The ADR Options
- Choose and Send Representative(s) with full authority to settle
- Instructing Lawyers Who Know Mediation
- Identify Mediation Goals
- Commercial Issues

Submitting the Request for Mediation

- The Request for Mediation
- How to Get the Right Mediator
- The WIPO Model
- Working with the Mediator on Process

The Request for Mediation

- Know the Rules
- Communication with the WIPO Center
- Communication with the Mediator
- Negotiating a Mediation Agreement

Practical Example #1

- U.S. NPE suit against a Japanese consumer product manufacturer
- Court denied summary judgment motion re invalidity
- Parties agreed to mediate
- Impediment to settle was differing views as to the value of the patented technology
 - patent owner was very concerned about setting a low precedent
- With the help of the mediator, a creative solution was found that involved cash and non-cash consideration
- Result: case settled

Practical Example #2

- Two U.S. competitors in a trade secret misappropriation lawsuit over the hiring by one of a former employee of the other
- The defendant was financed with private equity and contemplated an IPO
- The cloud of litigation would have made an IPO difficult and the trial date was years down the road
- The plaintiff lost its attempt to get a TRO and preliminary injunction and needed a face-saving way out of the litigation it initiated
- Mediation met the business needs of both parties
- Result: case settled

Practical Example #3

- Two competitors were involved in multiple lawsuits in multiple jurisdictions, including in the U.S., the U.K. and Germany
- Patents were being asserted and challenged by both parties
- Mediation gave the parties the opportunity to reach a global resolution
- Result: all cases settled worldwide

Thank You