

## CPR

### International Institute for Conflict Prevention & Resolution

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#### *Changing the Way the World Resolves Conflict*

#### ABOUT CPR

**CPR Mission:** – CPR is the leading independent resource helping global business and their lawyers resolve complex commercial disputes more cost effectively and efficiently.

**About CPR:** – CPR is the only independent non-profit organization whose mission is to help global business and their lawyers resolve complex commercial disputes more cost effectively and efficiently. For over 30 years, the legal community has trusted CPR to deliver superior arbitrators and mediators and innovative solutions to business conflict.

**CPR Members** – CPR's membership comprises an elite group of ADR trailblazers, including executives and legal counsel from the world's most successful companies and global law firms, government officials, retired judges, highly-experienced neutrals, and leading academics. CPR accomplishes its mission by harnessing the expertise of these leading legal minds to change the way the world resolves conflict for generations to come.

**CPR Pledge:** – In 1979, CPR started this legacy by being the first to bring together Corporate Counsel and their firms to find ways to lower the cost of litigation. Since that time, CPR has changed the way the world resolves conflict by being the first to develop an ADR Pledge. Today, this Pledge obliges over 4,000 operating companies and 1,500 law firms to explore alternative dispute resolution options before pursuing litigation.

**CPR 21st Century Pledge:** – CPR is once again challenging the way the world resolves conflict by introducing the 21st Century Corporate ADR Pledge. This new Pledge will systemically change the way global business and their leaders resolve complex commercial disputes.

**CPR's Clauses and Distinguished Neutrals:** – CPR's rules and clauses allow for a self-administered ADR process, enabling practitioners to maintain control and flexibility while minimizing costs. CPR members have unlimited access to a highly qualified panel of more than 600 distinguished neutrals, specializing in over 20 practice areas. CPR employs a highly competitive vetting and evaluation process to ensure that the highest quality and most experienced neutrals are available without administrative expenses.

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## Patent Mediation Task Force

In 2012, the Patent Mediation Task Force formed three focus group subcommittees to explore the benefits of mediation in resolving patent disputes, and to analyze the methods and solutions for improving the use and efficiency of mediation. Each subcommittee was comprised of participants who had experience with patent mediation and participants included in-house counsel, litigators, mediators and judges.

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## International Institute for Conflict Prevention & Resolution

# WHY PATENT MEDIATION WORKS

*"Our litigation system is too costly,  
too painful, too destructive, too  
inefficient for a civilized people."*

*—Chief Justice Warren E. Burger (1)*



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## A Successful Method

- ♦ Mediation is a highly effective process for resolving patent disputes.
- ♦ Discussions take place through pre-mediation calls, private caucuses with the mediator, and joint sessions where both parties and their counsel are present.
- ♦ The mediator identifies the key business concerns for each party, assesses the risks and costs that the dispute poses, and works with each party to realistically analyze its case and develop an appropriate business solution.
- ♦ The mediator's ultimate goal is to assist the parties in reaching a resolution which will satisfy their respective interests and, if requested, to recommend a resolution for them to consider.

## Dispelling Myths

**Myth:** Initiating mediation is a sign of weakness.

**FACT:** A party which initiates mediation is not conceding its position on the merits of the dispute or abandoning its litigation objectives. It is simply seeking to explore a workable resolution of the dispute with its adversary, according to its business needs, with an experienced third party who understands the subject matter. During a caucus, each party can also privately convey an initial settlement proposal to the mediator without disclosing it to the other side. The mediator can then tailor future communications between the parties using these initial proposals as a guide without expressly disclosing them.

**Myth:** Full-blown litigation discovery has to occur before mediation.

**FACT:** It is not necessary to complete litigation discovery in order to have a successful mediation. Mediation can and often takes place:  
a) if the parties have sufficient information (i.e. from partial discovery or a cooperative exchange of information) to evaluate each other's cases,  
b) if counsel know and respect one another, and  
c) if the parties are motivated to settle. Proceeding with full discovery often leads to wasteful litigation expense, especially since the likelihood of finding a "smoking gun" in discovery is rare.

**Myth:** Mediation is binding.

**FACT:** Unlike arbitration, mediation is entirely voluntary and non-binding, and the mediator does not render a decision on the merits. Mediation provides each party with an opportunity to decide whether and how they would like to resolve their dispute. The mediator assists the parties in negotiations by identifying the primary obstacles to settlement and developing creative solutions in response. If the mediation is successful, the settlement is reflected in an enforceable contract accepted by both parties.

## Key Benefits

**REDUCED COSTS:** The cost of mediation is much less than patent litigation.

- ♦ In full patent litigation, parties typically incur substantial legal fees for pleadings, motions, document discovery, depositions, expert witnesses, court filing fees, *Markman* hearings, summary judgment motions, and trial.
- ♦ The median cost of litigation for a patent infringement suit with more than \$25 million at risk is approximately \$5 million. <sup>(2)</sup>
- ♦ Mediation, particularly if initiated early, substantially reduces the cost of litigation.
- ♦ Although the cost of mediation varies depending on the nature of the dispute and the type of mediation used, it is always a small fraction of the cost of litigation. <sup>(3)</sup>

**SPEED:** Mediation is a much faster process than litigation, and provides the parties with a timely resolution. Reaching a speedy resolution is a significant factor in many patent disputes because patent protection is by its nature time sensitive. The uncertainty and delay inherent in litigation can negatively affect the parties' sales and profitability.

- ♦ On average, patent infringement litigation takes 2.5 years to reach trial. Many cases can take as long as seven years to reach final judgment. <sup>(4)</sup>
- ♦ In contrast, parties can begin mediation well before completing all of the steps required in litigation. On average, mediated cases are resolved in less than one year. <sup>(5)</sup>

**MANAGEMENT TIME:** A company's senior management and executives will often benefit the most from the speedy resolution that mediation provides. During litigation, executives spend weeks, months, and sometimes years, in consultation with counsel, gathering and reviewing of company documents, and preparing for and appearing at depositions and trial. In contrast, the preparation for and participation in mediation usually only takes 3 or 4 days.

**CONFIDENTIALITY:** Mediation sessions are private and confidential, and, unlike lawsuits, not a matter of public record. Any statements made during the sessions are inadmissible as evidence in litigation. The strict confidentiality of this process protects both parties from the disclosure of any proprietary technical or financial information. Any settlement reached in mediation is also confidential.

**DEFINITE OUTCOME:** Unlike litigation, where parties face the uncertainty of a "win-lose" result, which lingers over the case for many years, mediation allows the parties to reach a "win-win" outcome of their own design and eliminates uncertainty. Even if settlement is not reached, each party gets the benefit of learning more about its opponent's case, a valuable tool in assessing the economic consequences of victory or defeat if litigation is pursued.

## Testimonials

*"Mediation is an opportunity to achieve a worthwhile result while avoiding giant legal bills and the significant time and energy in going to trial and not getting the result the client wanted or hoped." —Focus Group Participant*

*"There is no such thing as a failed mediation. Even if a case does not settle after a mediation session, the parties typically learn useful information about their own case and their opponent that they would not have otherwise known and that might be useful for a later settlement." —Focus Group Participant*

*"When I was a trial attorney, I used to think that the more discovery you have the better. But as a mediator I have found that where the parties are in discovery is irrelevant. The parties seem to know all they need to know to reach the bottom line." — Former trial attorney and retired judge*

*"The parties have the freedom to choose a mediator with requisite technical background, business sense, skills and energy who understands the merits of the dispute and will push each side to arrive at a mutually agreeable solution, rather than someone just shuffling numbers back and forth." —Focus Group Participant*

*"Mediation offers broader relief or value than what parties might typically obtain from a court (e.g. access to other intellectual property, other business opportunities such as a supply agreement for a different product line.)" —Focus Group Participant*

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