

## **Arbitration & Mediation: A More Effective Way to Protect Valuable Intellectual Property Alternative Dispute Resolution Can Short-Circuit Expensive Litigation to Achieve Better Results**

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Arbitration and mediation provide ways to avoid the skyrocketing costs of litigation while achieving better results.

In arbitration, the parties present their cases to an arbitrator for a binding or nonbinding decision. Mediation is a non-binding process designed to encourage the parties to settle. Collectively, these processes are known as "alternative dispute

resolution" or "ADR" and they offer many benefits to traditional patent litigation.

For many years I opposed ADR, especially mediation. I viewed mediation as a way for someone with no case to extract a settlement, not only unjustly enriching him, but also encouraging his behavior. I still oppose ADR in such cases, but that type of misuse of the process notwithstanding, over the last several years I have come to recognize the value of ADR in many cases. In fact, I have been so convinced of the advantages offered by mediation -- especially in patent cases -- I even became certified as a mediator myself.

However, I am just part of the movement. As the costs, risks and delays of traditional litigation have escalated in recent years, ADR has become ever more advantageous and popular. ADR often is a very inexpensive opportunity to short-circuit lengthy and costly litigation. It can save literally millions of dollars. It is also a way to achieve a definite result quickly, allowing your business to move forward without a threat looming over it. In addition, the result is business-driven rather than legal-driven and so is often even *better* than that which can be obtained from a court.

Patent cases are particularly suitable for ADR. Patent litigation often involves highly specialized and complex technology and legal concepts that are often inscrutable to trial judges and juries. As a result, patent litigation is very expensive and lengthy and yields judgments and verdicts that have a high rate of reversal on appeal. Moreover, even after all the time, costs and disruption of the business caused by such suits, the ultimate judgment is commonly inadequate because it is typically difficult to establish the real value of a patent. In fact, because of the nature of patent rights and the great variety of ways to exploit patents, patent cases are especially ripe for creative results beyond the limited tools of injunctive relief and monetary damages available to a court. Underlying all of these considerations is the fact that confidential technologies or licensing techniques are often associated with patents and such confidences may be better served by private mediation. I will discuss these issues in turn.

First, most trial judges are legal generalists with little familiarity of patent law and even less knowledge of science and technology, which is, after all, essential to understanding many patents. Therefore, for most judges, a patent case is double trouble. One, it is difficult for them to understand the technology addressed in patents. Two, patent law is "Greek" to many of them. In fact, while courts as a rule forbid the use of an expert witness to explain the law, patent law experts traditionally have been permitted on the theory that patent law is in the

nature of “foreign” law with which judges are expected to be unfamiliar.

All of this frequently adds to the costs and length of litigation while the judge and jury climb two steep learning curves. The result is that patent infringement lawsuits typically cost millions of dollars in attorneys’ fees for each side and that it often takes years before patent lawsuits get to trial and a decision is rendered.

Moreover, the difficulty so many trial judges have with both the technology and law involved in patent cases also leads to frequent mistakes. Decisions in patent cases are commonly reversed on appeal, leading to more years of delay and costs for the inevitable appeal, which may then result in yet another trial and appeal before final resolution. In short, patent litigation is typically a money-draining endurance contest. Often the victories are Pyrrhic. And, while all this is dragging on over the course of years, your business is in limbo with the uncertainty hanging over it. If you want to produce a product that has been accused of infringing a patent, you may have to wait years before you find out whether you can do so. If you own a patent, you may have to wait years before you can learn whether you may prevent the sale of your competitor’s product, and tout that advantage to your customers or set higher prices or profit margins due to your exclusivity in the market. All of this happens in a world of rapidly advancing technology and limited patent life where time is, therefore, of the essence.

By contrast, in ADR, the parties can select an arbitrator or a mediator with particular knowledge and experience in patent law and technology. Because of the mediator’s expertise, he or she may be able to convince your opponent of the weakness of your opponent’s case or otherwise give both sides an independent appraisal of the strengths and weaknesses of their cases, thereby assisting the parties in reaching settlement. Or, the mediator might suggest or facilitate more creative solutions that would not be apparent to those without familiarity with the technology or area or law. In arbitration, because the parties have more confidence in the arbitrator’s specialized expertise than they have in a judge’s limited background, they may decide that the arbitrator’s decision will be binding and non-appealable. In mediation, the parties come to an agreement. In either case, the final resolution is immediate, producing a quick and final result by a knowledgeable arbiter for thousands rather than millions of dollars and both parties can return to making money the old fashioned way.

ADR yields many other advantages as well. For example, while the remedies available to courts are limited to injunctions and monetary damages, the

mediation process lends itself to creative results. Because patents are property rights that can be assigned or licensed or divided geographically or by market or technology, patent cases lend themselves to such creative alternatives. While one or both of the parties may be resistant to resolution by the limited choices of halting production or paying damages, they may be amenable to assignment, a license agreement, an assignment or license agreement limited territorially or commercially, cross-licensing of other technology, or some other creative solution. Sometimes we can find a win-win solution in which both parties end up better than they could from litigation.

Also, because of the cooperative rather than combative nature of mediation, it is particularly useful where it is desirable to maintain a good relationship with an opponent who may be a supplier or customer or have something else of interest to your business. In fact, all of the aspects of ADR are business-driven. The process, as well as the solutions, can be controlled and dictated by the business interests and business managers of the parties. And, as noted above, all of this can be carried out in confidentiality.

## Conclusion

Although these hard economic times make the expensive and time-consuming job of protecting intellectual property difficult, alternative dispute resolution offers a way to protect such valuable assets expeditiously and at substantially reduced costs, while simultaneously achieving better results than available in traditional litigation.