

# *Alternative Dispute Resolution in Technology Disputes*

*Robert F. Copple*

# ADR: A PRIMER

## ■ Process

- Private Settlement
- Mediation
- Neutral Evaluation
- Arbitration

# ADR: A PRIMER

## ■ Mediation

- Private and confidential structured settlement discussions in which the neutral serves as a facilitator and evaluator to help the parties resolve the dispute.
- Focus on costs and risks of going forward to litigation.

## ■ Neutral Evaluation

- Materials and arguments are submitted to a neutral who provides an objective analysis of the case as a “preview” of a judicial opinion.

## ■ Arbitration

- Private, confidential “mini trial” to a neutral or panel of neutrals who provide a binding or nonbinding decision.
- The parties, by agreement determine the scope of the proceeding and the procedures that will be implemented.

# Technology Disputes Defined

- **Many Different Types of Tech Disputes**
  - **Application of General Legal Principles v. Specific Regulatory Schemes**
  - **Each With Their Own Economic Structures and Motivations**
- **Today's Focus**
  - **Intellectual Property**

# Components of the Dispute

- **What are the two most important components of any civil dispute?**

# Components of the Dispute

- Two most important components
  - Liability

# Components of the Dispute

- Two most important components
  - Liability
  - Damages / Exposure

# Components of the Dispute

- **Damages But No Liability**
  - No Case
- **Liability But No Damages**
  - Who Cares
- **Liability and Damages**
  - Lawsuit



# Follow The Money!

## IP Economics

- **What Is The Value Of IP?**
- **How Do You Value IP?**

# Follow The Money!

## The Costs Of Infringement - Patents

- **During The Boom**
  - Competitive Advantage
  - The Sport Of Kings
  
- **Post Bust**
  - Leveraging The Patent Portfolio
  - Licensing Shops
  
- **The Global Marketplace**
  - Early Development
  - Whose Ox is Being Gored?

# Follow The Money!

## The Costs Of Infringement - Patents

- Past Damages
- Future Damages
- License
  - Similar To Acquisition Or Sale Of Small Business
- In Kind Settlements

# Follow The Money!

## The Costs Of Infringement - Copyright

- **Cassette Tapes Killed The Record Album**
- **Computers And CD/DVD Burners**
- **Music And Video Downloads**
- **The Asian Market**

# Follow The Money!

## The Costs Of Infringement -- Trademarks

- Dilution
- Quality Control
- Loss Of Consumer Loyalty
- Others
- [Askjesus.com](http://Askjesus.com)

# Follow The Money!

## The Costs Of Litigation

- **Attorney, Discovery And Expert Fees**
- **Business Disruption**
- **Internal Resources**
- **Shareholder And Stock Market Uncertainty**

# **Follow The Money!**

## **The Risks Of Patent Litigation**

### **Do You Really Want to be in Federal Court?**

- **Widely Varying Levels of Expertise**
- **Inconsistent Treatment**
  - **Local Rules**
  - **Eastern District of Texas**

# Mediation The Myths

- **Demonstrates Lack Of Resolve**
  - Demonstrates Business Sophistication
  - Microsoft
- **Free Discovery**
  - Modern Discovery – No Bush Whacking
- **It's Technical**
  - The Cult Of The Engineer Or “I'm Smarter Than You”
  - The French Revolution – A Lesson
  - When Is A Crate A Crate?



# Mediation

## The Advantages

- **Vehicle For Early Resolution**
  - Lower Litigation Costs
  - Avoid Crystallization Syndrome
- **Confidential**
  - Avoid Copycats
  - Protect Secrets
- **Protect Licensing Program**
  - Avoid the Double Jeopardy Result
- **Avoid Questionable Non USA Forums**

# Mediation Strategic Planning

- **Pre Dispute**
  - ADR Clauses
  - Army Corps of Engineers
- **At First Notice**
- **During Litigation**
  - Parallel Strategies
- **Negotiation Teams**
  - Early Business Involvement
  - Avoid The Technical Road Block

# Arbitration Myths

- **It's Technical (Again)**
- **Arbitrator Could Make A Bad Decision**
  - **So You Want A Judge And Jury?**
- **Cost As Much As Trial**
  - **This Is A Real Issue**
  - **But In The Control Of The Parties**

# Arbitration Advantages

- **Confidentiality**
  - Secrets
  - Copycats
  - No Precedential Effect
  - No Collateral Estoppel
- **Parties Design Process**
  - Limit Discovery, Scope, Relief, Form Of Decision
  - Identify Neutral Expertise
- **Avoid Questionable Non USA Forums**

# Arbitration Strategic Planning

- **Pre Dispute**
  - **ADR Clauses**
- **Faster Resolution**
- **Parties Control Process**
- **Costs**

# ADR Resources

- **CPR Institute For Conflict Prevention and Resolution**
  - [www.cpradr.org](http://www.cpradr.org)
- **American Arbitration Association**
  - [www.adr.org](http://www.adr.org)

**PostScript:**  
**Statistics Suggest There**  
**Is A Better Way**

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January 30, 2007

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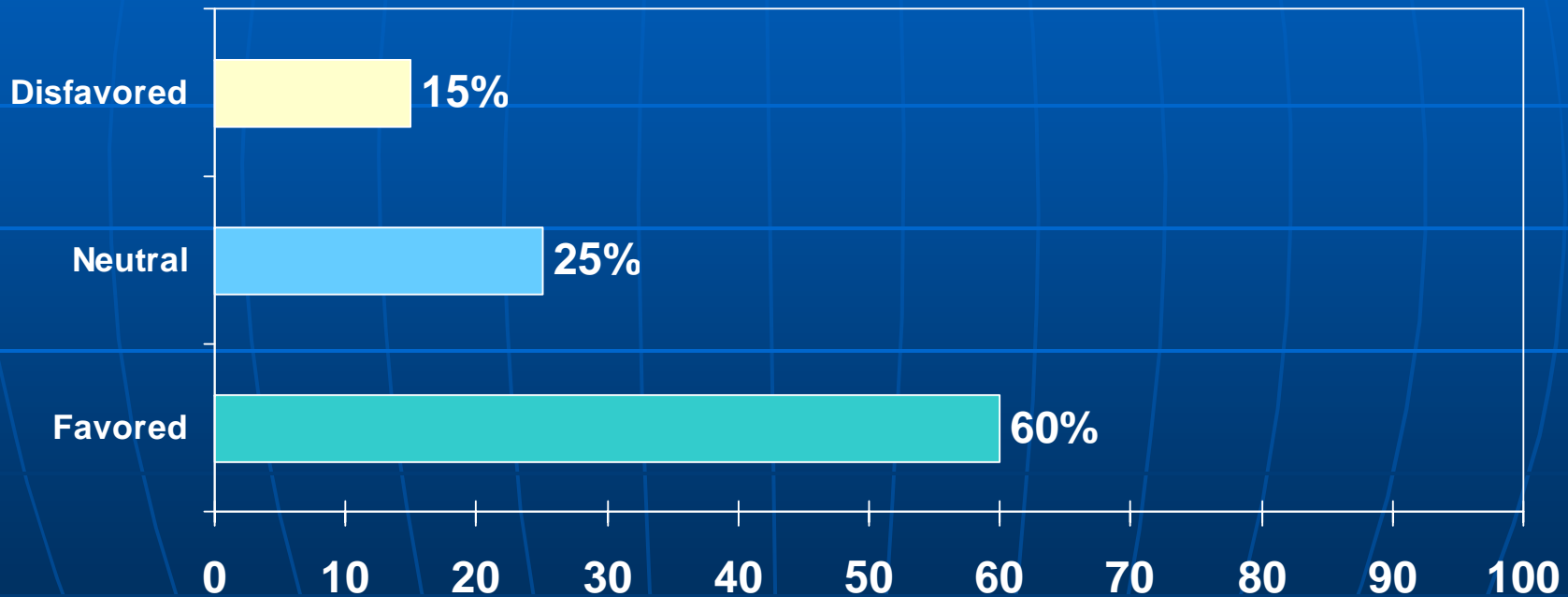
# Cornell/PERC Survey of Fortunate 1,000 Companies (1997; 2002)

- More than 600 companies surveyed
- The great majority had experiences with mediation, arbitration – but 4 out of 5 “only occasionally”
- Mediation was the most widely used ADR approach (87%)



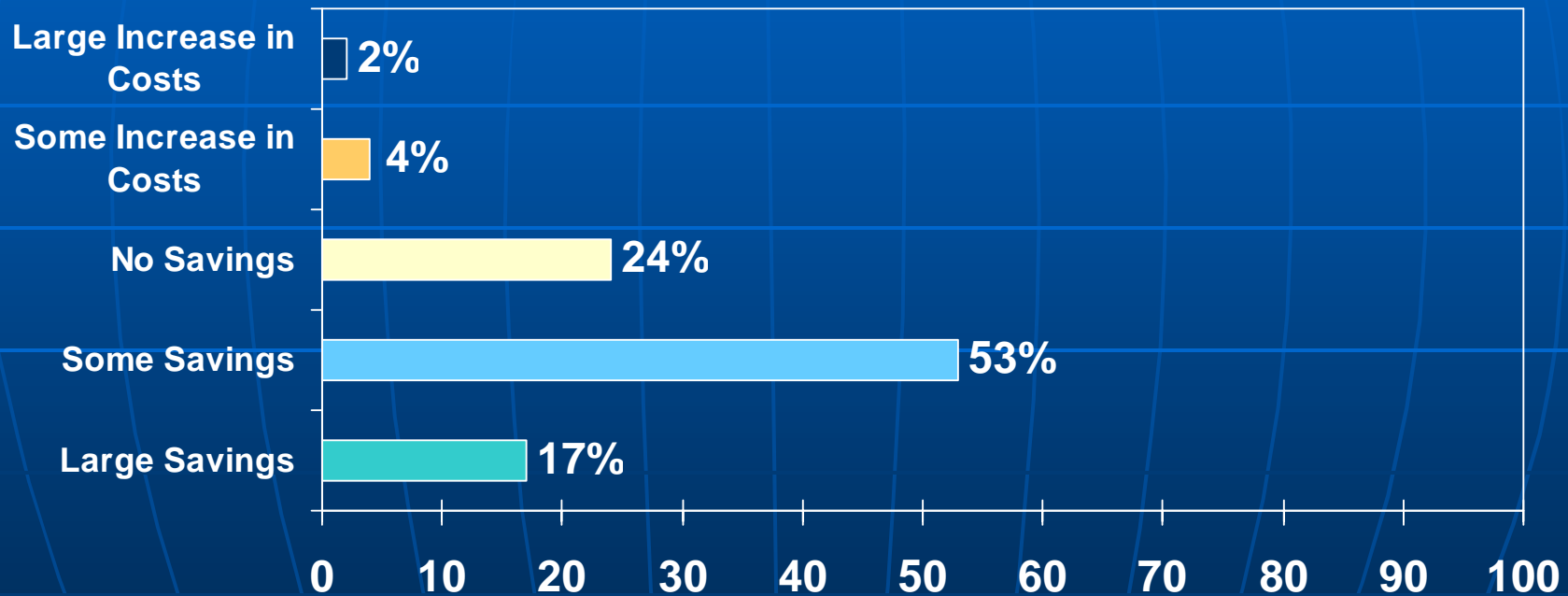
# 2004 Fulbright & Jaworski Survey of 300 Corporate Counsel

## Attitudes Regarding Mediation

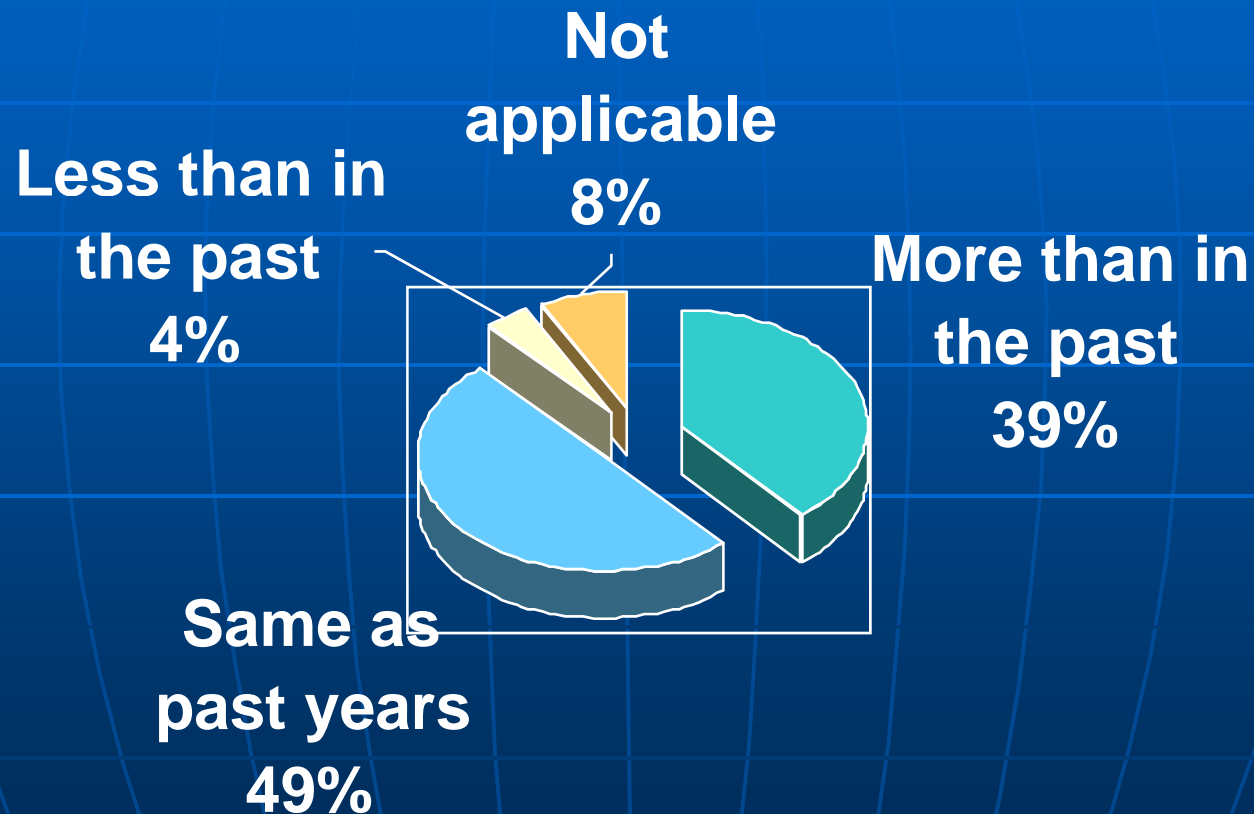


# 2004 Fulbright & Jaworski Survey of 300 Corporate Counsel

## Mediation Results: Savings vs. Costs



# Extent of Mediation Last 12 Months: Months: Corp. Legal Times Survey (2004)



# *CPR Corporate Survey:* *Results, Satisfaction*

- Most respondents report settlement rates for mediation in 80-90% range
- Most responding companies are highly satisfied with mediation under private auspices
- Nearly all at least moderately satisfied with court-annexed mediation
- Companies rarely report more than moderate satisfaction with arbitration or litigation

# *The Case for Mediation of Patent Disputes*

*The CPR International Commission on Patent Disputes finds there is a need for informal, confidential, business-driven alternatives for the resolution of patent disputes...*

- Patents are an increasingly lucrative component of IP asset portfolios
- The costs of patent litigation are growing rapidly—especially discovery costs
- The majority of patent disputes settle...the question is, can we get earlier and better outcomes?

## *Patent Cases Are Among The Most Expensive Cases To Litigate And Try*

- The cost of preparing a matter through the end of discovery with a medium amount at risk was over \$1 million in 2003. *AIPLA Report of Economic Survey 2003.*
- The average cost of patent litigation from filing through trial can range from \$1.5 million to \$3 million. And in some pharmaceutical cases, reaching into the \$4 million to \$10 million range. *Matthew W. Siegal, "Selecting the Right Forum For a Patent Dispute," National Law Journal (May 7, 2004).*

# *The Vast Majority Of Patent Cases Settle But Only After Incurring Significant External And Internal Cost*

- Over 95% of patent cases settle before trial. Merriann M. Panarella, "Stemming the Patent Litigation Tide" 2004
- Settlement rates in patent infringement cases are roughly 80%. Zisk, supra, quoting Elizabeth Plapinger and Donna Stienstra, "Federal Court ADR: A Practitioner's Update," 14 Alternatives to High Cost Litig. 7, 7 (1996).

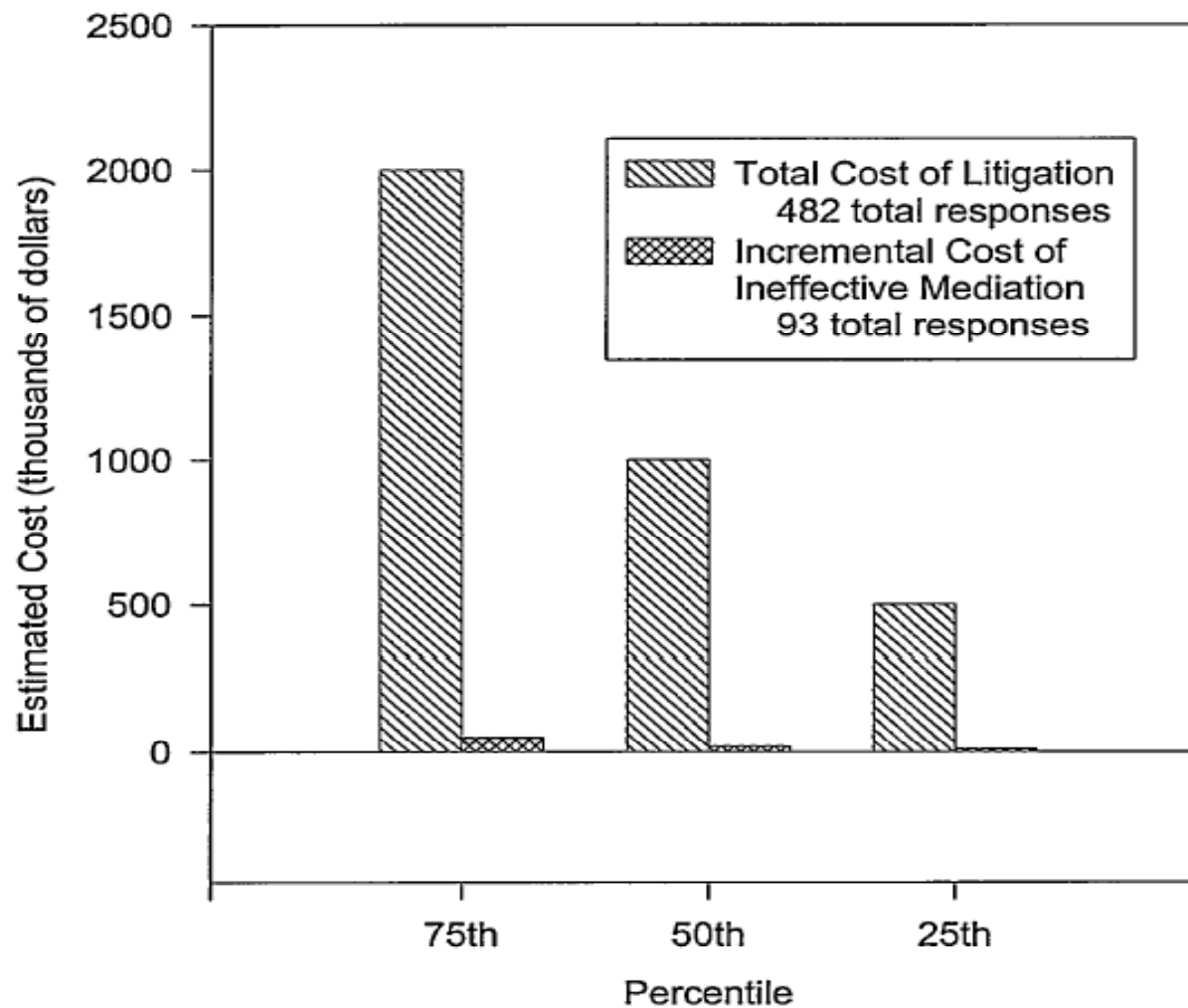
# Mediation Has Been Very Effective

- A survey by the American Intellectual Property Law Association in 1995 found that 56% of patent infringement cases brought to mediation were resolved in that manner. Seymour E. Hollander, "Patent Counsel Debate Pros and Cons of ADR", The National Law Journal (Jan. 27, 1997), quoting AIPLA Report of Economic Survey, at 72 (1995)



# *The Costs Of Mediation Are Negligible In Comparison With The Costs Of Litigation* *(Moral: No Harm In Trying To Settle)*

- The incremental cost of ineffective mediation is negligible compared to the total cost of patent litigation.

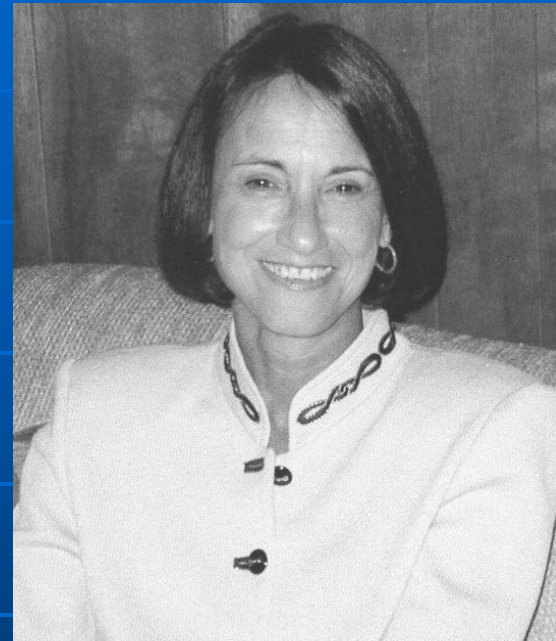


Source: Matthew B. Zisk, "Mediation and Settlement of Patent Disputes in the Shadow of the Public Interest," 14 Ohio St. J. on Disp. Resol. 481 (1998-1999).

# An Impressive Success Rate

**Statistics from the U.S. District Ct. for the District of Delaware reveal the success of mediation in patent disputes...**

- U.S. Dist. Ct. for Delaware has the 4<sup>th</sup> highest number of patent cases in the US (behind C.D. Cal., N.D. Cal. and N.D. Ill.)
- As of Jan. 16, 2003, Magistrate Judge Thyngge had mediated 203 patent cases, of which about 67% settled through mediation. (Another 23 cases settled prior to mediation.)
- Between Jan. 2002 and Jan 2003, 58 cases were mediated, of which 20 were patent cases. Of the latter, about **87.5%** settled. The court reports growing "comfort level" with mediation.



**Hon. Mary Pat Thyngge**  
**United States District Court,**  
**District of Delaware**

# *Benefits of Mediation in Patent Disputes*

*Mediation is increasingly used in the patent arena because...*

- It permits party control of process and outcome
- It is well suited to expert handling of complex technical matters
- It may bring about prompt resolution of time-sensitive issues
- It permits flexible, tailored business responses to problems
- It can avoid significant direct and indirect costs, risks
- It maximizes privacy, confidentiality

# Patent Mediation Deskbook

BETTER SOLUTIONS FOR BUSINESS

CPR INTERNATIONAL COMMISSION  
ON PATENT DISPUTES

*ROBERT COPPLE, CHAIR*

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