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ADR in the Federal System

We live in interesting times. Even though some say that the wish for "interesting times" is a curse in Chinese, our time—like many other times—contains much promise in the midst of much uncertainty. The economy continues its downward spiral.

Joblessness is on the rise. Those who profit are under higher scrutiny from those who have suffered and from those who care about them. Struggles continue abroad. But with all this, we have a new administration that began with a regard for freedom and a call to find common ground among divided factions, rose on a platform of hope and change, and has taken its first steps based on the themes of responsibility, collaboration, and transparency. Whatever side one represents in the political spectrum, freedom, consensus, hope, and responsibility are mighty values. They are also common themes in the field of dispute resolution, which I am proud to say is the theme of this issue.

The Federal Bar Association sees its mission as improving the quality of the federal legal system; therefore one might ask: What is the relevance of these other processes: mediation, arbitration, neutral evaluation, and even negotiation? On a practical level, alternative dispute resolution (ADR) has been in the federal court system for decades. In 1988, the Judicial Improvements and Access to Justice Act established a Federal Courts Study Committee to look into the future of the federal judiciary. Among other things, the committee was tasked with developing a long-range plan for the federal judicial system, including the use of alternative dispute resolution.[1]

We have had court-annexed arbitration since the 1980s and programs focused on early evaluation by a neutral party and mediation since the early 1990s. The district court pilot programs of the early 1990s developed into permanent programs within the federal courts.[2] Moreover, as you will read in this issue of *The Federal Lawyer*, the legal system has had long-standing mediation programs at the circuit court level as well. In addition, since the mid-1990s, executive orders encouraged federal agencies to use ADR. Thus, it makes sense to learn how to serve our clients through these processes, to reflect on whether these processes enhance the public good, and to consider ways to improve the quality of the range of our dispute resolution processes.

Underlying these system-based observations lies a more fundamental reason that dispute resolution is pertinent to the FBA. Let's admit it. Many lawyers love a good fight. We match wits, take stands, and refine strategy and arguments. There is a rush of adrenaline as we enter a courtroom, connect with a jury, or argue an appeal. There is a flash of pleasure as we find a good case or craft a trenchant point. Beneath these satisfactions, however, we find a richer, broader swell of joy in the altruism that first brought us to the bar. At our core, we want to help others, to find ways to work through problems with respect for the values and interests of the parties, to find and restore harmony and people's regard for one another. The search for creative solutions to conflict in a manner that reflects regard for the values and circumstances of all parties—and in a way that respects and promotes their freedom—is at the heart of ADR. I would wager that all of us would like to be of greater service in this way. Our commitment to enhancing the federal system is not to help the system as an end in itself but to benefit the people whose lives are governed by this system—including those who govern, judge, and serve in the administration of this system.

Thus, I am proud of the work that our editor in chief and chair of the Editorial Board, René Harrod, and the contributing authors have done to produce this issue on the theme of ADR. In the roundup of circuit mediators' reports, Editorial Board member Mike Newman and René have gathered the voices of many of our appellate court mediators to guide us in ways to get the greatest benefit from mediation at the appellate level.

We have learned that mediation offers a host of benefits to parties. The process can save time and money, reduce disruption and uncertainty, preserve confidentiality, and enable parties to design their own outcome—putting fate back into the parties' own hands. Mediation offers parties and counsel a safe forum in which to consider their legal and business interests, their relationship, and the costs, risks, and

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rewards of proceeding with litigation as compared to the ability to resolve the matter under a range of possible terms. And, at its best, mediation offers parties the opportunity not only to gain empowerment by making their own process and substantive choices but also to achieve mutual recognition by coming to see and understand one another's circumstances, feelings, perceptions, values, choices, and life context. Mediation enhances the quality of the communication and relationship between the parties. We could all use some more of that.

Several articles in this issue examine the more evaluative process of arbitration: George Lieberman's piece on the Federal Arbitration Act, Edna Sussman's critical look at the most recent version of a proposed Fairness in Arbitration Act, and Laura Kaster's discussion of the recent *Vaden* decision. Even though arbitration has been around for centuries, refinements in our laws enforcing arbitration agreements and awards and developments in the handling of arbitration processes, such as the conduct and scope of discovery, continue to challenge courts and practitioners. Congress and the federal courts have long recognized the freedom of parties to agree to design their own dispute resolution process and to select a decision-maker—perhaps a person with unique subject matter or process expertise—to determine the outcome of a given dispute. The interplay of arbitration and the federal system and the cultivation of the skills needed for optimally conducting arbitrations in court-annexed programs, will continue to be of interest to federal jurists and practitioners.

If you are intrigued or inspired by anything you find in this issue, we encourage you to get involved with the FBA's Alternative Dispute Resolution Section. The chair of the section, Simeon H. Baum, a leader in the ADR field in New York (www.mediators.com) with 800 matters under his neutral belt, welcomes your participation and your e-mails. (He can be reached at simeonhb@disputeResolve.com.) Among the projects in the works for the ADR Section is a lobbying effort aimed to correct problems with the proposed Fairness in Arbitration Act (as discussed by Edna Sussman in this issue), development of regular roundtables with administrators of the district court mediation programs and with the circuit court mediators, and the joint presentation with the Environment, Energy and Natural Resources Section of an environmental mediation CLE program. There are a host of activities that you can promote or participate in with the ADR Section: legislative efforts to promote or commenting on pertinent legislation; CLE programs; networking events; development of and contributions to an ADR newsletter (*Resolver*); work on an ADR Web site; cultivation of skills; addressing ethical issues, and the like.

The FBA is a unique national bar organization, particularly in the relationship of sections and chapters. We have many chapters throughout the country—in districts as well as circuits. This offers greater opportunities for coordinating section and local activities than is found in any other national bar organization. To this end, the ADR Section has come up with an initiative that was inspired by the circuit mediators' reports published in this issue: development of local roundtable discussions, perhaps on a regular basis, with circuit mediators on a circuit level and with district court ADR administrators on a district chapter level. These sessions can provide a chance for legal practitioners to become familiar with the mediators and ADR administrators in their area and could include events for the local mediators who serve on those district court ADR panels or events in which these mediators participate. In most instances, local mediators provide these services on a pro bono basis, and these sessions can provide a good opportunity for the FBA to express its gratitude for this public service and also to sponsor forums for discussion of mediation issues, development of mediation skills (for mediators and representatives), and improvement of the quality of the process. I would encourage our chapters to join with the ADR Section in implementing this initiative.

For the sake of harmony and to give genuine help to the people for whom the federal system has been designed and by whom it is run, we should consider and take full advantage of alternative dispute resolution. With this in mind, I will conclude this message with a quote from one of our current President's heroes, Abraham Lincoln: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, and expenses, and waste of time. As peacemaker the lawyer has a superior opportunity of being a good man. There will be business enough."[3] **TFL**

Endnotes

[1]Pub. L. No. 100-702, 102 Stat. 4642; 1988 enacted H.R. 4807; *see* § 102(b)(2)(A).

[2]The Alternative Dispute Resolution Act of 1998, H.R. 3528, Public Law 105-315, amending Title 28, Chapter 44, § 651 et seq., extended ADR to all 94 federal district courts and broadened the statutory focus beyond arbitration to other forms of ADR, based on these findings: "Congress finds that—'(1) alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has

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about discovery issues (such as preservation, collection, and production of documents) that are confidential and should remain confidential. True transparency would mean that adversaries would have the same level of access to clients and data, substantially changing the structure of the discovery process. Such a development could substantially chill the exchange of information with counsel that ultimately helps ensure adequate preservation and production of documents and electronically stored information.

The more accurate concept and terminology that should be broached with clients is an odd, four-syllable word: "translucency." The 10th edition of *Merriam Webster's New Collegiate Dictionary* defines "translucent" first as "permitting the passage of light"; the second definition is "transmitting and diffusing light so that objects beyond cannot be seen clearly"; and, perhaps most fitting in this case, the third definition is "free from disguise or falseness."

Neither clients nor counsel have to fear that their adversaries can sit down and rifle through cabinets, search endlessly on computers, meet and confer without bounds, and question witnesses without end on any topic under the blanket of "transparency." To be sure, counsel need to be prepared to intelligently disclose and discuss much more information about discovery processes than was expected 10 years or even five years ago. That aspect is critical to building trust and resolving disputes efficiently. But the process has contours, and clients need to be assured that their confidences that are properly within the scope of the attorney-client privilege will be protected.

Perspective

Limited discovery by proportionality is not a new idea. The Federal Rules of Civil Procedure have contained specific provisions related to proportionality since 1983, and Rule 1 itself has consistently championed the concept. And the IAALS and ACTL highlight this concept and the critical need for lawyers, litigants, and judges to embrace the idea.

Never before has it been possible for discovery costs to escalate beyond reason so easily and quickly if they are not controlled and placed into context. Although there is no doubt "a story behind the case," the *In re Fannie Mae Securities Litigation* decision, 552 F.3d 814 (D.C. Cir. 2009), quickly comes to mind when considering the rising cost of discovery. In this case, the Office of Federal Housing Enterprise Oversight ended up spending 9 percent of its annual budget (more than $6 million) in order to comply with a Rule 45 subpoena. Setting aside the reasons why the D.C. Circuit did not disturb the district court's rulings, it is apparent to most people that parties should not be required to consume such extraordinary resources in order to comply with discovery obligations absent extraordinary circumstances that might compel them to do so.

The bottom line is to always seek to place discovery into the context of the case at hand and the parties involved. Consider what you truly need, not just what you want. Think about tiering or staging discovery to focus on the most important discovery that can help lead to the resolution of the case before discovery costs spread like a wildfire. Meet and confer early to identify discovery requirements that will be truly burdensome and onerous, and be prepared either to justify the need if you are seeking such discovery or to obtain relief if the burdens are falling on your client. And never lose sight of Rule 1. **TFL**

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the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements; (2) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, minitrials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently; and (3) the continued growth of Federal appellate court-annexed mediation programs suggests that this form of alternative dispute resolution can be equally effective in resolving disputes in the Federal trial courts; therefore, the district courts should consider including mediation in their local alternative dispute resolution programs.'"
Alternative Dispute Resolution Act of 1998; findings and declaration of policy. Act Oct. 30, 1998, P.L. 105-315, § 2, 112 Stat. 2993.

[3]Abraham Lincoln, *Notes on the Practice of Law*, LINCOLN: SPEECHES AND WRITINGS 1832–1858 (The Library of America, 1989).