

Message from the ADR Section Chair

As I conclude my term as chair of the Alternative Dispute Resolution (ADR) Section, I thank the FBA for the opportunity to serve. As I look back, I also ask, what are the questions for the future? One of the most important questions is to reevaluate the role of courts in the mediation process. I believe that the role of courts in determining when mediations should take place should be eliminated.

In the timing of mediation, one critical question is whether the parties have exchanged enough information to evaluate the case meaningfully. Different people have different thresholds for this. By comparison, in poker, some players will know after two cards whether they want to play on or fold; others may need four. So it is with mediation. Some people are comfortable making decisions on less information than others. This is largely determined by a parties' emotional state. How angry are they when the litigation starts? When does that anger turn into acceptance of the reality that settlement is often better than the uncertainty, expense, delay, and hassle of continued litigation?

In federal practice, one classic challenge in intellectual property cases is the inventor, author, or composer who has labored for years and finally created something with commercial potential. The creator may not be able to get rich off of this work, though, and litigation may not be likely to save the day. This can be a bitter pill for the creator, who has a reasonable fear: It took so long to come up with this idea; what guarantee is there that she will ever come up with another idea as good or, indeed, any other good idea at all? It's not easy for this creator to accept reality and settle, with the accompanying financial disappointment. So, lawyers need to focus on whether the emotional moment is right for settlement. If not, mediation can be unproductive, and actually counterproductive, if the creator concludes that she doesn't want to return to mediation later.

One important consequence of this is a reconsideration of whether courts should be ordering—coercing, really—people to mediate. How are judges supposed to know when litigants are emotionally ready to put a matter behind them? That knowledge is the unique province of the lawyers, in consultation with their clients. Lawyers as sophisticated as those who routinely handle federal cases should be able to tell when their client is ready. And, these lawyers should be able to initiate settlement and mediation dialogues without court intervention. After all, before mediation existed, the conventional wisdom was still that 90-something percent of cases settled. Lawyers must have initiated the discussions that led to those settlements somehow. If lawyers have initiated unfacilitated settlement discussions for generations, why can't lawyers initiate facilitated settlement discussions (i.e., mediations) today? One piece of conventional wisdom survives above all: When courts set firm trial dates, lawyers will figure out how to get cases settled in appropriate ways at appropriate times. The timing should be determined by lawyers, not the court.

—*Jeff Kichaven*

Alternative Dispute Resolution Immediate Past Chair

Join the Section!

From the formation of 20 Federal District Court ADR pilot programs pursuant to the Civil Justice Reform Act of 1990, to the use of mediation, arbitration and other forms of ADR today—the last 25 years have witnessed a widespread growth in the use of ADR in all areas of civil dispute resolution—and throughout the federal district and appellate courts. The FBA's ADR Section offers an opportunity for practitioners to expand their knowledge and skills in ADR processes, and to meet like-minded practitioners with an interest in serving as neutrals or representatives in those processes.

If you have an interest in developing your ADR practice, in conducting or attending an ADR CLE, in developing ADR protocols, or cultivating the use of ADR in your district, think of becoming an active member of the FBA's ADR Section. To join the section, visit www.fedbar.org/ADR. To volunteer, email jayhogarth12@gmail.com.