

Two Sides to the ADR Story?

To the Editor:

The June 2010 alternative dispute resolution (ADR) edition of the *Bar Journal* was sans articles on the darker side of the subject. While focusing on the good aspects of ADR, we should not lose sight of serious issues that can be neglected. It would have been helpful to know that the ADR Section is committed to addressing these issues and knowing which ones have been addressed already.

Brand new life forms have been created in the laboratory, offering great hope and ethical qualms. Should ADR decide who owns new life forms or which ones cannot be owned at all, let alone patented? There are other questions of scope, never mind the social impact ADR may have in transforming America from a melting pot into a boarding house with separate house rules on each floor.

The question of unfair ADR adhesion was not addressed. My personal favorite was a consumer contract with a binding arbitration clause on the back, in small print, limiting damages to an amount that was less than the filing fee for the required arbitration administration service. After deducting the ADR administrator's filing fee, full recovery would have resulted in a net loss. How have legislatures and courts dealt with this, or how should they? While there is law in this area, sketchy though it may be, there was no article addressing it.

Has ADR helped or hurt the Judicial Department make needed improvements? One speculation is that ADR has relieved the

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pressure needed to move the judicature toward commonsense ways to better serve the public in a fast, fair, and—don't laugh—inexpensive manner. Has ADR demonstrated anything that the Judicial Department can replicate toward that end? If so, nothing about it was mentioned.

While ADR has much to commend it and the bright side was well presented in the articles, alternative waste, alternative fraud, and alternative abuse have the sole virtue of being lighter and less filling than the regular brand.

**David Meldman
Mahtomedi, Minnesota**

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Response from the Alternative Dispute Resolution Section Chair

David Meldman's comments are well taken and his point of view is appreciated. While it is fair to anticipate that proponents of alternative dispute resolution (ADR) are enthusiastic about alternatives to litigation, we also understand that the techniques of ADR are not a panacea that can resolve all the issues related to the administration of justice.

In fact, the many accomplished mediators and arbitrators throughout the state of Michigan often refer to their "toolbox" from which a variety of skills can be utilized in an effort to facilitate communication or implement a process for resolution. The issues that Mr. Meldman addresses relate to problems all of us encounter in the administration of any dispute resolution, whether through the form of mediation, arbitration, or litigation. All lawyers should recognize

that contractual limitations that bind parties to one form of dispute resolution can prove troublesome. In addition, in the daily advocacy each of us undertakes to resolve our clients' problems, consideration should be given to which form of dispute resolution will serve our clients' needs best and, perhaps, most efficiently.

The ADR Section of the State Bar of Michigan is proud to advocate that alternatives to litigation do exist and are effective. It is my hope that the ADR Section and its active practitioners recognize the concerns raised by Mr. Meldman and continue efforts to create cost-efficient and appropriate solutions for the problems presented to us by our clients on a daily basis.

**Charles B. Judson
Traverse City**

Stop, Read, and Listen

To the Editor:

Kudos and very high marks to Robert E. Lee Wright on his article, "Mediator Listening Skills for All Attorneys" (June 2010 *Michigan Bar Journal*). Mr. Wright really hit the mark for all lawyers. He states:

- "Chances are we can all improve our listening skills."
- "Listen with your eyes as well as your ears."
- "Tone of voice, hand gestures, eye movements, and facial expressions are all important parts of the message the speaker wishes to convey."
- "Ask open-ended questions."

I am a trial lawyer, and Mr. Wright's effective communication techniques for mediators also apply to litigators. Persuasion, credibility, and trustworthiness are the hallmarks for trial lawyers. The reflective listening technique used by mediators should also be used by litigators on direct and cross-examination. Save this article or order a copy and re-read it periodically.

In Mr. Wright's own words, "[G]o ahead, borrow these skills from mediators. We don't mind."

**James A. Johnson
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