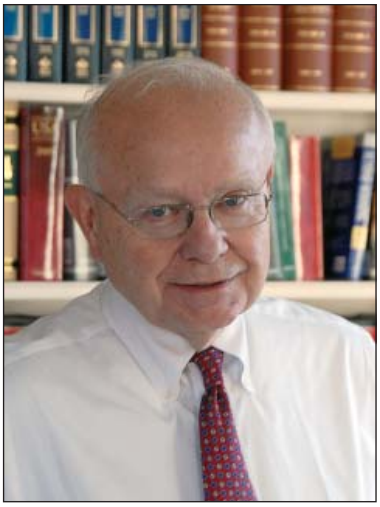
Message from the Chair



Daniel Kolb

Although it has been gradual, we have for some time been living through a period of significant change in how civil disputes are resolved in the United States. Beginning in the 1930s the resolution of such disputes came to be driven primarily by the belief that before resolution, whether by trial or settlement, all relevant facts should be discovered. Counsel were trained to see it as their duty to unearth all facts. For many years, they took it as their job in the service of their client to limit the client's disclosure. Judges carefully tailored their decisions and avoided early dispositive decisions to allow for full discovery. The paramount idea was that if all facts were known then a reasonably fair resolution could be based on truth, or something close to it.

Although for many years that "ideal" drove the process, over time the mounting costs of dispute resolution that resulted increasingly made the ideal unattainable in too many cases. Instead of knowing the facts leading to fair resolution, the expense and length of the process itself was what too often actually led to resolution. The parties did not benefit from an efficient system and often they also went without all the facts.

Awareness of the problem has been leading to important and beneficial changes. Federal and state procedural rules and the rules of providers of arbitration services have in recent years been modified to emphasize proportionality in discovery. Counsel have been reminded more frequently that their clients will benefit from an efficient resolution and that working together to exchange relevant facts is in most cases preferable to fighting every disclosure. Courts have been adopting measures to streamline the process, among other things emphasizing mediation as a good step even before formal discovery. The high percentage of cases settled early and quickly through mediation—often over 50 percent—speaks for itself. Very often, even if mediation does not result in immediate settlement, by bringing the parties together it will promote a more efficient exchange of relevant facts than can be achieved through the formal court process. In addition to embracing mediation, judges also increasingly see it is helpful to make early decisions on key motions and direct the parties to focus their discovery on what is truly relevant.

While old habits—especially those resulting from belief in what was seen for years as an ideal—die hard, the benefits of change are in this case evident. It is very important that progress continues with all stakeholders embracing and building on the changes. Clients should want litigators and counselors who understand the benefits to the clients of a cost-efficient process; advocates should see cost-efficient resolution as the best way to serve the client and keep the clients coming back; and judges and arbitrators should use their roles to promote efficient decision making and resolution. Some cases do need to be tried but many others don't, and the costs need not be so exorbitant that they distort the process. In many cases getting to the relevant facts is important but that need not cost so much as to defeat the process.

For those in our Dispute Resolution Section, it is time to change to a new ideal: the efficient resolution of disputes.