This book is intended to serve as a practical guide for experienced attorneys (in-house or outside) and business executives whose work requires them to have knowledge and skills in using alternative processes to litigation (Alternative Dispute Resolution, or ADR) in intellectual property cases. The book offers, even for veteran attorneys, strategies, skills, and practices for representing clients in ADR processes that may be new, confirming, or an improvement over current knowledge and skills. Whether you are a litigator who represents clients in ADR processes, a frequent participant (legal/business) in ADR processes, a transactional attorney who negotiates pre-dispute resolution clauses, or a neutral, this book was written to make you more effective at what you do.

The idea for this book came from the simple reality that possessing ADR skills is an important core competency for attorneys. And those skills are best learned early in, and refined throughout, an attorney’s career. Early in an attorney’s career, litigation is the first, and sometimes only, dispute resolution process learned. In their first year, students take a course in federal civil procedure that teaches them the rules and procedures by which civil litigation is conducted in United States federal courts. Thereafter, the importance of litigation is reinforced because knowledge of those rules is tested on state bar exams. Courses teaching ADR are typically offered after the first year of law school—if offered at all—as electives, and are typically not tested on bar exams. As such, ADR courses often compete with other electives that may seem more pertinent to students for their future practices. So, as a practical matter, future lawyers often leave law school having no formal introduction to ADR. That was my experience.

I became enlightened only after taking a job with a corporation. A day in the life of an in-house (litigation) counsel often felt like being on the receiving end of a tennis ball machine. And litigation simply was not the best dispute resolution mechanism to return service on all, or even the majority, of the disputes that came my way. No matter how large the company, there were limits to how much money, personnel, and time could be diverted from the business to deal with disputes. Furthermore,
avoiding unnecessary risks demanded that disputes be resolved expeditiously and sometimes confidentially to avoid the escalation of a manageable dispute into a costly and uncertain situation. Thus, circumstances demanded that I not only acquire knowledge of alternatives to litigation, but also firsthand experience, so that I could advise the corporation about which processes to use and then competently represent it in those processes.

At the time I discovered the need to develop core competencies in ADR, I began looking at outside IP counsel similarly: what was their ADR competence? What I generally found was that their practices (litigation, licensing, and prosecution) generally defined their core competences. Competence with ADR did not exist or, all too often, it was treated as information or skills that could be picked up along the way. That is more a statement of the past rather than the present, and hopefully not the future.

Over the years, courses in ADR have gained more prominence in law school curricula. Law firms are not only identifying ADR as practice areas or sub-areas; they are also recruiting attorneys who have distinguished themselves as experts in ADR, and attorneys are including their experience and successes in ADR on their firm resumes. Likewise, bar associations and professional organizations are more routinely offering courses and programs in ADR practice as continuing legal education. This evolution, together with the various pressures from clients and the courts to consider alternatives to litigation, means that ADR practice skills are as important as ever to have and maintain.

To be clear, litigation continues to be an essential dispute resolution process. But what my in-house experience taught me was that alternatives to litigation are equally essential to a business, particularly when strategically used. And, like a musician playing an instrument, to get the most out of an ADR process you must have respect for the process, understand how it works, learn to use it effectively, and practice, practice, practice.