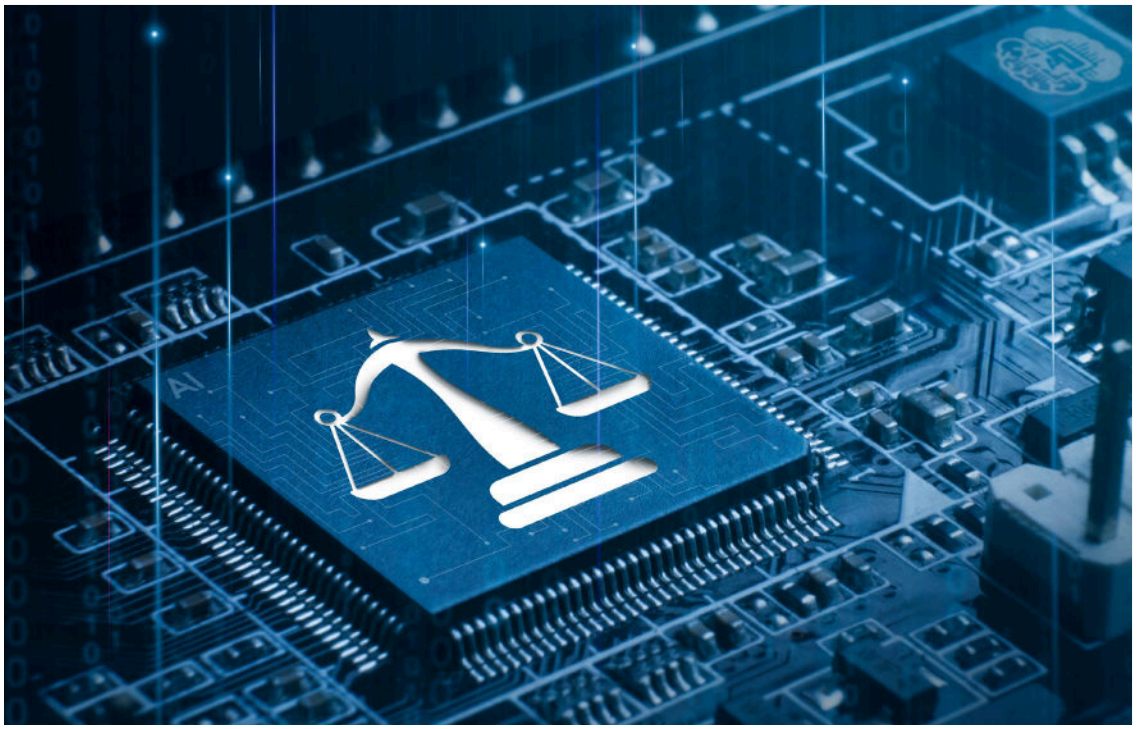
LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, MAY 30, 2025

REIMAGINING ADR: PART III

The future of resolution: AI, strategy and the next generation of mediation

The final installment of this three-part series examines how parties and counsel can enhance mediation outcomes through strategic preparation, the use of settlement counsel and co-mediation, broader stakeholder involvement, and emerging technologies like AI.

By Greg Derin



Shutterstock

In the first two parts of this series, I explored pre-litigation pathways to expand the use of ADR to achieve its overall promise. I also discussed fundamental changes in institutional structures designed to create incentives for the use of ADR processes and disincentives for resort to litigation, which could be averted by thoughtful planning and use of alternatives. In this final part of the series, I turn to ways parties and counsel can optimize results in mediation.

Use of artificial intelligence

Over the past year, the evolving promise of artificial intelligence tools has been impressive. At a recent conference with 100 distinguished mediator colleagues from countries around the world, I participated in a demonstration of the use of AI tools to assist in mediations.

The demonstration was an impressive display of the potential of AI for negotiation. After ingesting basic information about a dispute, the platform provided an insightful series of questions for the mediator to ask to elicit a deeper understanding of each side's interests, to lay a foundation to explore avenues for resolution. The platform also developed potential options for resolution based upon the presumed interests of the parties. With facial recognition and other advanced emotional intelligence systems, AI software promises to assist mediators and arbitrators to cut to the heart of conflicts, find common ground for potential deals, test veracity, summarize facts, data and arguments, create timelines, and identify differences from which tradeoffs may be discerned.

Rethinking the role of parties, counsel and mediators

Expand the role of third parties and potential stakeholders

Will Rogers said that "[t]he dangers of life are infinite, and among them is safety." Mediation has proved its value, but parties often neglect to avail themselves of its full benefits, missing its subtle "magic."

A persistent struggle in the mediation of complex business disputes involves persuading litigants to look beyond the short-term horizon. What deeper business interests are involved? How might both parties benefit from a resolution? Is there available "currency" other than money? Certainly, there are disputes that require a simple distributive bargain in which whatever one party gains the other loses. But more often than parties acknowledge, deeper examination of motivations and interests permit the parties to locate potential trades and cooperation that benefit all and cost each less than risking trial results or 'cutting losses' by a straight distributive negotiation.

Beyond the challenge in pressing parties to explore their interests in search of deals and tradeoffs, lies opportunities available if third parties become involved. It is hard enough to persuade Parties A and B to negotiate a resolution of their property or rights dispute; but what if the optimal solution involved the property or rights controlled by non-litigant Party C? Rather than resolving the dispute between A and B and letting the "prevailing" rights holder then approach C, why not involve

C in the mediation of the entire rights transaction? What if those rights involved governmental approvals? Would it be prudent to involve appropriate authorities in the process? If the goal is to achieve an enduring agreement, what is the optimal approach?

Settlement Counsel

The family law bar sometimes engages in a "collaborative law" approach to resolving disputes. Counsel who represent clients in negotiations to resolve disputes contractually agree that if settlement efforts fail, they will not represent the client in resulting litigation. Counsel thereby communicate that they are dedicated to the process of resolution, with no incentive to bypass the negotiation and resort to litigation which could drain the estate and financially benefit counsel.

A corollary is the use of settlement counsel in commercial litigation. Settlement counsel participate in negotiations, but have no role in the litigation. The dispute may be in its early stages or in trial, but no matter how deeply informed and invested litigation counsel may be, settlement counsel has one mission - to educate themselves sufficiently regarding the matter and the client's interests to explore the viability of a resolution outside of the courtroom. Litigators stay focused on getting a case to trial and do not attend mediations, leaving that representation to trained settlement counsel.

Greater Use of Co-Mediation

When I explain what I do professionally, I receive a range of responses. People ask about my background in psychology, business, accounting, computer technology, cryptocurrency, and the list goes on. While some mediators train deeply in the process and "art" of mediation, we also bring experience in a wide range of subject matters. Even as I mediate many cases involving the entertainment industry, copyright, trademark, trade secrets and related issues, the range of interpersonal dynamics and specific substantive issues varies. A mediator may advertise that they do "entertainment" cases, but do they understand profit participation audits, guild collective bargaining agreements, relevant labor laws, film distribution, idea submission nuances, etc.?

Co-mediation has proven useful in certain cases with one mediator focused on personal dynamics and another on unique substantive issues. By diversifying mediation teams and perspectives, mediators may better address the dimensions of a dispute. The economics of a dispute must either justify employing a diverse team or be adjusted to accommodate the use of multiple professionals. But in service of better results, co-mediation has much to recommend it.

Pre-mediation conferences

Among the practices that improve the mediation experience and outcome is the use of pre-mediation conferences between the mediator and counsel. The practice is invaluable to build trust, uncover issues, encourage the participation of other necessary participants, and explore creative options by advance planning. Pre-mediation conferences permit the mediator to be more proactive in creating the architecture of the mediation session and designing it to meet the unique requirements of the dispute. Proper training of mediators could make the use of such sessions standard. For mediators too busy to conduct such sessions, the parties should evaluate the experience they expect without the session and the opportunity to obtain its benefits from other available professionals.

Conferences permit the mediator to begin work toward the important role of negotiation coach. Although most litigators have experience as mediation advocates, the role of collaborator rather than warrior is not instinctive. Each side persists in testing the limits of the other's flexibility, placing stress on trust and extending the length of negotiations. The parties often know the range of options and zone of possible agreement before they begin the day, but find it necessary to engage in the "dance" to affirm their conviction. Mediators should encourage parties to focus their bargaining on realistic objectives, but also explore potential creative solutions that provide greater advantages for all disputants, often at lower costs.

To accomplish potential win-win results, pre-mediation conferences can be used to explore creative, non-financial solutions that may require the attendance of different participants than originally contemplated. Such long-term strategic solutions are not always on the radar of counsel or parties and should be part of every mediation planning session as cases evolve through conflict and litigation processes.

Remember joint sessions?

In most parts of the United States, and certainly outside of the country, it is common for joint sessions to occur during a mediation. Not so in Southern California. While it may rarely be productive to begin a mediation with an omnibus opening joint session, assembling some groups for a conversation during the mediation, preceded by appropriate "coaching," is nearly always helpful. It may be a caucus just with counsel, or only with the parties, it may be all attendees or another subset.

It is a lost opportunity if participants do not have the opportunity to speak directly to each other. Such direct interaction permits the mediator to assist in managing the emotional dynamics, reframe issues so that parties recognize the viewpoint of adversaries, and ensure that parties feel heard by other stakeholders. Especially in high-stakes commercial disputes, where parties often feel that they are operating on purely economic levels, surfacing and addressing unrecognized emotional roadblocks can be crucial in reaching resolution.

Conclusion

In preparing this series, I revisited the article referenced in Part I and realize that some of my observations and suggestions were advanced 10 years ago. Parties are slow to adapt even as their litigation costs rise and the institutions designed to serve them suffer more distress. A radical reimagining of ADR and means to channel parties into its early use is needed now more than ever.

Greg Derin *is a mediator and arbitrator with Signature Resolution. He has been a professional mediator for 23 years. Greg is a Distinguished Fellow of the International Academy of Mediators and a Fellow of the Chartered Institute of Arbitrators. For eight years he assisted in teaching the Mediation Workshop at the Harvard Program on Negotiation. Greg can be reached at gderin@signatureresolution.com.*