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REIMAGINING ADR: PART II

Slaying the litigation dragon: institutional reforms to make mediation the first strike

How incentivizing early mediation and restructuring dispute resolution pathways can serve as the sword and shield needed to tame the costly and unruly dragon of litigation.

By Greg Derin

In Part I of this series, I explored pre-litigation pathways to expand the use of ADR to achieve its overall promise - efficiently meeting the interests of the parties through negotiation. "Mediation reigns, but the litigation beast lives on," (Daily Journal, May 13, 2025.) This part of the series focuses on more fundamental changes in institutional structures designed to create incentives for the use of ADR processes and to avoid litigation.

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Creating incentives to participate in early mediation

It would be naive to assume that all stakeholders not required to participate in pre-litigation mediation would do so without the prospect of tangible benefits. Putting aside situations requiring prompt provisional relief (which should be permitted even when ADR processes are otherwise required), either a loser-pays system or a sliding scale recovery of attorneys' fees, costs and other potential remedies may motivate potential litigants to first participate in defined steps in a good-faith mediation process. Various real estate and other agreements provide examples of contractual requirements of mandatory first-step mediation as a predicate to the ultimate recovery of attorneys' fees if litigation proves necessary.

Where defendants have insurance to cover litigation fees and costs, policies can be drafted to require first-step mediation and initial information exchanges. Claimants have an incentive to cooperate if assured of having sufficient information to make reasonable decisions, knowing that agreement at mediation is voluntary and, at worst, participation could be an advantageous first step toward early resolution. By mandating early mediation, the stigma of discussing settlement is eliminated as it becomes an industry norm.

The relative costs of litigation versus providing tax benefits or rebates tied to economic scenarios arising from early pre-litigation mediated settlements (e.g., annuities, staggered payment schedules, interest) should be evaluated to determine other structural changes that might induce participation.

Disincentives for bypassing early mediation

Disincentives for bypassing early first-step mediation could include greatly increased filing costs and caps on recovery or forfeiture of certain remedies or claims. Plaintiffs who file suit without engaging in first-step dispute resolution could be required to cover eventual mediation costs of adversaries or be subject to later court determination of cost or fee adjustments (whether they win or lose) for having failed or refused to engage in first-step mediation.

As a disincentive for counsel who urgently file lawsuits seeking the leverage of publicity, legislation and State Bar ethics rules could be enhanced, creating penalties for litigation found to be unsupported, or which, under new rules, should have utilized first-step dispute resolution. Parties certainly have First Amendment rights of expression, but as is true outside of litigation fora, only in legally sanctioned and productive ways. Anti-SLAPP and sanction statutes can be amended to facilitate a greater focus on resolving claims early and productively at lower costs.

The public rarely knows the name of the mediator who assisted the parties in reaching a resolution. That is the nature of confidential processes and it helps facilitate candid disclosure of interests and revelation of settlement pathways. Publicity-seeking pressure tactics work for counsel and parties in certain contexts, but more often than not, they merely aggravate tensions and cause costs and fees to skyrocket before the conflict ultimately

finds its place in the 98% of matters that fade from public view by settlement or other pre-trial disposition.

First-step mediation could productively replace late-stage Mandatory Settlement Conferences and become a gateway to eliminating a large percentage of prospective lawsuits before filing.

Multi-step ADR processes

Many stakeholders create contractual multi-step ADR processes for resolution of disputes. These might begin with direct negotiation, followed by early neutral evaluation and/or mediation, and ultimately arbitration. As arbitration has become more prevalent, criticism has focused on whether it actually provides cost-effective adjudication, the failure of some arbitrators to "follow the law," and the generally non-reviewable nature of final arbitral awards. Arbitration is generally the creature of private contract or collective bargaining. As such, the parties may determine before or after a dispute arises the process for selection and the number and qualification of arbitrators, the allocation of expenses, the requirement that arbitrators follow designated rules of law and/or evidence, rights of appeal, and the rules of, and administration by, applicable arbitral fora. Objections to potential "captive" arbitrators, in which certain industries or corporations turn exclusively to one ADR provider, can be overcome by establishing lists of approved arbitrators or mandating the choice of two or more ADR providers or panels from which arbitrators may be selected.

Access to free or low-cost adjudication should be provided. Additionally, by expanding the circumstances and context in which multi-step ADR is available, especially if costs and expenses are properly allocated and/or recoverable, it can expedite resolution and relieve the burden on court systems. Employment arbitration represents a model in which statutes, provider rules, case law, and contract terms have developed to shift fees and costs initially to the party deemed most appropriate and capable of bearing them, with the deterrent prospect of reimbursement under specified circumstances.

Despite the inherent potential for conflicts of interest, some find benefit in med-arb or arb-med processes in which stakeholders participate in a process involving a single ADR professional who provides both services. If a mediation is unsuccessful, the mediator, having already gained an understanding of the applicable facts and law, is converted into the arbitrator to resolve the dispute. Conversely, an arbitration may proceed and before an award is circulated, the arbitrator seals the award and proceeds to mediate the dispute. If the mediation is not successful, the award is unsealed and delivered without modification (no matter what new information may have been revealed during the mediation). Both processes carry advantages relative to the knowledge of the professional, but also risks inherent in becoming privy to candid communication of facts and interests by the parties.

With the economics properly allocated and conflicts controlled, multi-step ADR processes that are designed to inspire trust and bring finality to a dispute can more expeditiously and satisfactorily resolve claims at greatly reduced costs compared to traditional litigation. The trade-off is obviously the surrender of a right to jury trial, which also occurs whenever a knowing waiver and agreement to arbitrate is made.

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