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Remote dispute resolution still strong in a post-pandemic world

More than three years ago, a Chicago Daily Law Bulletin article argued that remote dispute resolution is here to stay as work life changes. That prediction appears to be correct.

Remote dispute resolution is thriving, and legal work life has changed significantly. The question, then, for alternative dispute resolution providers and law firms using these services is: What's next?

An eye on AI

Remote dispute resolution remains a very human process: people proverbially coming to the table to reach solutions, but artificial intelligence (AI) may take the role of technology in dispute resolutions a step further and may disrupt how neutrals traditionally resolve disputes.

Like its use in e-discovery and document management tools, AI can complement a mediator or arbitrator's own expertise by rapidly analyzing materials relevant to the proceeding — so long as the tool is properly trained and safeguarded for such a specialized task.

Generative AI tools like ChatGPT can potentially ideate suggestions for settlement and solutions to impasses during negotiations, as well as draft settlement agreements that the parties can then modify, execute and memorialize. And as such AI tools are fed more data from cases, they have the potential to become more precise in their capabilities thanks to the self-refining, self-teaching power of machine learning.

All of this seems, at least at first glance, interesting and enticing. From a business perspective, tools that — at least in theory — can help mediators and arbitrators more effectively resolve disputes are worth learning about. Moreover, ADR providers and other legal support services must keep pace with changing technology trends like



MARC BECKER is the founder and president of ADR Systems. He has almost 30 years of experience in dispute resolution, promoting the growth of ADR in the Chicago area and beyond. MICHAEL KOSS is the business development and marketing assistant manager at ADR Systems.

the proliferation of AI because the work of lawyers is expected to be particularly altered — though certainly not replaced — by it.

And yet the human factor at play in mediation and arbitration is inescapable: the camaraderie and spontaneity of personal (though not necessarily in-person) interaction, as well as the need to read body language and non-verbal cues, that so many ADR practitioners consider essential to resolving legal disputes.

Mediating civil disputes requires robust legal experience, but neutrals guide parties to settlement more so by understanding the deeper “why” behind litigants’ positions.

Several years ago, a neutral we know worked tirelessly to settle an emotional family car accident case — and just before the finish line, the parties halted. The money was there, but the plaintiffs would not budge. Something was missing — something that went beyond arguments about damages and liability. Something personal. After speaking with the plaintiffs again, the

neutral realized: The family was injured while traveling to their vacation. They lost a family vacation. The neutral discussed an idea with the defendant, who ultimately agreed to also cover all costs related to a future family trip, bringing the case to a resolution.

Advances in AI will change how ADR providers serve lawyers and their clients. Legal issues related to its use — questions of privacy, confidentiality, liability, as well as risks of bias — are yet to be fully fleshed out. But the human side of every dispute will remain, and AI will never truly replace human mediators and arbitrators.

Think preemptively about ADR

Attorneys should think more preemptively about how they will engage in mediation and arbitration. Notably, they can plan for resolution in advance of a dispute by participating in pre-mediation conferences with their mediator to position themselves for more focused mediations and by writing an ADR “step clause” into contracts.

Parties can and should engage in more pre-mediation communication. In these informal colloquies, parties and their neutral can speak beyond the formalities of submission materials, which do not always articulate the challenges that parties encounter on their quest to resolve a legal dispute.

Settlement can turn not on the tact of the negotiators but on extra-legal insights that a neutral receives about parties’ personal concerns, sensitivities and needs. Moreover, not all cases can settle on the day of mediation without pre-mediation. Matters with multiple defendants, multiple insurance carriers, disagreement about insurance coverage and the distribution of liability often require advance work with neutrals to disentangle issues that could impact settlement negotiations.

When parties write ADR step clauses into contracts, they lay the foundation for resolution in advance of a dispute. Step clauses provide for mediation prior to arbitration, generally, before litigation. If parties do not settle in mediation, they proceed to arbitration, perhaps having narrowed some issues in the dispute during the mediation process. If the parties proceed to arbitration, the matter will be resolved because arbitration awards can only be vacated or modified in limited circumstances in Illinois. See 710 ILCS 5/12, 5/13.

Specifics in a step clause can help manage the dispute resolution process. Timetables, a named ADR provider and language that addresses the scope of the step clause can guide the parties through their conflict with clarity. ADR gives parties the keys to resolution. Step clauses let them take ownership of it.

Engaging in pre-mediation contact with a neutral and planning preemptively to pursue dispute resolution can give parties more say and, hopefully, satisfaction when resolving disputes.

Keep ADR flexible

Videoconferencing technology has

altered alternative dispute resolution, and attorneys should continue to leverage remote options for dispute resolution because they offer flexibility. This may seem obvious, but when change becomes normal, one can easily forget the advantages it originally brought.

Remote dispute resolution gives parties greater choice as to how they resolve their disputes. Whereas insurance adjusters often flew in to attend pre-pandemic proceedings, now they need only click a link to participate fully.

Likewise, counsel may agree — especially in an acrimonious case — that coming together virtually while remaining apart geographically is best for negotiations. Whatever works for the parties is a boon for the process.

Moreover, life happens. Unforeseen circumstances that may have cancelled an in-person proceeding — a child becoming ill, last-minute travel disruptions — need not postpone a proceeding because many parties are comfortable shifting to a remote format. Remote dispute resolution offers choices, and choices make resolution easier.

Those with complicated cases also benefit from the choices that remote dispute resolution offers. We have helped parties remotely resolve multi-party disputes over multiple days and, in some cases, multiple weeks. Notably, a neutral on our panel remotely arbitrated a complex panel commercial dispute involving numerous deposition transcripts, construction drawings, exhibits, as well as counsel and witnesses in multiple time zones across and beyond the continental United States.

At first, the parties doubted this could work, but we showed them that it could. We conducted simulations, acquainted counsel with tools for displaying demonstrative evidence and spotlighting witnesses and memorialized the entire arbitration for them without a court reporter.

Remote dispute resolution has facilitated significant changes in legal practice these past three years and will likely be a fixture of alternative dispute resolution services in the years ahead. As the profession moves forward, the humanity, customizability and flexibility of the ADR process should be top of mind.