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## PERSPECTIVE

## Will AI mediators soon replace humans? The simple answer is no

By Leonid M. Zilberman

I recently watched a TED talk with renowned film director Shekhar Kapur, who spoke about two concepts that he believed were the essence of humanity. First, humans become the stories we tell ourselves. Kapur argues that we humans know we exist because we tell stories about ourselves and end up living out the things we tell ourselves. Second, Kapur theorizes that the Universe is one giant contradiction and humans spend our lives looking for harmony and unity. When you think about it, looking for harmony is what musicians do, as well as architects and mathematicians, and mediators who try to bridge divides to settle disputes. Trying to find harmony or common ground with people in conflict is the first principle of mediation.

While Kapur's talk focused on weighty philosophical concepts, it made me focus on the AI frenzy, which has invaded all aspects of our lives, including the legal industry and specifically mediation. The abbreviation of artificial intelligence (AI) has been named the Collins Dictionary Word of the Year for 2023. What if we could get a computer to tell us how to resolve disputes? What if, in a minute or less, a machine could absorb a mountain of data and put a value on everything from bodily injury to real estate, commercial contracts and intellectual property? How cool would that be?

AI is increasingly looking like a huge disruptor and core part of almost all knowledge-based indus-



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tries, including the legal field. With AI powered computers successfully passing Bar exams and writing court briefs, there has been rumbling that generative AI will use its ability to gather and analyze large amounts of data (including litigation outcomes) to replace human mediators in dispute resolution in the near future. Mind you, this generative AI and large data machine learning technology, using language models like Chat GPT wasn't a "thing" just twelve months ago. Today, almost every law firm – large and small – are jumping on the bandwagon to seemingly use AI to assist in solving litigation problems with the promises of

more efficiency, productivity and cost savings.

Similar to the initial tsunami of ".com" companies of the late 1990s, including many that failed, multiple legal AI-associated businesses are mushrooming at record speed, already marketing themselves as the best tool to quickly and cheaply resolve disputes. Exactly how will AI tools be used in mediation and dispute resolution to save litigants money? Here are three potential scenarios:

**Gathering and analyzing data:** AI tools can quickly gather and analyze large amounts of data, which can help mediators better understand the factual issues in

a dispute and identify potential solutions, helpful in consumer and employment class action litigation, which often involves thousands of class members.

**Increased efficiency:** AI tools can automate many of the tasks involved in mediation, such as scheduling meetings, gathering documents, and drafting briefs and agreements. This can free up mediators to focus on more complex and personal aspects of the mediation process.

**Facilitating communication:** AI tools can help facilitate communication between disputing parties and provide parameters for negotiation (think "bracketing"), which

can be essential for reaching a successful resolution. Of course, these programs must ensure that the “AI mediator” isn’t programmed with a bias.

While AI-powered mediation tools could be helpful, are they able to replace the human touch of a mediator? No, and here’s why. The open secret that most mediators don’t disclose is that one of their “superpowers” is to make all the parties like them. Yes, it seems simple but in order for a mediator to be effective they must obtain buy-in, credibility, trust and confidence from all stakeholders. How do you do that? Well, objectivity and fairness plays a critical role, but most importantly emotional intelligence, cannot be underestimated. Have you ever called a colleague about a potential mediator? What’s the first thing you ask? “Did you like them?” Think about how that would sound about an AI-based computer large language model? Human mediators have their own personal life experiences and in almost all cases, a successful outcome hinges on the parties feeling that they have been “heard” by the mediator and that from a psychological perspective,

they are ready to compromise. Ever heard of a computer showing empathy or emotion? Can a computer look someone in the eye and say, “I hear you.”

Ready to hear the second secret of successful mediators? In addition to building trust, a successful mediator must be able to “read the room” and know all of those personal nuances and triggers that could lead to resolution or catastrophe. What is this person feeling as they’re telling me this? How can I make this person feel satisfied with the outcome? Why are they acting in this way, when this argument is presented? Are there some underlying emotions or grievances that need to be addressed?

Good mediators try to figure out the answers to these and many other questions (in real time). And all good mediators aren’t afraid to be candid, provide thoughts on the strengths and weaknesses of cases (hopefully at the right time) and ultimately say the hard things and tell a party when their case sucks. Importantly, logic is not always the sine-qua-non of a mediated settlement. Can a computer do that?

The truth is that most highly

sought out mediators are also expert negotiators. They leverage the facts and the law and have the ability to attack cases and problems from different angles, like a great football running back who is always looking for the open lane to score a touchdown. Most lawyers won’t admit this, but they often select a mediator who is capable of giving their own client the “bad news” about why they should settle their case and do it in a very logical, yet caring and sympathetic way.

It takes time to hear both sides’ story and then to help bring them together without hurt feelings. From observing and participating in hundreds of successful mediations, I doubt that an electronic tablet, computer monitor or other inanimate object would be good at these tasks, which are necessary for a successful resolution.

While it appears that soon the ADR industry will see a disruption like they have never seen before, based on use of AI programs that calculate “value” for cases, predictable algorithms don’t resolve cases, people do. So long as the parties to a dispute are also human, it is very likely that it will continue to be hu-

man mediators who are indispensable in assessing the emotional and psychological risks associated with litigation and enabling people to face various emotional factors that can play a significant role in the resolution of any dispute.

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