



Screening

The

Future

For

Virtual

ADR

The revolution in computer technology and networked communications has already had a profound effect on dispute resolution, says David Johnson. Teleconferencing and e-mail are common and organizations such as the AAA are now bringing their message to the public via world wide networking systems. The next stage in the process brings technology itself into the dispute resolution process so as to reduce subjectivity and enhance the presentation of creative alternatives. Johnson takes us out of the hearing room and into the "virtual architecture of shared online workspaces."

by **David R. Johnson**

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formation Research and the Center for Computer-Assisted Legal Instruction.

Many businesses and professions have made great strides in using new computer-based technologies to enhance substantially their methods of operation.

The potential for significant productivity gains in alternative dispute resolution is also there for ADR. Let's consider the modest ways in which computers and net-

worked communications have already changed dispute resolution. Then, let's try to imagine how to reinvent this art form with a healthy dose of new technologies and creative thinking.

Obviously, even the most computer-phobic practitioners of ADR have begun to use word processors. Simple e-mail communication is rapidly becoming prevalent. Even teleconferencing is no longer particularly arcane. The speed with which every professional can record and communicate ideas is increasing. And computer-aided legal research has been around so long that it is almost malpractice not to use it. Circumstances often call for review of applicable legal materials or investigation of information typically found in news sources or online databases.

Less obviously, the ability of the computer screen to aid calculations has begun to assist some mediators, neutral evaluators, and counsel to determine the expected value of litigation alternatives. It also helps them to communicate more fully and accurately with clients regarding the relative importance of alternative arguments, the attractiveness of settlement offers, and the prospects faced by the client in litigation. For example, DATA™ by Tree Age software allows the user to create a "decision tree." This associates subjective probabilities with alternative branches of the tree, to calculate an overall expected value. It also tests that value for its sensitivity to differing assumptions regarding the outcome of particular uncertain elements of a case. Software like this gives the practitioner a virtual analytical microscope with which to examine what would otherwise be gut feelings about a case. The very process of constructing a decision tree often dramatically enhances the level of communication between client and counsel or ADR professional.

Many Possibilities

The ability of stand alone PCs to calculate and re-calculate, to display results in graphical form, and to lead the user through simulations and roleplaying, can be put to work in the ADR context in still other ways. The parties' Best Alternatives to Negotiated Agreement (BATNA) can be evaluated and displayed—in a fashion that makes very clear who benefits from a proposed agreement and to what extent. Simulations can open each party's mind to new ways to create value for the other party at low cost. Bargaining programs can prepare the parties for negotiation sessions—helping them think through in advance the best manner in which to respond to the other side. Much work remains to be done to deploy these readily available tools effectively. But technically advanced ADR professionals already know that the computer screen can be a most telling mirror in which to view the image of a client's case.

The real news with regard to technology that can impact ADR relates to communications. As every sentient being on the planet must now know, we're all connected through the internet. Electronic mail and bulletin boards of many varieties allow effective "asynchronous" communications—conversations that take a little longer than those conducted face to face but that can be engaged in at the convenience of the parties. Online conferencing creates a written record and

seems to combine some of the best (and worst) attributes of both writing and chat. It can involve multiple parties and may allow anonymity, pseudonymity and role playing of various types.

How will the combination of local computer calculation and the connectivity provided by the net change ADR? We can only speculate for now, but the general directions of change can be divined by looking hard at the nature of the task at hand. ADR professionals are trying to get parties to understand their disputes more fully, to evaluate accurately the strengths of both parties' arguments, to think open mindedly about creating value, and to work constructively towards a resolution. New technologies can help with all these tasks.

Understanding one's own dispute requires a somewhat dispassionate approach to the merits of your cause. The use of the computer screen may well be able to provide an emotional distance between the parties—allowing more accurate evaluation of the merits of the case. Think of the screen as a semi-opaque barrier onto which the parties' positions must be placed. A party that cannot focus on the enemy may be better able to focus on the merits and demerits of an argument crystallized on the screen. In some sense, this type of dispassionate analysis is precisely what the decision tree programs now allow. But when you add communications to the mix, there is a possibility for the parties to exchange their subjective probability judgments. That can lead to a rapid increase in the rate of communication—and in each party's understanding of the case.

Virtual Courthouse

Because online conferencing can involve multiple parties, contributing at their own convenience, it is easy to structure an online ADR session that calls on the views of neutral evaluators. Thus, insofar as the goal is to get an early and accurate reading regarding the relative strengths of the parties' arguments, objectively assessed, the online, "virtual courthouse" is just the place to go. Informal experiments with dispute resolution in online settings have made clear that it is easy to find a set of "friends of the virtual court" who will provide their opinions about the merits of a case. A jury drawn "just in time" from volunteers on the net—or a more controlled, carefully chosen, more certainly neutral group—may be used. In either case, there is no speedier and more effective way to sort out unpersuasive arguments and demolish a weak case.

Similarly, there is nothing like online conversation to open a party's mind to creative alternatives. Nor is anything quite as effective in spurring creativity as presenting the need to make a choice of some kind. In the context of computers tied together by communications networks, the opportunities for creative conversation—and the presentation of alternative choices—are greatly enhanced. Because online dialogues are generally not held in real time, the parties have a

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chance to think through, thoroughly, their answers to probing questions from a mediator. The participants can be presented, graphically or in text, with alternative hypotheticals that help to prompt a creative response. The screen tends to aid in the suspension of disbelief—and it therefore enables roleplaying of a type that can get the parties unstuck.

One way to assess the potential impact of technology on alternative dispute resolution is to see how new computer capabilities are changing even traditional litigation. It is now common for parties to embody their view of disputed events in animated computer models that help the decision-makers to visualize their arguments. In some courts, real time transcripts aid in preserving the flow of testimony and in speeding rulings on objections. Litigation databases make it much easier to comb through large volumes of documents to find a smoking gun. And “smart” search engines make it increasingly easy to summon pertinent authoritative texts. These can then be pointed to with hypertext links embedded in documents filed electronically with the court.

Not all of these litigation-inspired innovations translate well to an ADR setting, where the object is to reduce costs and speed resolution of the case. But the general point remains that the computer screen allows more complete communication of a party’s position—and that networked communications allow the rapid combination of diverse elements and voices into a single, dynamic whole. In general, what we are seeing is the creation of a shared electronic workspace. Whether this takes the form of a “courtroom without walls,” or a dispute resolution conference table in cyberspace, the core opportunity is the same. It becomes possible to use the computational, graphical qualities of the screen and the communications-enhancing capabilities of the net, together, to create an architecture for group collaboration to resolve disputes.

What might such an architecture look like if we peer far enough into the future? It might well use the new Virtual Reality Markup Language to create a three dimensional space. This would allow the parties to navigate around an easy-to-understand environment or to record their decision tree structures in visually gripping and explorable form. It may well incorporate the capabilities of expert systems and software to automatically summon support for and effective answers to particular arguments. It will certainly allow the parties to work together to link all of the evidence, arguments and conclusions in the dispute into one large hypertext record of the case that can be explored (subject to confidentiality constraints) by all concerned. It can be an architecture that reflects in its pathways, walls and linkages the very essence of the processes that can best reach a constructive and mutually agreeable resolution.

Perhaps if we are very clever architects, we can construct templates for such virtual dispute resolution spaces. These would maximize the alternative number of paths that bring the parties together, minimizing those that draw them apart in counterproductive ways. And perhaps we can figure out how to populate such dispute resolution spaces with just the right mix of textual legal authorities, opportunities for self-

expression and catharsis, and opportunities to confer with wise and thoughtful neutrals and advisors. We will be creating a virtual architecture that reflects our profession’s highest aspirations. The technology that allows this is sufficiently powerful and malleable that the beauty and utility of that joint creation will be our own responsibility, not something we can blame on the machines.

I use this architectural metaphor because, in essence, the new technologies give us the opportunity to crystallize procedures into structure. Those procedures can include distinct steps that constitute free form conversation—even in-person meetings. The architecture of courthouses and the written rules of our traditional legal process serve to crystallize the procedures that make up the litigation process. We can similarly strive to create an alternative by using the software of tomorrow. This will present screens and carry messages embodying our best judgments as to which processes would resolve disputes more expeditiously and constructively.

A key challenge facing those who will try to adapt new technologies to ADR—similar to the challenge facing every architect—is how to freeze generalized choices without damaging the spontaneity and free choice of individuals. The answer to this dilemma, surely, is to construct pathways with many branches, rooms with many doors. We can let the users decide whether and when to take a dose of neutral evaluation, or to wander down the path towards the room where they face demands to create value for the other side, or to check in at the BATNA comparison screen, or to send a general help message to one’s online advisor. But we will also want to constrain some choices. Insofar as the screen and its connections allow us to ascertain that a party has not been cooperative or forthcoming, we can set some corrective measures in motion. Insofar as the parties clearly suffer from conflicting evaluations of a particular argument, we can bring both authoritative texts and the judgments of neutral evaluators (expert or lay) to bear on the situation. Insofar as the parties dawdle or prevaricate, we can create paths and prompts that call their bluffs and speed them towards more serious and honest efforts.

In summary, the potential for the impact of new technologies on ADR is as great as the scope of our imagination. We can embody our judgments regarding dispute resolution processes into the virtual architecture of shared online workspaces. Some skeptics will insist that only the personal chemistry of an in-person meeting ever works. But they should not devalue the potentially positive effects, at times, of getting the parties OUT of the same physical room. And even the skeptics would be hard-pressed to argue that we cannot benefit from presenting the parties with a range of analytical and introspective procedures. In this way the parties can assess the facts, fairly evaluate both sides’ positions, and benefit from the suggestions and judgments of others. The future house of our ADR profession has many rooms. I’m willing to bet that you’ll find most of them by going through a computer screen. ■

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