

## Integrate Technology into the Practice of Dispute Resolution

### Theory-of-Change Symposium

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**Colin Rule** urges the dispute resolution community to integrate technology into the provision of mediation and arbitration, as well as training and certification of mediators and arbitrators. He is vice president for online dispute resolution at Tyler Technologies. In 2017, Tyler acquired Modria.com, an ODR provider that Colin co-founded. From 2003 to 2011 he was director of online dispute resolution for eBay and PayPal.

### Technology and the Multidoor Courthouse

In his famous 1976 speech, “Varieties of Dispute Processing,” at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (now usually referred to as the Pound Conference), Frank Sander envisioned a future justice system that could direct parties into appropriate pathways customized to the particulars of their disputes. Frank wondered aloud whether the “courts of the future” (in particular, courts around the year 2000) might help to screen incoming complaints, matching each dispute with its most appropriate form of resolution.

There’s no way that Frank could have envisioned the coming invention and expansion of the internet as he delivered that speech in St. Paul more than 40 years ago. But the rise of the internet since then has transformed our society, creating opportunities exactly along the lines he predicted.

Technology now enables us to customize almost every area of our lives, both personal and professional. Many of us know millennials who find it hard to imagine how we got anything done in the days before we could text, videoconference, or surf the internet. How did we find people at the airport? How did we figure out the latest conversion rate from pesos to dollars? As the years progress, it’s getting hard to remember how we managed to get anything done.

But if we now leverage technology so thoroughly, it makes sense that we would also use it to transform the way we resolve disagreements and disputes. Most people use technology tools to complete the items on their to-do lists every day, so they now expect that they will also be able to draw upon them to resolve any problems that they encounter. From minor annoyances with eCommerce purchases to parking tickets to restaurant complaints, technology is already making it easier to find solutions when problems crop up. Now technology is being applied to more complex emotional disputes, like workplace issues or divorce and custody cases, and higher-value matters, like commercial and contract disputes. Just like finding people at the airport, we’ll never go back to the way it was before.

All societies need to provide their citizens access to just means to resolve disputes, and as our society moves online, there are more opportunities to provide that access through technology. Citizens now demand efficient and effective redress 24x7 because that's the level of responsiveness they already enjoy on websites like Amazon and Google. We need a justice system that works the way the internet works. In the future, resolution processes should not be dependent on geographic location, because the internet makes determining a precise location for each interaction almost impossible. We need to design a new justice system that works at the speed of technology, enabling fast and fair resolutions anywhere within the reach of the internet.

### **Changing Disputes Necessitates Changing Dispute Resolution**

Many professions have been transformed by technology. If you think back to the 1950s, the practice of medicine was very much a hands-on discipline. Today, however, technology is everywhere in the practice of medicine, from telemedicine to MRIs to laser surgery. The same is true in the world of finance. Stock trades used to happen face-to-face on the floor of the stock exchange, with people holding little slips of paper and calling out their orders. Now financial markets operate at the speed of light with computers conducting trades in milliseconds. A stock trader from 1980 would be amazed to see the trading floors empty in 2020, replaced by server farms conducting millions more trades in the blink of an eye.

But even as technology has transformed those professional fields, the fields themselves did not go away. The introduction of technology increased the efficiency and effectiveness, but it did not replace humans – it just changed their role. Now there are even more people employed in the fields of medicine and finance than there were before technology took over, but now people manage the technology instead of doing all the work by hand.

This kind of change has now come for the law – and by extension, dispute resolution (because dispute resolution lives in the shadow of the law). These changes are not being driven primarily by lawyers, bar associations, judges, or court administrators. They are being pushed most significantly by the disputants and litigants themselves. The long delays that are routine in the judicial system are out of sync with the fast pace of life in our newly digitized society. Disputants now demand faster, cheaper, and more efficient resolution processes that deliver outcomes in days or weeks instead of months or years. They're no longer willing to pay large retainers and be billed by the hour to resolve their cases over a long period of time. Technology is giving them the means to push for the kinds of changes they want.

The legal system also is suffering from several crises that are accelerating the move towards digitization. One is a very high rate of self-represented litigants (SRLs). Many courts report that 50 to 60% of the new cases being filed are coming from SRLs, which frustrates litigants and creates administrative costs for the courts. Also, state legislatures are cutting budgets for court systems. Politicians must balance many

competing priorities in making budget decisions, and when resources are tight, the funds allocated to the courts are being reallocated to matters considered more pressing. In addition, law schools are reporting that it is harder for recent graduates to find paying positions in the law than it was 10 or 20 years ago. To save costs, some law firms have outsourced their entry-level work to less expensive employees and contractors in other parts of the world. This is making young people more hesitant about choosing a legal career. The strategy for dealing with these issues can't be going back to the way things worked before the Internet.

These changes bring new challenges, surely, but they also present opportunities. The biggest opportunity may be the use of technology to expand access to justice. In the past, many people didn't bother to pursue redress for minor annoyances because they sensed that the resolution process would be more of a headache than a fair resolution was worth. But now that technology has made pursuing redress easier and more convenient, the calculation has changed, so more people are deciding that they want to pursue resolution. Technology is also enabling the creation of new paths to redress in the private sector alongside traditional resolution forums like the courts, enabling parties to select the path they feel most suits their needs.

### **Overcoming Reluctance to Embrace Change**

Many experienced mediators may feel a sense of dread when reading this piece. They may ask themselves, "Why is it necessary that we re-invent face-to-face processes that currently are effective and that we have worked to refine over the past few decades? Plus, there is so much we do not know about the effectiveness of these new techniques. What is the sense in fixing something that is not broken?"

The answer is that using the same techniques while society is changing radically due to technology is likely to reduce the effectiveness and utilization of dispute resolution services over time. If the dispute resolution field is to stay relevant and useful to the younger generation (who eventually will become the older generation), it is important to engage with these changes and learn when and how to leverage technology.

Part of the hesitation about welcoming this move to online dispute resolution (ODR) may be generational. Most young mediators are very comfortable with technology and are open to integrating it into the way they service their parties. Eventually, all mediators may appreciate the benefits of ODR, just like their clients. After all, being able to reach agreements from anywhere – including your home office, at the pool, on the golf course, or at the beach – can be pretty great. ODR can expand the reach of one's practice and increase efficiency by handling a lot of the administrative minutiae that prevents mediators from focusing entirely on the needs of the parties.

ODR certainly is not a panacea. People are just as complicated on either side of a computer-based interaction as they are face-to-face. There is nothing magical about the use of technology that suddenly makes all disputes easily resolvable and makes parties more reasonable, less angry, and less emotional. However, research to date

indicates that technology does have great promise in helping to expand access to justice, build sustainable agreements, and avoid escalation. We can identify which disputes and at what point in each dispute that technology may be most helpful in assisting parties to reach agreement. By building on existing ODR platforms and leveraging dispute system design frameworks to address the full spectrum of design criteria, it's easy to see how ODR can enable mediators to help more people reach better outcomes around the world. Mediators, provider organizations, and courts can learn about the advantages and challenges in using ODR for cross-border disputes so they can best decide when to use – and not use – technology with their parties.

I've been sensing a bit of fatalism that has crepted into the dispute resolution field as of late. Law school professors who have specialized in ADR are retiring and are being replaced by professors who specialize in other disciplines. There is a sense that some of the energy has drained out of the movement. Some suspect that we may have already seen the high-water mark for ADR and we're now starting a slow decline.

I think the cynicism about our current politics in the US and the adoption of intentional conflict escalation by our leaders has more than a little do with this sentiment.

But I think we need to take the longer view. If we can evolve our practice to leverage technological change instead of being threatened by it, I believe we have many higher water marks still in our future. Eventually, the political winds will blow in another direction, and our leaders may come back to us to learn how conflict resolution can help us heal. In the meantime, the changes wrought by technology will only accelerate. My grandfather always used to say, "Don't build your business where the highway is, build your business where the highway is going." This is good advice for everyone trying to future-proof their field and their movement. Leveraging the flexibility that undergirds dispute resolution to build for the future can help us do exactly that.

## Conclusion

When Frank Sander gave his speech in 1976, his vision of a courthouse with multiple pathways to justice was a radical concept, but the wisdom of his recommended approach transformed the provision of justice in the United States over the next few decades. I think that when he spoke about "courts of the future" in the "year 2000," he was predicting something along the lines of the possibilities that have been opened by ODR. Instead of a clerk at a desk, routing disputants to one of a dozen doors inside a physical building, ODR aims to make every mobile phone a point of access to justice, with algorithms dynamically directing cases toward hundreds or thousands of virtual doors available to fit each disagreement to a specifically crafted and appropriate forum for resolution.

As the adoption of ODR by courts continues to accelerate, growing from dozens to hundreds to thousands, there is a direct line back to the future envisioned in Frank Sander's speech. The algorithms that ODR relies upon are getting smarter and more powerful every day, which means they are getting more effective at sorting cases into

appropriate resolution channels. It is undeniably true that the power of technology to resolve disputes is dwarfed by the power of technology to generate new disputes. But ODR can expand access to justice, make courts operate more efficiently, and encourage citizens to pursue redress as opposed to giving up. We truly stand on the shoulders of giants like Frank Sander. Now the burden is on us to follow through on the promise of his original vision and to keep ADR vibrant and relevant for the future.